This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HL 5DRL 5

Digitized by Google

HARVARD LAW LIBRARY

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

WEEKLY NOTES OF CASES,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF PENNSYLVANIA, THE COUNTY COURTS OF PHILADELPHIA, AND THE UNITED STATES DISTRICT AND CIRCUIT COURTS FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BY

MEMBERS OF THE BAR.

VOLUME XXXVI.

FEBRUARY, 1895, TO SEPTEMBER, 1895.

PHILADELPHIA:
KAY & BROTHER,
LAW BOOKSELLERS, PUBLISHERS AND IMPORTERS.
1895.

Digitized by Google

Entered according to Act of Congress, in the year 1895, by

KAY & BROTHER

in the Office of the Librarian of Congress, at Washington.

Rec. Feb.- Oct. 1895.

PHILADELPHIA:
HARPER & BROTHER, PRINTERS,
200 South Tenth Street.

Digitized by Google

REPORTERS.

Supreme Court.

MR. HENRY BUDD, *assisted by* Messrs. William M. Stewart, Jr., Samuel Hinds Thomas, John Douglass Brown, Jr., William C. Stoever, and William D. Neilson.

Courts of Common Pleas.

C. P. No. 1. MR. WILLIAM WYNNE WISTER, JR.

C. P. No. 2. HON. SAMUEL W. PENNYPACKER.

C. P. No. 3. HON. JAMES T. MITCHELL.

C. P. No. 4. MR. HENRY BUDD.

Quarter Sessions and Oyer and Terminer.

Mr. Thomas W. Barlow.

Orphans' Court.

MR. WM. LYTTLETON SAVAGE, *assisted by* Messrs. Edward F. Hoffman, William C. Stoever, John Douglass Brown, Jr., William M. Stewart, Jr., Charles K. Zug and Frederick B. Neilson.

U. S. District and Circuit Courts.

MR. C. BERKELEY TAYLOR, *assisted by* Mr. Mark Wilks Collet.

N. B. *Admiralty Cases* revised by MR. MORTON P. HENRY.

U. S. Circuit Court of Appeals.

MR. ALFRED ROLAND HAIG.

GENERAL EDITOR.

MR. ALBERT A. OUTERBRIDGE, 608 Chestnut Street, Philadelphia.

Digitized by Google

ERRATA.

PATRICK *v.* SMITH, p. 11, col. ii, line 34, insert "*of*" before "surety."

BURFORD *v.* FERGUS, p. 43, last word of ¶ 4 of syllabus, for "set-off" read "*same.*"

VINCENT *v.* WOODLAND OIL CO., p. 52, line 2 of syllabus, for "next ensuing moment" read "*next moment unless accepted*"; p. 53, lines 3 and 4 of syllabus, for "unless an actual sale has been made, *i. e.*, where" read "*on a conditional promise by a purchaser where the offer is withdrawn by the principal before actual acceptance. In such case*"; fifth line insert "*fail to*" between the words vendee and concur.

SIMON'S APPEAL, p. 91, forty-first line, for "appellant" read "*appellees.*"

MCMICHAEL *et al.*, *v.* THE INTER-COUNTY STREET RAILWAY COMPANY, p. 179, syllabus, the word "Dubitur" should be "*Dubitatur.*"

Digitized by Google

TABLE OF CASES

REPORTED IN THIS VOLUME.

ALLEGHENY Valley R. R. Co., Ruppel *v.* 210
Allen, Irons *v.* 507
Amheim *v.* Dye Works (C. P.) 32
Armstrong *v.* Latimer *et al.* 45
Ashhurst *et al.*, Trustees, *v.* The Eastern Pennsylvania Phonograph Co. 60
Assigned Estate of Edward S. Handy, Jr. 265
Atlas National Bank, Richardson *v.* 242

BAILEY *et al.* *v.* City of Philadelphia 236
Bailie's Appeal 130
Balfour *v.* Russell and Rindfuss 225
Balt. & Ohio R. R. Co., Kennelty *v.* 50
Barker *v.* Fairchild *et al.* 358
Barner's Appeal 331
Barry *v.* Hill Defendant, and Gillespie, Terre tenant 92
Bartley *et al.*, *v.* Phillips 19
Bash, Dougherty & Co. *v.* 420
Baugh & Sons Company *v.* Mitchell *et al.* 228
Bayer *v.* Walsh 57
Bell, Com'th *v.* 146
Benham's Appeal 573
Benson's Estate 512
Binkley, Crouse *v.* 312
Birch *et al.*, Ex'rs *v.* Pittsburgh, etc., R. R. Co. 69
Boley, Bradford *v.* 238
Bonowitz's Appeal 374
Borden *et al.*, Fredonia National Bank *v.* 16
Borie *et al.*, Kennedy *v.* 73
Bowman, City to use of Kelley *v.* 138
Boyle *v.* Hamburg-Bremen Fire Insurance Co. 476
Bradford *v.* Boley 238
Bradley *v.* Irwin 130
Brady *v.* The Prudential Insurance Co. 401
Brill Co. *v.* The City of Philadelphia 217
Brolasky's Estate (O. C.) 263
Brown, Defendant, and The Camden Nat. Bank, Garnishee; The Commonwealth Title Ins. and Trust Co. *v.* 190
Brown *et al.*, Gilchrist *v.* 39
Bryson *v.* Home for Disabled and Indigent Soldiers, *et al.* 362
Burford to use, etc., *v.* Fergus 43
Burr *v.* Kase and Stone 284

CAFLISCH *et al.*, Rand *v.* (C. P.) 198
Caldwell *v.* East Broad Top R. R. & Coal Co. 405
Carpenter's Estate 516
Carr *v.* Frick Coke Co. 493
Carson *et al.*, Com'th *v.* 115
Cassidy *v.* Knapp, Admr. 197
Central Coal Dealers' Association *et al.*, Rhoads *et al.*, *v.* 48
Central Traction Co., Thatcher *v.* 84
Chisolm, Gettysburg National Bank *v.* 472
Citizens' Traction Co., Iaquinta *v.* 86
City of Allegheny, Huckestein *v.* 66
City of Chester *v.* Pennell 457
City of Chester to use of Ross *v.* Eyre *et al.* 216
City of Erie, Kies *v.* 426
City of Lancaster, Schroder *v.* 572
City of Philadelphia, Bailey *et al.* *v.* 236
City of Philadelphia, Brill Co. *v.* 217
City of Philadelphia *v.* Glading (C. P.) 247
City of Philadelphia, Glase *v.* 453
City of Philadelphia *v.* Goudey (C. P.) 246
City of Philadelphia, Heidenwag *v.* 281
City of Philadelphia, Justice *et al.* *v.* 509
City of Philadelphia *v.* Keystone Battery A. 482
City of Philadelphia *v.* Schofield 108
City of Philadelphia, Shaw *v.* 510
City of Philadelphia to use of Mack *v.* Eddleman 438
City of Reading *v.* O'Reilly *et al* 489
City of Reading, Witman *v.* 528
City to use of Kelley *v.* Bowman 138
Clymer Paving Company *v.* Donegan (C. P.) 261
Cobb's Appeal 378
Coffin's Estate (O. C.) 71
Collins's Appeal 17
Collins *v.* The London Assurance Corporation 26
Commonwealth *v.* Bell 146
Commonwealth *v.* Carson *et al.* 115
Commonwealth *v.* Coon 5
Commonwealth *v.* County of Allegheny 303
Commonwealth *v.* Green 297
Commonwealth *v.* Harmel 1
Commonwealth *v.* Harris 343
Commonwealth *v.* Heckler 363
Commonwealth *v.* Junkin and Sponsler 503
Commonwealth *v.* Latta 297
Commonwealth *v.* Wm. B. Mann 297
Commonwealth *v.* Pittsburgh & Western Ry. Co. 137
Commonwealth *v.* Shields 297
Commonwealth *v.* The Merchants and Manufacturers National Bank 291
Commonwealth *v.* Weber 193
Commonwealth Title Ins. and Trust Co. *v.* Brown, Defendant, and The Camden Nat. Bank, Garnishee 190
Commonwealth *ex rel.* City of Lancaster *v.* Martin, Treasurer 479
Commonwealth *ex rel.* Holland *v.* Schneipp *et al.* 102
Commonwealth *ex rel.* Whitman *et al.*, *v.* Ramsay 142
Conshohocken Tube Co. *v.* Iron Car Equipment Co. 254
Conshohocken Tube Company *v.* Equipment Company, Defendant, and Receivers of P. & R. R. R. Company, Garnishees 256
County of Allegheny, Commonwealth *v* 303
County of Berks *v.* Reading City Pass. Ry. Co. and Reading Traction Co. 173
Cridland, McNeile *v.* 274
Crouse *v.* Binkley 312

DAVENPORT Co. *v.* Penna. R. R. Co. 132
Davis, Defendant, and Penna. R. R. Co., Garnishee, Kinsloe *v.* 258
Davis *v.* Koenig 51
Davis's Appeal 512
Delaware & Hudson Canal Co. *v.* Genet 444
Dell *v.* The Phillips Glass Company 467
Dempsey, Graham *v.* 533
Dennis *v.* Pittsburgh & Castle Shannon Railroad Co. 81

Digitized by Google

Dickerman *v.* Eddinger 327
Dickson, Gandy *v.* 95
Diehl *v.* Rodgers 447
Dietz *v.* Metropolitan Life Insurance Company 403
Dobbins, Merrall *v.* 451
Donegan, Clymer Paving Company *v.* (C. P.) 261
Dorner, Saake *v.* 204
Dougherty & Co. *v.* Bash 420
Duffield's Appeal 377
Duffy's Estate (O. C.) 199
Dye Works, Amheim *v.* (C. P.) 32

EARNSHAW, Martinez *v.* 498
East Broad Top R. R. & Coal Co., Caldwell *v.* 405
Eastern Pennsylvania Phonograph Co., Ashhurst *et al.*, Trustees *v.* 60
Eddinger, Dickerman *v.* 327
Eddleman, City of Philadelphia to use of Mack *v.* 438
Edison Co. *v.* Thackara Mfg. Co. 276
Equipment Company, Defendant and Receivers of P. & R. R. Company, Garnishees, Conshohocken Tube Company *v.* 256
Erie & Wyoming Valley Railroad Company, Jones *v.* 441
Ervin, Smith *v.* 339
Erwin's Estate (O. C.) 412
Estate, Benson's 512
Estate, Brolasky's (O. C.) 263
Estate, Carpenter's 516
Estate, Coffin's (O. C.) 71
Estate, Duffy's (O. C.) 199
Estate, Erwin's (O. C.) 412
Estate, Freed's (O. C.) 88
Estate, Hamilton's (O. C.) 492
Estate, Harker's 207
Estate, Huston's 205
Estate, Ingersoll's 251
Estate, *In re* Denlinger's 573
Estate, Johnson's 514
Estate, Keys's (O. C.) 231, 459
Estate, Lennig's (O. C.) 118
Estate, Lippincott's (O. C.) 333
Estate, Long's 331
Estate, McCarthy's (O. C.) 315
Estate, Naglee's (O. C.) 104
Estate, Nathan's (O. C.) 184
Estate, Parker's (O. C.) 400
Estate, Richard's (O. C.) 264
Estate, Schmidt's (O. C.) 152
Estate, Schwartz's 337
Estate of William P. Shinn, *In re* 33
Estate, Springer's (O. C.) 335
Estate, Stauffer's (O. C.) 150
Estate, Steinmetz's 377, 378
Estate, Strauss's 374
Estate, Watt's 369
Estate, Wheeler's (O. C.) 296
Estate, Whelen's (O. C.) 575
Estate, Willock's 13
Estate, Worsley's (O. C.) 247
Evans *et al.* *v.* Township of Willistown 385
Evans *v.* Smith *et al.* 144
Evilhock *v.* Philadelphia, Harrisburg, and Pittsburgh Railroad Company 568
Eyre *et al.*, City of Chester to use of Ross *v.* 216

FAIRCHILD *et al.*, Barker *v.* 358
Farmers and Mechanics Bank, etc., *v.* Third National Bank 47
Fassett's Appeal 272
Fergus, Burford to use, etc., *v.* 43
Fife *v.* Miller 37
Fillman *v.* Ryon 391
Finch, Lang *v.* 61
Fire Association of Philadelphia, Freedman *v.* 353
Fischer's Appeal 380
Fitzpatrick's Appeal 48
Fitzwater *v.* Kirk *et al.* 113
Fox, Executor, Young *v.* 201
Frack *et al.* *v.* Gerber 230
Fredonia National Bank *v.* Borden *et al.* 16
Freedman *v.* Fire Association of Philadelphia 353
Freed's Estate (O. C.) 88
Freyer *v.* McCord 75
Frick Coke Co., Carr *v.* 493
Frick Company, Moreland *et al.* *v.* 496
Fridenberg, Martin *v.* 464
Friend *v.* Oil Well Supply Co. 18
Fuellhart, Watterson *v.* 565

GANDY *v.* Dickson 95
Gangawer *v.* Philadelphia & Reading Railroad Company 356
Geiger *v.* President, Managers, and Company of the Perkiomen and Reading Turnpike Road 233
Gemas' License 367
Genet, Delaware & Hudson Canal Co. *v.* 444
Gerber, Frack *et al.* *v.* 230
Gettysburg National Bank *v.* Chisolm 472
Gilchrist *v.* Brown *et al.* 39
Gilton *v.* Hestonville Pass. Ry. Co. 143
Glading, City of Philadelphia *v.* (C. P.) 247
Glase *v.* City of Philadelphia 453
Goddard, Hill & Co. *v.* Leopold Weil & Co. 98
Goudey, City of Philadelphia *v.* (C. P.) 246
Gowen *v.* Pierson 5
Graham *v.* Dempsey 533
Graybill *v.* The Penn Township Mutual Fire Insurance Association of Lancaster County, Pa. 554
Green, Commonwealth *v.* 297
Groetzinger *v.* Kann & Co. 9
Grohmann *v.* Kirschman 389

HAMBURG-BREMEN Fire Insurance Co., Boyle *v.* 476
Hamilton's Estate (O. C.) 492
Harker's Estate 207
Harmel, Com'th *v.* 1
Harris, Commonwealth *v.* 343
Haught *v.* Irwin 128
Heckler, Commonwealth *v.* 363
Heidenwag *v.* The City of Philadelphia 281
Henry, Romberger *v.* 215
Hestonville Pass. Ry. Co., Gilton *v.* 143
Hickok *v.* Still 329
Hicks *v.* The National Bank of Northern Liberties 424
Higgins Carpet Company *v.* Latimer 62
Hill, Defendant, and Gillespie, Terre-tenant, Barry *v.* 92
Hippely, Mentel *v.* 135
Hollister to use, etc., *v.* Vanderlin 41
Home for Disabled and Indigent Soldiers, *et al.*, Bryson *v.* 362
Hopkins, Receiver *v.* O'Kane 475
Hormann's Appeal 396
Howell *et al.* *v.* Mellon *et al.* 484
Huckestein *v.* City of Allegheny 66
Huston's Estate 205

IAQUINTA *v.* Citizens' Traction Co. 86
Indiana Bicycle Co., Tradesmen's Bank *v.* 133
Ingersoll's Estate 251
In re Denlinger's Estate 573
In re Estate of William P. Shinn 33
In re Lower Chanceford Water & Power Co. (Exec. Dept.) 148
In re Martic Water & Power Co. (Exec. Dept.) 148
In re Narrowing of Greenough Street 545
In re Old Eagle School Property (C. P.) 348
In re Opening of Pringle St. 314
In re Road in Ohio and Ross Townships 140
In re Sandusky Street 68
In re Shiloh Street 219
In re South Side Water Company (Exec. Dept.) 55
In re Sowego Water & Power Co. (Exec. Dept.) 148
Irons *v.* Allen 507
Inter-County Street Ry. Co., Lehigh Coal and Navigation Co. *v.* 160
Inter-County Street Ry. Co., McMichael *et al.* *v.* Irwin, Haught *v.*

JOHNSON, Ogontz Land and Improvement Co. *v.* 307
Johnson's Estate 514
Jones *et al.*, Van Reed *v.* 549
Jones *v.* The Erie & Wyoming Valley Railroad Company 441
Junkin and Sponsler, Commonwealth *v.*
Justice *et al.* *v.* City of Philadelphia 509

KANN & Co., Groetzinger *v.* 9
Kase and Stone, Burr *v.* 284

Digitized by Google

Kennedy *v.* Borie *et al.* 73
Kennelty *v.* The Balt. & Ohio R. R. Co. 50
Kerr *v.* Pennsylvania Railroad Company 325
Keys's Estate (O. C.) 231, 459
Keystone Battery A, City of Philadelphia *v.* 482
Kies *v* City of Erie 426
Kinsloe *v.* Davis, Defendant, and Penna. R. R. Co., Garnishee 258
Kirk *et al.*, Fitzwater *v.* 113
Kirschman, Grohmann *v.* 389
Knapp, Admr., Cassidy *v.* 197
Koenig, Davis *v.* 51
Kountz, Sturgis *v.* 78

JACKAWANNA Iron and Coal Co., Scranton Gas & Water Co. *v.* 185
Laird *v.* Pittsburgh Traction Co. 24
Lang *v.* Finch 61
Larned & Haas's Appeal 265
Latimer *et al.*, Armstrong *v.* 45
Latimer, Higgins Carpet Company *v.* 62
Latta, Commonwealth *v.* 297
Lehigh Coal and Navigation Co. *v.* The Inter-County Street Ry. Co. 160
Lennig's Estate (O. C.) 118
Light *v.* The Countrymen's Mutual Insurance Co. 454
Lilly *v.* Person *et al.* 382
Lindenberger's Appeal 251
Link *v.* The Phila. & Read. R. R. Co. 21
Lippincott's Estate (O. C.) 333
Lockard, Playford *v.* (U. S. C. C.) 32
London Assurance Corporation, Collins *v.* 26
Long's Estate 331

MANHATTAN Brass Company *v.* Reger 342
Mann, Commonwealth *v.* 297
Martin *v.* Fridenberg 464
Martin, Treasurer, Commonwealth *ex rel.* City of Lancaster *v.* 479
Martinez *v.* Earnshaw 498
Maury's Appeal 249
McCadden, Restein *v.* 64
McCarthy's Estate (O. C.) 315
McComeskey, Reeves *v.* 394
McCord, Freyer *v.* 75
McManus, Underhill *v.* (C. P.) 552
McMichael *et al.* *v.* The Inter-County Street Ry. Co. 179
McNeile *v.* Cridland 274
Meigs *et al.* *v.* Milligan (C. P.) 406
Mellon *et al.*, Howell *et al.* *v.* 484
Mentel *v.* Hippely 135
Merchants and Manufacturers National Bank, Commonwealth *v* 291
Merrall *v.* Dobbins 451
Metropolitan Life Insurance Company, Dietz *v.* 403
Miller, Fife *v.* 37
Miller, Simrell *v.* 519
Milligan, Meigs *et al.* *v.* (C P.) 406
Mitchell *et al.*, Baugh & Sons Company *v.* 228
Mix *v.* Royal Insurance Company 558
Montgomery County Pass. Ry. Co., Penna. R. R. Co. *v.* 153
Moore, Sewell *v.* 121
Moreland *et al.* *v.* The H. C. Frick Company, 496
Mulholland *v.* Wood, Brown & Co. 140

NAGLEE'S Estate (O. C.) 104
Nathan's Estate (O. C.) 184
National Bank of Jamestown *v.* Scofield 361
National Bank of the Northern Liberties, Hicks *v.* 424
New York & Ontario Land Co. *v* Weidner 461

OFFERLEE *et al.* *v.* Reynolds Lumber Co. 540
Ogontz Land and Improvement Co. *v.* Johnson 307
Oil Well Supply Co., Friend *v* 18
O'Kane, Hopkins, Receiver *v.* 475
Old Eagle School Property, *In re* (C. P.) 348
O'Reilly *et al*, City of Reading *v.* 489
Ott, Park Fire Clay Co. *v.* 105

PARKER'S Appeal 525
Parker's Estate (O. C.) 400
Park Fire Clay Co. *v.* Ott 105
Patrick *v.* Smith 10
Patterson, Philler *et al.*, *v.* 416
Patterson, Young *v.* 100
Pedrick *et al.*, Pile *et al* *v.* 220
Penna. R. R. Co., Davenport Company *v.* 132
Penna. R. R. Co. *v.* Montgomery County Pass. Ry. Co. 153
Pennell, City of Chester *v.* 457
Pennsylvania Company for Insurances on Lives and Granting Annuities *v.* The Philadelphia & Reading Railroad Company (U. S. C. C.) 534
Pennsylvania Railroad Company, Kerr *v.* 325
Pennsylvania Railroad Company, Wood *v.* (C. P.) 410
Pennsylvania Schuylkill Valley R. R. Co. *v.* The Spring City Gas Light Company 413
Penn Township Mutual Fire Insurance Association of Lancaster County, Pa., Graybill *v.* 554
Perrin *et al* *v.* Waterhouse *et al.* 17
Person *et al.*, Lilly *v.* 382
Petition of Clerks of Councils 89
Philadelphia, Bailey *et al.* *v.* 236
Philadelphia, J. G. Brill Co. *v.* 217
Philadelphia, Harrisburg, and Pittsburgh Railroad Company, Evilhock *v.* 568
Philadelphia & Reading Railroad Company, Gangawer, *v.* 356
Phila. & Reading R. R. Co., Link *v.* 21
Philadelphia & Reading Railroad Company, Pennsylvania Company *v.* (U. S. C. C.) 534
Philadelphia Traction Co., Tietz *v.* 469
Philadelphia Trust Co. *et al.'s* Appeal. 265
Philler *et al.* *v* Patterson. 416
Phillips, Bartley *et al.* *v.* 19
Phillips Glass Company, Dell *v.* 467
Pierson, Gowen *v.* 5
Pile *et al.* *v.* Pedrick *et al.* 220
Pittsburgh & Castle Shannon Railroad Co., Dennis *v.* 81
Pittsburgh & Lake Erie R. R. Co., Stoltenburg *v.* 87
Pittsburgh, etc., R. R. Co., Birch *et al.* Ex'rs *v.* 69
Pittsburgh Traction Co., Laird *v.* 24
Pittsburgh & Western Ry. Co., Com'th *v.* 137
Playford *v.* Lockard (U. S. C.C.) 32
Plumb's Appeal 182
President, Managers and Company of the Perkiomen and Reading Turnpike Road, Geiger *v.* 233
Price's Appeal 531, 551
Prospect Building and Loan Ass'n *v.* George B. Russel, (C. P.) 260
Prudential Insurance Company, Brady *v.* 401

RAILROAD Co., Birch *et al.* *v.* 69
Railroad Co., Davenport Co. *v.* 132
Railroad Co., Dennis *v.* 81
Railroad Co., Evilhock *v.* 568
Railroad Co., Jones *v.* 441
Railroad Co., Kennelty *v.* 50
Railroad Co., Kerr *v.* 325
Railroad Co., Link *v.* 21
Railroad Co., Pennsylvania Co. for Insurances on Lives and Granting Annuities *v.* (U. S. C. C.) 534
Railroad Co. *v.* Railway Co. 153
Railroad Co., Ruppel *v.* 210
Railroad Co., Stoltenburg *v.* 87
Railroad Co. *v.* The Spring City Gas Light Company 413
Railroad Co. Wood *v.* (C. P.) 410
Railway Co., City of Philadelphia *v.* 428
Railway Co., County of Berks *v.* 173
Railway Co., Com'th *v.* 137
Railway Co., Lehigh Coal and Navigation Co. *v.* 160
Railway Co., McMichael *et al.* *v.* 179
Railway Co. *v.* Railway Co. 166
Railway Co., Township of Plymouth *v.* 317
Railway Co. Yingst *v.* 320
Ralston's Appeal 521
Ramsay, Com'th *ex rel.* *v.* 142
Rand *v.* Caflisch *et al.* (C. P.) 198
Reading City Pass. Ry. Co. and Reading Traction Co., County of Berks *v.* 173

Digitized by Google

Reeves *v.* McComeskey 394
Reger, Manhattan Brass Company *v.* 342
Re Sewer on Park Avenue 525
Restein *v.* McCadden 64
Reynolds Lumber Co., Offerlee *et al. v.* 540
Reynolds *v.* Reynolds Lumber Co. 537
Rhoads *et al. v.* Central Coal Dealers' Association *et al.* 48
Richard's Estate (O. C.) 264
Richardson *v.* Atlas National Bank 242
Rockell's Appeal 327
Rodgers, Diehl *v.* 447
Romberger *v.* Henry 215
Royal Insurance Company, Mix *v.* 558
Ruppel *v.* The Allegheny Valley R. R. Co. 210
Russell and Rindfuss, Balfour *v.* 225
Russel, Prospect Building and Loan Asso. *v.* (C. P.) 260
Ryon, Fillman *v.* 391

SAAKE *v.* Dorner 204
Sandusky Street, *In re* 68
Schmidt's Estate (O. C.) 152
Schneipp *et al*, Com'th *ex rel.* Holland *v.* 102
Schofield, City of Phila. *v.* 108
Schroder *v.* The City of Lancaster 572
Schwartz's Estate 337
Scofield, National Bank of Jamestown *v.* 361
Scranton Gas & Water Co. *v.* Lackawanna Iron and Coal Co. 185
Seitz *v.* Seltz 553
Sewell *v.* Moore 121
Sewer on Park Avenue, *Re* 525
Shaw *v.* The City of Philadelphia 510
Shields, Commonwealth *v.* 297
Shiloh Street, *In re* 219
Simon's Appeal 89
Simrell *v.* Miller 519
Smith *v.* Ervin 339
Smith *et al.*, Evans *v.* 144
Smith, Kline & French Co. *v.* Smith 124
Smith, Patrick *v.* 10
Smith *v.* Snyder 425
Smith v. The *Times* Co. (C. P.) 561
South Side Water Company, *In re* (Exec. Dept.) 55
Snyder, Smith *v.* 425
Spring City Gas Light Company, Pennsylvania R. R. Co. *v.* 413
Springer's Estate (O. C.) 335
Stauffer's Estate (O. C.) 150
Steinmetz's Estate 377, 378
Still, Hickok *v.* 329
Stoltenburg *v.* Pittsburgh & Lake Erie R. R. Co. 87
Strauss's Estate 374
Sturgis *v.* Kountz 78
Sweeting *v.* Wanamaker, Defendant, Hallowell, Garnishee (C. P.) 279

TAMAQUA and Lansford Street Ry. Co. *v.* The Inter-County Street Ry. Co. 166
Thackara Mfg. Co., Edison Co. *v.* 276
Thatcher *v.* Central Traction Co. 84
The Chestnut Hill and Norristown Railway Co., Township of Plymouth *v.* 317
The City of Philadelphia *v.* The Thirteenth & Fifteenth Streets Passenger Railway Company of Philadelphia 428
The Countrymen's Mutual Insurance Co., Light *v.* 454
The Fidelity Insurance, Trust and Safe Deposit Company, Guardian, etc., *v.* The Commonwealth Title Insurance and Trust Company 387
The Lebanon and Annville Street Railway Company, Yingst *v.* 320
The *Times* Company, Smith *v.* (C. P.) 561
Third National Bank, Farmers' and Mechanics' Bank *v.* 47
Thirteenth and Fifteenth Streets Passenger Railway Company of Philadelphia, The City of Philadelphia *v.* 428
Tietz *v.* Philadelphia Traction Co. 469
Titlow's Appeal 207
Thomas' Appeal 253
Thomas *v.* The Inter-County Street Ry. Co. 176
Thomas, Wertheimer, *v.* 309
Township of Plymouth *v.* The Chestnut Hill and Norristown Railway Co. 317
Township of Rahn *v.* The Tamaqua and Lansford Street Ry. Co. 165
Township of Willistown, Evans *et al. v.* 385
Tradesmen's Bank *v.* Indiana Bicycle Co. 133
Trenton Iron Company's Appeal 36

UNDERHILL *v.* McManus (C. P.) 552

VANDERLIN, Hollister to use, etc., *v.* 41
Van Reed *v.* Jones *et al.* 549
Vincent *v.* Woodland Oil Co. 52

WALSH, Bayer *v.* 57
Walsh, Whissler *v.* 114
Wanamaker, Defendant, Hallowell, Garnishee, Sweeting *v.* (C. P.) 279
Waterhouse *et al.*, Perrin *et al. v.* 17
Watterson *v.* Fuellhart 565
Watts' Estate, No. 1 369
Watts' Estate, No. 2 372
Weber, Com'th *v.* 193
Weidner, New York & Ontario Land Co. *v.* 461
Weil & Co., Goddard Hill & Co. *v.* 98
Wertheimer *v.* Thomas 309
Wessels *v.* Weiss 111
Wheeler's Estate (O. C.) 296
Whelen's Estate (O. C.) 575
Whissler *v* Walsh 114
White's Appeal 207
Willock's Estate 13
Witman *v.* City of Reading 528
Wood, Brown & Co., Mulholland *v.* 140
Woodland Oil Co., Vincent *v.* 52
Wood *v.* The Pennsylvania Railroad Co. (C. P.) 410
Worsley's Estate (O. C.) 247

YINGST *v.* The Lebanon and Annville Street Railway Co. 320
Young *v.* Fox, Executor 201
Young *v.* Patterson 100

RULES OF THE SUPERIOR COURT - - - - - - - - - 433

Digitized by Google

TABLE OF CASES CITED

IN THE

OPINIONS OF THE SUPREME COURT IN THE CASES REPORTED IN THIS VOLUME.

ALCORN *v.* Philadelphia, 112 Pa. 494, 439
Alger *v.* Lowell, 3 Allen, 402, 81
Allegheny Savings Bank *v.* Meyer, *et al.*, 29 Pa. 361, 258
Am. Brewing Co.'s License, 161 Pa. 378, 368
Ammant *v.* New Alexandria & Pittsburgh Turnpike Co., 13 S. & R. 210, 539
Am. Sunday School Union *v.* Phila., 161 Pa. 307, 548
Angier *v.* Eaton Co., 98 Pa. 594, 278
Anonymous, 3 Salk. 155, 448
Arnold *v.* Stedman, 45 Pa. 186, 423
Auer *v.* Penn, 99 Pa. 370, 396
Ayars' Appeal, 122 Pa. 266, 458

BAIR *v.* Hubartt, 139 Pa. 96; 27 WEEKLY NOTES, 272, 64
Baker *v.* Morton, 12 Wall. 150, 394
Baldwin *v.* Cash, 7 W. & S. 427, 509
Balsley *v.* Hoffman, 13 Pa. 603, 567
Bank *v.* Coke Co., 137 Pa. 601, 539
Bank *v.* Earley, 113 Pa. 477, 142
Barnet *v.* Barnet, 15 S. & R. 72, 464
Bayard's Appeal, 72 Pa. 453, 539
Beaumont *v.* Wilkesbarre, 142 Pa. 198, 491
Beers *v.* Walhizer, 43 Hun. 254, 242
Behling *v.* Pipe Line, 160 Pa. 359, 80
Biddle *v.* Bank, 41 Leg. Int. 15, 258
Blight *v.* Wright, 1 Phila. 549, 374
Bowlby *v.* Thunder, 105 Pa. 173, 146
Boyer *v.* Reading, 151 Pa. 185, 439
Boyle *v.* Boyle, 152 Pa. 110, 146
Boyle *v.* Phila. & Read. R.R. Co., 54 Pa. 310, 234
Braddon *v.* G. N. Ry. Co., 28 L. J. Ex. (N. S.) 51, 213
Bramberry's Appeal, 156 Pa 628, 202
Breuckmann *v.* Twibill, 89 Pa. 58, 396
Brisben's Appeal, 70 Pa. 405, 371
Brodie *v.* Bickley, 2 R. 431, 34
Brooke *v.* Railroad Co., 108 Pa. 529, 276
Brooks *v.* Bank, 125 Pa. 394, 237
Brown *v.* Crashaw, 2 Bulst. 154, 448
Brown *v.* Finney, 67 Pa. 214, 147
Bucknor's Estate, 136 Pa. 23, 15

CALDWELL *v.* Miller, 127 Pa. 442, 112
Caley *v.* Railroad Co., 80 Pa. 363, 276
Campbell's Adm'r *v.* Boggs, 48 Pa. 524, 190
Carey *v.* Bright, 58 Pa. 70, 502
Carl's Appeal, 106 Pa. 635, 372
Carpenter *v.* Koons, 20 Pa. 222, 551
Catasauqua *v.* Hopkins, 141 Pa. 30, 346
Charles *v.* Abell, Brightly, 131, 136
Christy *v.* Sill, 95 Pa. 380, 94
City *v* Hays, 93 Pa. 72, 220
City of Phila. *v.* Presbyterian Board of Pub., 9 Phila. 499, 309
Clark *v.* Ferry Co., 35 N. Y. 485, 80
Clark *v.* Railroad Co, 5 WEEKLY NOTES, 119, 469
Clay *v.* Rufford, 5 De Gex & Smale, 768, 331
Clever *v.* Mutual Reserve Fund Life Association, 1 Q. B. 147, 519
Coal Co. *v.* Iron Co., 162 Pa. 114, 498
Cochran *v.* Pew, 159 Pa. 184, 21
Coleman *v.* Nantz, 63 Pa. 178, 64
Collins *v.* Cronin, 117 Pa. 35, 394
Commercial Assurance Co. *v.* Hocking, 115 Pa. 407, 8
Commonwealth *v.* Carey, 151 Pa. 368, 367
Commonwealth *v.* Cooley, 10 Pick. 39, 301
Commonwealth *v.* Cromley, 1 Ash. 179, 301
Commonwealth *v.* Equitable Beneficial Association, 137 Pa. 412, 381
Commonwealth *v.* Erie and Northeast R.R. Co., 27 Pa. 339, 444
Commonwealth *v.* Macferron, 152 Pa. 244, 573
Commonwealth *v.* Rees, 3 Wh. 123, 567
Commonwealth *v.* Switzer, 134 Pa. 383, 346
Com'th *ex rel.* Braughler *v.* Weir, 165 Pa. 284, and 35 WEEKLY NOTES, 556, 103
Com'th *ex rel.* Sherry *v.* Jenks *et al.*, 154 Pa. 368, 236
Com'th *v.* Oellers, 140 Pa. 457, 237
Com'th *v.* Wilkinson, 16 Pick. 175, 234
Cooper *v.* Lampeter Township, 8 Watts, 125, 158
Cover *v.* Manaway, 115 Pa. 345, 495
Cox *v.* Hickman, 8 H. L. C. 268, 112, 453
Coxe *v.* England, 65 Pa. 212, 288
Cozens *v.* Middleton, 118 Pa. 622, 420

DAVIS'S Appeal, 83 Pa. 348, 371
Deem *v.* Milliken, 6 Ohio C. C. Rep. 357, 518
De Morat *v.* Falkenhagen, 148 Pa. 393, 396
Dennis *v.* Barber, 6 S. & R. 420, 287
Dent's Appeal, 22 Pa. 514, 35
Dexter *v.* Billings, 110 Pa. 135, 203
Dickinson *v.* A. O. U. W., 159 Pa. 258, 381
Dobbins *v.* Stevens, 17 S. &. R. 13, 328
Donohugh's Appeal, 86 Pa. 306, 548
Downey *v.* Garard, 24 Pa. 52, 190
Dull *v.* Ridgway, 9 Pa. 272, 158
Devers *v.* York City, 150 Pa. 208, 458

EASTON Pass. Ry. Co. *v.* Easton Borough, 133 Pa. 505, 175
Eckstein's Petition, Yard's Appeal, 148 Pa. 509, 91
Edwards *v.* Tracy, 62 Pa. 374, 112
Ehrisman *v.* East Harrisburg Ry. Co., 150 Pa. 180, 85
Ely *v.* Railroad Co., 158 Pa. 233, 358, 454
Erie *v.* Brady, 127 Pa. 169, 491
Erie Dime Savings and Loan Co. *v.* Vincent, Ex'r, 105 Pa. 315, 374
Estate of Potter *v.* Page, 54 Pa. 465, 524
Ex parte Garland, 71 U. S. 333, 449

FIFTY-FOURTH Street, 165 Pa. 8, 527

Digitized by Google

Fink *v.* Garman, 40 Pa. 103, 71
Finlay *v.* Stewart, 56 Pa. 183, 147
Fire Works Co. *v.* Polites, 130 Pa. 537, 502
Fisher *v.* Witham, 132 Pa. 488, 290
Foreman *v.* Baldwin, 24 Ills. 298, 449
Foster *v.* Fowler, 60 Pa. 27, 540
France *v.* Ruddiman, 126 Pa. 257, 142
Fritz *v.* Hathaway, 135 Pa. 280, 360
Fross's Appeal, 105 Pa. 258, 373
Fulmer *v.* Seitz, 68 Pa. 237, 474

GANNON *v.* Fritz, 79 Pa. 303, 64
Gardner *v.* Madeira, 2 Yeates, 466, 147
Garrett *v.* Dewart, 43 Pa. 342, 31
German-American Ins. Co. *v.* Hocking, 115 Pa. 398, 479
Gibbs *v.* Bartlett, 2 W. & S. 33, 567
Gibbs' Estate, 157 Pa. 59, 112
Gilbert's Appeal, 85 Pa. 347, 328
Gilmore *v.* Railway Co., 153 Pa. 31, 85
Girard Point Storage Co *v.* Southwark Foundry Co., 105 Pa. 248, 540
Good *v.* Fichthorn, 144 Pa. 287, 146
Goodenow *v.* Buttrick, 7 Mass. 140, 301
Gould *v.* Dwelling House Ins. Co., 134 Pa. 570, 356
Gould *v.* Insurance Co., 134 Pa. 570, 560
Gourley *v.* Kinley, 66 Pa. 273, 102
Grace *v.* Smith, 2 Wm. Blackstone, 998, 112, 453
Graffenstein *v.* Epstein, 23 Kans. 443, 127
Gratz *v.* Bayard, 11 S. & R. 41, 97
Greensburg *v.* Laird, 138 Pa. 533, 439
Grevemeyer *v.* Southern Ins. Co., 62 Pa. 342, 456
Grim *v.* School District, 57 Pa. 433, 464
Griswold *v.* Gebbie, 126 Pa. 353, 77
Groff's Appeal, 128 Pa. 621, 320
Gross's Estate, 10 Pa. 360, 574
Gross' License, 161 Pa. 344, 368
Guest *v.* Water Co., 142 Pa. 610, 539

HACKETT *v.* King, 6 Allen 58, 394
Hall *v.* Benner, 1 P. & W. 402, 31
Hammett *v.* Philadelphia, 65 Pa. 146, 439, 527, 530
Hand *v.* Fellows, 148 Pa. 456, 527
Hand *v.* Weidner, 151 Pa. 362, 464
Hardwick *v.* Galbraith, 147 Pa. 333, 278
Harrisburg *v.* McCormick, 129 Pa. 213, 530
Harrisburg *v.* Segelbaum, 151 Pa. 172, 439
Hart *v.* Kelley, 83 Pa. 286, 112
Hartley & Co. *v.* Corboy, 150 Pa. 23, 475
Hartupee *v.* Pittsburgh, 97 Pa. 107, 8
Hassanclever *v.* Tucker, 2 Binn. 526, 328, 371
Hawk *v.* Stouch, 5 S. & R. 157, 30
Hazel *v.* Pass. Ry. Co., 132 Pa. 96, 322
Heeter *v.* Glasgow, 79 Pa. 79, 495
Heinrich *v.* Venter, 1 Atl. Rep. 598, 509
Hemphill *v.* McClimans, 24 Pa. 367, 237
Hessner *v.* Helm, 8 S. & R. 178, 276
Hey *v.* City of Philadelphia, 81 Pa. 44, 81
Hill *v.* Cooley, 46 Pa. 259, 475
Hill *v.* Protection Co., 59 Pa. 474, 31
Hillbish Appeal, 89 Pa. 497, 102
Hise *v.* Geiger, 7 W. & S. 273, 102
Hoffman *v.* Coster, 2 Wh. 453, 449
Hoff's Appeal, 24 Pa. 200, 516
Hoge *v.* Hoge, 1 Watts, 214, 94
Holden *v.* Banes, 140 Pa. 63, 237
Hollinshead's Appeal, 103 Pa. 158, 94, 190
Holloway *v.* Jacoby, 120 Pa. 583, 9
Holmes, Lafferty & Co *v.* German Security Bank, 87 Pa. 525, 245
Holridge *v.* Gillespie, 2 Johns. Ch. 35, 449
Holt *v.* Pie, 120 Pa. 440, 10
Homer *v.* Com'th, 106 Pa. 221, 283
Hopkins *v.* Glunt, 111 Pa. 287, 146
Hopkins and Johnson's Appeal, 90 Pa. 69, 539
Horwitz *v.* Norris, 60 Pa. 261, 574
Hostetter *v.* Pittsburgh, 107 Pa. 419, 8
Houghtaling *v.* Kelderhouse, 1 Parker, 241 (N. Y.), 449
House of Refuge *v.* Smith, 140 Pa. 387, 548
Huntingdon and Broad Top R.R. Co. *v.* Decker, 84 Pa. 425, 326
Hunt's Estate, 133 Pa. 260, 574

IMPERIAL Ins. Co. *v.* Dunham, 117 Pa. 471, 31
In re North Whitehall Township, 47 Pa. 156, 42
Ins. Co. *v.* Graybill, 74 Pa. 17, 31
Ins. Co. *v* Stauffer, 9 Casey 397, 560
Ins. Co. *v.* Todd, 83 Pa. 272, 560
Ins. Co. *v.* Updegraff, 21 Pa. 513, 31

JARECKI CO. *v.* Hays, 161 Pa. 613, 278
Jauretche *v.* Proctor, 48 Pa. 466, 145
Johnson *v.* Hart, 6 W. & S. 319, 202
Johnson *v.* Phila. & Read. R. R. Co., 163 Pa. 127, 260
Johnson's License, 156 Pa. 322, 368
Johnston's Estate, 33 Pa. 511, 301
Joliet *v.* Verley, 35 Ill. 58, 81
Jones' Appeal, 99 Pa. 124, 333
Jones *v.* Erie and Wyoming Valley R. R. Co., 151 Pa. 30, 444
Jones *v.* Shawhan, 4 W. & S. 257, 422
Jordan *v.* Stewart, 23 Pa. 244, 384

KELLUM *v.* Smith, 33 Pa. 158, 94, 286
Kelly *v.* Eby, 141 Pa. 176, 237, 521
Kemmerer's Appeal, 102 Pa. 558, 422
Kennedy *v.* Bank, 18 Pa. 347, 473
Kennedy *v.* Poor, 151 Pa. 474, 8
Keough *v.* Leslie, 92 Pa. 424, 276
Kerns *v.* Swope, 2 Watts, 75, 288
Keys *v.* Johnson, 68 Pa. 42, 65
Kountz *v.* Kennedy, 63 Pa. 187, 475
Kurtz's Appeal, 26 Pa. 465, 102

LACKEY'S Estate, 149 Pa. 7, 250, 252
Lancaster County Bank *v.* Gross *et al.*, 50 Pa. 224, 258
Lancaster *v.* Dolan, 1 R. 231, 380
Landis *v.* Roth, 109 Pa. 621, 521
Larimer Ry. Co. *v.* Larimer Street Ry. Co., 137 Pa. 533, 178
Laughlin *v.* Lorenz, 48 Pa. 275, 97
Laverty *v.* Vanarsdale, 65 Pa. 507, 393
Leaf's Appeal, 105 Pa. 505, 97
Leake *v.* Philadelphia, 150 Pa. 643, 440
Leonard *v.* Duffin, 94 Pa. 218, 237
Levy's Estate, 153 Pa. 174, 146
Lewis *v.* Smith, 107 Mass. 334, 80
Linderman *v.* Pomeroy, 142 Pa. 168, 521
Lines *v.* Lines, 142 Pa. 149, 35
Lithgow *v.* Supreme Tent, *etc.*, 165 Pa. 292, 381
Lockhart *et al.* *v.* Craig St. Ry. Co., 139 Pa. 419, 179
Lodge *v.* Hamilton, 2 S. & R. 491, 202
Lord *v.* Proctor, 7 Phila. 630, 112
Lowrey *v.* Robinson, 141 Pa. 189, 521

MAC CONNELL *v.* Lindsay, 131 Pa. 476, 380
Mallet *v.* Bateman, L. R. 1 C. P. 163, 423
Martin *v.* Schoenberger, 8 W. & S. 367, 466
Maule *v.* Bucknell, 50 Pa. 39, 422
Mayer *v.* Walter, 64 Pa. 285, 394
McCormick *v.* Royal Ins. Co., 163 Pa. 184, 356
McCredy *v.* The Schuylkill Navigation Co., 3 Wh. 424, 288
McCullough *v.* Young, 1 Binn. 63, 34
McDevitt *v.* Gas Company, 160 Pa. 367, 158
McFarland *v.* The Ins. Co. 134 Pa. 590, 560
McGinley *v.* Levering, 152 Pa. 366, 571
McIntyre *v.* McIntyre, 125 Pa. 329, 146
McKeesport *v.* Soles, 165 Pa. 628, 491
McKnight *v.* Pittsburgh, 91 Pa. 273, 219
McLeod *v.* Central Normal School, 152 Pa. 575, 540
Mead's License, 161 Pa. 375, 368
Melick *v.* Williamsport, 162 Pa. 408, 458
Mellor's Ex'r. *et al.* *v.* Philadelphia, 160 Pa. 614, 184

Digitized by Google

Mentz *v.* Lancaster Fire Ins. Co., 79 Pa. 475. 456
Mentzer *v.* Menor, 8 W. 296, 102
Mercer *v.* Watson, 1 Watts, 330, 464
Meredith's Executor *v.* Cist, 7 S. & R. 183, 509
Michener *v.* Philadelphia, 118 Pa. 535, 530
Middleton *v.* Thompson, 163 Pa. 112, 55
Miller *v.* Pollock, 99 Pa. 206, 420
Miller *v.* Ruble, 107 Pa. 395, 495
Millerstown *v.* Bell, 123 Pa. 151, 4
Monongahela Navigation Co. *v.* Fenlon, 4 W. & S. 205, 8
Moore *v.* Baird, 30 Pa. 138, 420
Moore *v.* Fields, 42 Pa. 467, 35
Moore *v.* Taylor, 147 Pa. 481, 549
Moore *v.* Weber, 71 Pa. 429, 396
Moreland *v.* Moreland, 121 Pa. 573, 497
Morewood Avenue, 159 Pa. 20, 527
Mothland *v.* Wireman, 3 P. & W. 185, 34
Moulton *v.* Sanford, 51 Me. 134, 81
Munns *v.* Dupont, 1 Am. Leading Cases, 217, 390
Munroe *v.* Armstrong, 96 Pa. 307, 21
Musselman's Appeal, 101 Pa. 165, 35
Myers *v.* Clark, 3 W. & S. 535, 568
Myers *v.* Railroad Co., 150 Pa. 386, 358

NEELY *v.* Bair, 144 Pa. 250, 21
Neff *v.* Horner, 63 Pa. 327, 474
New York Mutual Life Ins. Co. *v.* Armstrong, 117 U. S. 591, 519
Nichols *v.* Postlethwaite, 2 Dall. 131, 328
Nicolls *v.* McDonald, 101 Pa. 514, 290
Norris *v.* Litchfield, 35 N. H. 271, 81
Nugent *v.* Wolfe, 111 Pa. 471, 422

OCEANIC Steam Navigation Co. *v.* Sutherberry, L. R. 16, Ch. Div. 236, 331
Oil City *v.* Morris, 1 Penny. 420, 491
Oil City *v.* Oil City Boiler Works, 152 Pa. 348, 528
Owens *v.* Owens, 100 N. C. 242, 518
Oxley *v.* Cowperthwaite, 1 Dall. 349, 567

PAINE *v.* Edsell, 19 Pa. 178, 474
Painter *v.* The Mayor, etc., of Pittsburgh, 46 Pa. 213, 282
Pancake *v.* Cauffman, 114 Pa. 113, 290
Pa. R. R. Co. *v.* Davenport, 154 Pa. 111, 229
Pa. R. R. Co. *v.* Plank Road Co., 71 Pa. 350, 214
Pa. R. R. Co. *v.* Sly, 65 Pa. 205, 235
Patterson *v.* Neuer, 165 Pa. 66, 521
Pauley's Estate, 149 Pa. 196, 270
Pearce *v.* Humphreys, 14 S. & R. 23, 567
Pennell *v.* Grubb, 13 Pa. 551, 44
Penn Nat. Gas Co. *v.* Cook, 123 Pa. 170, 276
Penn. & Ohio Canal Co. *v.* Graham, 63 Pa. 290, 139
Penn. Schuylkill Valley R. R. Co. *v.* Phila. & Reading R. R. Co., 157 Pa. 42, 443
Perkins *v.* Stevens, 41 Mass. 277, 449
Phila. & Baltimore Central R. R. Co., 70 Pa. 355, 539
Phila. & Reading Coal Co. *v.* Hoffman, 4 Atl. 848, 9
Philadelphia *v.* Baker, 140 Pa. 11, 440
Philadelphia *v.* Dibeler, 147 Pa. 261, 440
Philadelphia *v.* Ehret, 153 Pa. 1, 439
Philadelphia *v.* Hill, 166 Pa. 211, 440
Philadelphia *v.* Market Co., 161 Pa. 522, 386
Philadelphia *v.* Pennsylvania Hospital, 154 Pa. 9, 548
Philadelphia *v.* Spring Garden Market Co., 161 Pa. 522, 139
Piollet *v.* Simmers, 106 Pa. 95, 322
Pittsburgh Southern Ry. Co. *v.* Taylor, 104 Pa. 306, 322
Plank Road Co. *v.* Thomas, 20 Pa. 91, 234
Plumer *v.* Guthrie, 76 Pa. 441, 290
Plummer *v.* Iron Co., 160 Pa. 483, 498
Pollard's Petition, 127 Pa. 507, 368
Poor District *v.* Poor District, 107 Pa. 301, 142
Porter *v.* Mayfield, 21 Pa. 263, 94
Porter *v.* Vanderlin, 158 Pa. 146, 42
Potter *v.* Hiscox, 30 Conn. 508, 35
Pottsville *v.* Norwegian Township, 14 Pa. 543, 158
Pratt *et al.* *v.* Waterhouse *et al.*, 158 Pa. 45, 17
Pratt *v.* Paulus, 4 Atl. 751, 10
Presbyterian Church *v.* Disbrow, 52 Pa. 219, 146
Price *v.* Price, 156 Pa. 617, 532
Prough *v.* Entriken, 11 Pa. 85, 394
Provost *v.* Water Company, 162 Pa. 275, 158
Purviance *v.* McClintee, 6 S. & R. 259, 112

QUINN *v.* Cumberland Co., 162 Pa. 55, 573
Quinn's Estate, 144 Pa. 444, 380

RAFFERTY *v.* Traction Company, 147 Pa. 549, 158
Railroad Co. *v.* Decker, 84 Pa. 419, 71
Railroad Co. *v.* Hope, 80 Pa. 377, 80
Railroad Co. *v.* Hummell, 44 Pa. 375, 469
Railway Co. *v.* Phila., 51 Pa. 465, 551
Rankin *v.* Simpson, 19 Pa. 471, 290
Rauch *v.* Dech, 116 Pa. 157, 75
Reading *v.* Davis, 153 Pa. 360, 158
Real Estate Co. *v.* Roop, 132 Pa. 496, 12
Reed's Ex'rs *v.* Reed, 82 Pa. 420, 65
Reigart *v.* White, 52 Pa. 440, 13
Reninger *v.* Spatz, 128 Pa. 524, 100
Reno *v.* Moss, 120 Pa. 67, 41
Respublica *v.* Hevice *et al.*, 2 Yeates 114, 147
Reynolds *v.* Caldwell, 51 Pa. 298, 8
Rex *v.* Crosby, 2 Salk. 689, 448
Rex *v.* Ford, 2 Salk. 691, 448
Rex *v.* Greepe, 2 Salk. 514, 448
Riggs *v.* Palmer, 115 N. Y. 506, 519
Ripple *v.* Ripple, 1 Rawle 386, 328
Road from McClaysburg, 4 S. & R. 200, 140
Road in Donegal, 4 Yeates, 479, 140
Road in Radnor, 5 Binn. 612, 140
Rockell *v.* Eddinger, 81* Pa. 525, 328
Rosenagle *v.* Handley, 151 Pa. 107, 346
Rowand *v.* Finney, 96 Pa. 192, 290
Rushton *v.* Lippincott, 119 Pa. 12, 75

SANKEY *v.* McElevey, 104 Pa. 265, 189
Saunders *v.* Gould, 134 Pa. 445, 290
Sayre Borough *v.* Phillips, 148 Pa. 482, 4
Scheerer *v.* Stanley, 2 R. 276, 30
Schlecht's Appeal, 60 Pa. 172, 129
Schmidt *v.* Weidman, 63 Pa. 173, 394
Schofield *v.* Ferrers, 47 Pa. 194, 394
School District *v.* Padden, 89 Pa. 395, 158
Shakespeare *v.* Deposit Co., 97 Pa. 173, 35
Shellenberger *v.* Ransom, 59 N. W. Rep. 935, 518
Shrawder *v.* Snyder, 142 Pa. 1, 464
Silliman *v.* Haas, 151 Pa. 52, 94
Silsby Manufacturing Co. *v.* Allentown, 153 Pa. 319, 220
Simpson *v.* Stackhouse, 9 Pa. 186, 473
Smalley *v.* Morris, 157 Pa. 349, 276
Smith *v.* Simmons, 103 Pa. 32, 282
Snodgrass *v.* Gavit, 28 Pa. 221, 479
Snyder *v.* Lancaster, 20 WEEKLY NOTES, 185, 184
Sorver *v.* Berndt, 10 Pa. 213, 574
South Chester *v.* Garland, 162 Pa. 91, 491
Sparhawk *v.* Railway Co., 54 Pa. 401, 178
Stahl *v.* Crouse, 1 Pa. 111, 380
State *v.* Markins, 95 Ind. 464, 147
Stebbins *v.* Crawford Co., 92 Pa. 289, 237
Sterling's Appeal, 111 Pa. 35, 158
Stoop's Estate, 31 P. L. J. 34, 373
Stubbs *v.* King, 14 S. & R. 206, 276
Stuckey *v.* Keefe's Ex'rs, 26 Pa. 397, 202
Susquehanna Canal Co. *v.* Bonham, 9 W. & S. 27, 539
Susquehanna M. F. Ins. Co. *v.* Staats, 102 Pa. 529, 31
Sweeney *v.* Oil Co., 130 Pa. 193, 65

Digitized by Google

TATE *v.* Stooltzfoos, 16 S. & R. 35, 464
Taylor *v.* Birmingham, 29 Pa. 306, 203
Taylor *v.* Preston, 79 Pa. 436, 423
Taylor *v.* Smith, 2 Wh. 432, 75
Teller *v.* Boyle, 132 Pa. 56, 61
Thomas *v.* Folwell, 2 Wh. 11, 380
Thompson's Appeal, 126 Pa. 467, 270
Townsend *v.* Long, 77 Pa. 143, 423
Township *v.* Gibboney, 94 Pa. 534, 158
Township *v.* Parson, 105 Pa. 360, 158
Township *v.* Watson, 3 Atl. 869, 80

UNION Pass. Ry.'s Appeal, 81 Pa. 91, 386
Urias *v.* Railroad Co., 152 Pa. 326, 358

VENTURE Oil Co. *v.* Fretts, 152 Pa. 451, 21

WACHOB *v.* Bingham School Dist., 8 Phila. 568, 158
Wachter *v.* Phœnix Assurance Co., 132 Pa. 428, 465
Walker *v.* Jackson, 10 M. & W. 161, 80
Walker *v.* Tupper, 152 Pa. 1, 112
Walker's Appeal, 116 Pa. 419, 373
Washington Avenue, 69 Pa. 352, 527, 530
Waugh *v* Carver, 2 H. Blackstone, 235, 112, 453
Way *v.* Hooton, 156 Pa. 8, 94
Welton *v.* Missouri, 91 U. S. 275, 4
Westerberg *v.* Railroad Co., 142 Pa. 471, 469
Wharton *v.* Shaw, 3 W. & S. 124, 250, 252
Wheeler *v.* Crawford, 86 Pa. 327, 396
Wickersham *v.* Russell, 51 Pa. 71, 64
Wilkins *v.* Ellett, 9 Wall. 740, 35
Williams *v.* Baker, 71 Pa. 482, 495
Williamsport *v.* Beck, 128 Pa. 147, 439
Williard *v.* Williard, 56 Pa. 119, 94
Wills *v.* Gas Co., 130 Pa. 222, 21
Witman *v.* Norton, 6 Binn. 395, 328
Wood *v.* Fitzgerald, 3 Oregon, 568, 449
Woodburn *v.* Bank, 5 W. & S. 447, 75
Work's Appeal, 59 Pa. 445, 394
Wyckoff *v.* Ferry Co., 52 N. Y. 32, 80
Wylie *v.* Mansley, 123 Pa. 65, 41
Wynn *v.* Wood, 97 Pa. 216, 423
Wyoming Street, 137 Pa. 494, 66

ZEBLEY *v.* Storey, 117 Pa. 478, 136

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, FEB. 15, 1895.* [No. 1.

Supreme Court.

Oct. '94, 186. November 9, 1894.

Commonwealth v. Harmel.

Constitutional law—Act of February 6, 1830, P. L. 39—Peddling of clocks—Sale or lease—Effect of finding of facts by Judge on appeal from summary conviction by justice.

The Act of February 6, 1830, P. L. 39, forbidding the peddling of clocks, except by persons who have obtained a license, is constitutional. It is a police regulation and makes no discrimination between citizens of this and of any other State, and is enforceable against citizens of other States, or their agents, peddling clocks in this State.

Where B. delivers to A. a clock, which he says he is selling on the instalment plan, and a contract is executed, whereby A. "rents" from B. the clock for a given term at a specified rate per week, and B. agrees that at any time within the term A. may purchase the clock at a price equal to the rental for the term, and be allowed on said price whatever he had paid under the agreement, the transaction is a sale and not a leasing.

The findings of fact by a judge on an appeal from a summary conviction, while they have not the conclusive effect of a verdict of a jury, are entitled to great weight, and will not be disturbed unless plain error is shown.

Appeal of Rudolph Harmel, from the judgment of the Quarter Sessions of Allegheny County, finding him guilty of peddling clocks in violation of the Act of February 6, 1830, P. L. 39, and imposing sentence in accordance therewith.

Rudolph Harmel was convicted before Geo. H. Clementson, justice of the peace, of peddling clocks without a license in violation of the Act of February 6, 1830, P. L. 39. Upon petition an appeal was allowed to the Court of Quarter Sessions, and the case was heard before PORTER, J., before whom the following evidence was given for the Commonwealth:—

George H. Clementson, justice of the peace, said: "Rudolph Harmel was arrested on the 17th of April, and brought before me, charged with peddling clocks, under the Act of February 6, 1830. At the time of the hearing he admitted that he had no license; said he did not think it was necessary. He said that he was selling clocks and other articles on the instalment plan; that all the goods that he disposed of were leased; and a copy of the lease was offered in the evidence before me. Defendant stated that he had made no cash sales in the borough of Braddock. Under the evidence I found the defendant guilty, and imposed the penalty of $50, as provided; and in default of payment thereof, I committed him to jail."

Jerry Lutz said: "I am constable of the borough of Braddock, Allegheny County. I was sitting with Mr. Fisher in front of his store, in Braddock borough, on April 17, 1894. Defendant came along carrying a clock. Mr. Fisher asked defendant how much he wanted for the clock. Defendant replied $6 on payments, 25 cents a week. Mr. Fisher then said: 'I will give you $2 for your clock.' Defendant replied that he did not sell for cash. I watched defendant. He went with his clock into several places on the street. I followed him. He went into Markowitz's shoe store. They spoke German, and I could not understand what they said. He left the clock there. I arrested him for peddling. He said he had no license. He showed no license when arrested by me at Markowitz's store."

Thomas Ward said: "I keep a restaurant in the borough of Braddock. The defendant came into my place of business with a clock, and held it up, and asked me whether I wanted to get a clock, or whether I wanted to buy a clock; I cannot remember which. As I didn't want any clock I dismissed him at once."

William Murray said: "I am a barber in the borough of Braddock. Defendant came in my place of business the first time without any clock and asked me if I wanted to get a clock. I said no, I don't need one. Some time afterwards on the same day he came to my place of business with a clock and wanted me to take one for $6, 25 cents a week. I didn't want a clock and he left."

J. Fisher said: "The constable was sitting beside me on the 17th of April. Defendant came along, and I asked him what he would take for his clock, and he said $6, 25 cents a week. I then said to him, I will give you $2 cash for it. Defendant replied that he did not sell for cash. I didn't want a clock. I have clocks for sale in my store. I know the defendant well. He knew that I did not want a clock."

For the defence the following evidence was given:—

Rudolph Harmel, defendant, said: "I am the defendant in this case. I am in the employ of the American Wringer Company. Its place of business is on Wylie avenue, in the city of Pittsburgh. I have been living in Pittsburgh for two months. Before I came to Pittsburgh I lived in Braddock for about a year and a half. I am can-

Digitized by Google

vassing for the American Wringer Company. I secure orders for goods and then deliver them. We take a lease for the goods and receive weekly payments. Sometimes I receive the first payment, but none of the other payments. The collector from the house does all the collecting. I am not allowed to make cash sales. I never made a cash sale in the borough of Braddock. I had not made any sales, and I was not peddling at the time I was arrested. I generally take orders from this sample book. (Sample book offered in evidence.) Sometimes I carry a clock with me. I made no sales, but leased goods. The firm I worked for owned the goods. I secure orders for goods to be leased, and agree to deliver the goods at their residence. Sometimes I deliver them the same day, if I find time; sometimes one or two days afterwards. The firm for which I work has an office in the borough of Braddock. The office used is in the livery stable building. We keep our goods in that room in the day time. We also have a horse and wagon at that livery stable. We have occupied that room since the 1st of April. In the morning of the day that I was arrested I had taken an order from Mr. Markowitz, the shoe dealer, for a clock. Some time afterwards I took the clock and delivered it to Mr. Markowitz. On my way to his place I stopped at a number of places and showed the clock, and asked if they wanted to get one. I was in Mr. Murray's place of business, and also in Mr. Ward's place of business, on that day. I did not offer to sell that clock—I had disposed of it—but I tried to secure orders for others like it. I don't sell to any one, but lease goods. The firm for which I work pays all the expenses of renting the office and keeping the team. After I secure an order I go to the office and get the article and deliver it. We opened our office there about the 1st of April, and expect to continue it there. There was no sign of our business upon our office or any other place. We sold on the instalment plan; that is, leased goods upon condition of weekly payments, and at expiration of lease the party had a right to buy for a nominal sum."

Question by attorney for Commonwealth: What commission did you receive on goods sold?

Answer. I received 20 per cent.

G. W. Brown said: "I am in the employ of the American Wringer Company and work with the defendant. I have charge of the office at Braddock. We rented that place on the 28th day of March, 1894. We have about ten or fifteen hundred dollars' worth of goods there. We have a horse and a wagon which we use. I have paid $4 for one month's rent. Our only place of business is the room rented in the livery stable building."

G. H. Rishell said: "I have charge of the business of the American Wringer Company in the City of Pittsburgh. Our place of business is located on Wylie avenue, No. 43. I have only been with the company a short time, but the company has been doing business in Pittsburgh some ten or twelve years. We do our business through canvassing agents. Our agents are not allowed to make sales. They take orders and deliver the goods. All goods are put out on the regular instalment lease, the leases are passed over to us, and our collectors collect payments on them. We pay a mercantile tax. The present bill for this year has just been rendered. The defendant in this case was in our employ at the time he was arrested. He is paid by commission. The American Wringer Company is a corporation of the State of Rhode Island. I don't know who the president or secretary is; I don't know who the directors of the company are."

The form of paper signed by those receiving clocks from the defendant was as follows:—

"Article No. 11,863.

"This indenture witnesseth that The American Wringer Company, successor to the Metropolitan Manufacturing Company, the first party, does hereby rent unto Mrs. B. Daly, the second party, one clock for the term of thirteen months from the date hereof, for the use of which clock said second party agrees to pay to said first party the sum of 25 cents rent per week, in advance, which sum said second party agrees is a reasonable rental therefor; and said second party further agrees that at any time during the term of this lease when said rent, or any part of it, shall be in arrears and unpaid, the said second party will deliver up said clock to said first party and forfeit the residue, if any, of the term of this rental, said second party to so deliver up said clock in as good condition as when by them received, the natural wear and decay only excepted.

"Husband's place of business: name [SEAL.]
"Residence.

"We, The American Wringer Co., successor to the Metropolitan Manufacturing Company, the first party in the foregoing rental, agree that said second party may purchase at any of the stores of the said first party the above described article at any time during the term of the above described rental for the price of $13 in cash, and be allowed as a credit on such cash purchase whatever said second party has paid thereon as rent under the above agreement.

"Signed, The American Wringer Company, successor to The Metropolitan Manufacturing Company, opposite depot."

The Court made the following judgment:—

"May 1, 1894, the defendant, Rudolph Har-

Digitized by Google

mel, is adjudged guilty of going from place to place to sell clocks without a license so to do being by him first obtained; and the said defendant is adjudged to forfeit and pay the sum of fifty dollars; and in default of payment of said forfeiture it is ordered that the said Rudolph Harmel be committed to the jail of Allegheny County until discharged by due process of law."

The defendant took this appeal, and assigned as error the entry of the above judgment.

W. K. Shiras (with him *J. W. Kinnear*, *George Shiras, 3d*, and *C. C. Dickey*), for appellant.

The Act regulates only the peddling of a certain kind of articles, if valid at all it must be as a police regulation, but a police regulation must be directed against the business or practice that is harmful, not against one or some of the persons who may be engaged in it.

There is nothing harmful in clocks. The Act therefore discriminates against certain articles of trade.

A police regulation must be reasonable and for the common benefit; it must be exercised by means of laws that are equal and uniform; it must not be in restraint of trade, nor ought it to impose a burden without an apparent benefit.

Millerstown *v.* Bell, 123 Pa. 151.
Commissioners *v.* The Northern Liberties Gas Co., 12 Id. 318.
Sayre Borough *v.* Phillips, 148 Id. 482.

The imposition of a license tax on peddling goods is a regulation of commerce.

Brennan *v.* Titusville, 153 U. S 289.
Welton *v.* Missouri, 91 Id. 275.

The question now arises how far trading of this kind is entitled to Federal protection. It is not claimed that these clocks were disposed of in the original packages in which they came into the State; but there is no established law fixing the breaking of the original packages as the limit of Federal protection. The opinion of the United States Supreme Court in Brennan *v.* Titusville, *supra*, strongly indicates that Federal protection of goods imported from one State to another extends beyond the original package.

In Welton *v.* Missouri, 91 U. S. 282, it is said: "It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character."

But the evidence shows that the clocks in this case, which were imported from another State, were not sold, but leased by the defendant; and that they are still the property of the Rhode Island corporation. The foreign corporation has not parted with its property in the clocks. There is still a commercial relation existing between the Rhode Island Company and the citizens of Pennsylvania. Is not this such interstate commerce as is entitled to Federal protection?

The defendant was not a peddler but a canvasser.

Commonwealth *v.* Gardner, 133 Pa. 284.

The contract was a lease and valid as a bailment.

Wheeler & Wilson Manufacturing Co., *v.* Heil, 115 Pa. 487.

A. B. Stevenson, for appellee.

The Act does not prohibit the sale of clocks, but provides for the licensing of persons of good moral character to hawk them. The Act has been upheld.

Wolf *v.* Clark, 2 Watts, 298.

The defendant was a peddler.

Comth *v.* Gardner, 133 Pa. 284.

There are many police regulations which *do* affect interstate commerce, but which *have been* and will be sustained as clearly within the power of the State.

Brennan *v.* Titusville, *supra*.
Ficklen *v.* Shelby County Taxing District, 145 U. S. 1.

The ownership of the goods can make no difference—the license is a personal privilege.

Gibson *v.* Kauffield, 63 Pa. 168.

January 7, 1895. WILLIAMS, J. The judgment now appealed from rests on three distinct findings of fact made by the learned Judge of the Court below. These are, first, that the defendant was engaged in April, 1894, in the business of selling clocks in Allegheny County; second, that he made his sales not as a merchant having a place of business but as a peddler going from house to house and exposing his clocks for sale in the homes he had invaded; and third, that he was in so doing violating the Act of sixth February, 1830, P. L. 39, as he had no license authorizing him to sell clocks.

These findings have not the conclusive effect of a verdict, but they are entitled to great weight, and will not be disturbed unless plain error is shown. As to the second and third findings no serious question is raised. It is conceded that the defendant had no license under the Act of 1830, and it is not denied that he carried his clocks from house to house and disposed of them wherever he could bring a possible customer to bay.

The first finding is attacked on the allegation that the defendant did not sell clocks but let them for hire, and that the persons who took them were bailees and not purchasers. In support of this position the written agreement made with customers was relied on. It provided that

Digitized by Google

the American Wringer Company rents one clock for the term of thirteen months at the rate of twenty-five cents per week, or thirteen dollars for the term, and the lessee may at any time during the term purchase the clock for the price of thirteen dollars and be allowed all rents as a credit on such purchase. Now let it be conceded that this agreement may be enforced according to its terms between the parties because it is their agreement; the question still remains, what is the legal effect as to the rights of creditors or the Commonwealth?

The rent and the price of the article are the same. The payment of the price passes the title to the purchaser. It was plain to the Court below that the device of a lease was a cover for an actual sale in violation of the Act of 1830 so thin as to be transparent. The justice of the peace before whom they were first brought testifies that the defendant admitted that he was selling clocks. The constable who arrested him testifies that he saw him going from house to house peddling clocks. Maggie Tyrie, a witness, says he offered to sell a clock to her. She finally took it, and the paper relied on as a lease was produced, executed and left with her as a receipt for the money paid. Two other witnesses testified that clocks were offered to them to be paid for by monthly or weekly payments. G. H. Rishel, the general agent of the American Wringer Company at Pittsburgh, testified that the company was a corporation created under the laws of Rhode Island; that the clocks were made in Connecticut and sent to him in original packages. By him they were delivered to the road agents of the company who sold them at retail upon a commission. In answer to the question, "On what terms are they sold?" his answer was "They are sold on monthly instalments." This testimony clearly warranted the first finding of fact, viz: that the clocks were sold, and that the lease or instrument so called was a device contrived to evade the Act of 1830, and defeat its salutary provisions.

The findings of fact standing undisturbed there is but one question left and that a question of law. Is the Act of 1830 constitutional? It is not alleged that it violates any provision of the Constitution of this State, but it is said that it violates the Constitution of the United States because it interferes with interstate commerce. But how does it interfere with interstate commerce? It is a part of a system of police legislation beginning as early as 1784 directed against the business of peddling because of the fraud and crime connected with it. The Act of 1784 in its preamble recites the mischief requiring a remedy thus, "Whereas many idle and vagrant persons may come into this State, and under pretence of being hawkers and peddlers may greatly impose on many persons in the quality and price of goods, and also commit felonies and other misdemeanors; for preventing such inconveniences and evil practices, and to the intent that no person may be admitted to follow the business of hawkers and peddlers within this State but those who are of known honesty and civil behaviour;" and then follow the provisions of the statute requiring proof of good moral character, and the payment of a license fee by the applicant. As new branches of this peripatetic commerce have sprung up the Legislature has extended the prohibition of the Act of 1784 to them. As early as 1830 the peddling of worthless clocks became an evil of sufficient magnitude to attract the attention of the Legislature, and in that year the Act now before us was passed requiring all persons, resident or non-resident, desiring to embark in the business, to make proof before the Court of Quarter Sessions of their "good moral character," and to obtain a license authorizing them to peddle clocks. The purpose of the Act was to secure some measure of protection for the citizens of the Commonwealth against the frauds practiced upon them by strangers who had no place of business in the State, and who when wanted to answer for their cheats and crimes were safely beyond the reach of process.

This Court has uniformly asserted the validity of such legislation as a reasonable and proper exercise of the police power, and we do not propose to travel over the argument again in this case.

It is urged that the Act is a trade regulation like the ordinance of Sayre Borough considered in 148 Pa. 482. But this statute is not directed against certain persons engaged in peddling clocks. It is directed against all persons. It does not distinguish between the citizens of different sub-divisions of this State, or between citizens of Pennsylvania and those of any other State. It is directed against the business of peddling clocks by whomsoever undertaken. It does not, however, prohibit the business but regulates it. The regulation is reasonable. It is impartial in its operation. It is general in its application. It meets the tests required by Millerstown *v.* Bell, 123 Pa. 151; by Sayre Borough *v.* Phillips, 148 Id. 482, and by Welton *v.* Missouri, 91 U. S. 275.

In the recent case of Brennan *v.* The City of Titusville the judgment of this Court was reversed by the Supreme Court of the United States on the ground that the ordinance upon which the prosecution rested was not a police, but a trade regulation. But it was said in that case that "by virtue of its jurisdiction over persons and property within its limits a State may provide for the security of the lives, limbs,

Digitized by Google

health and comfort of persons, and the protection of property so situated," subject to the qualification that a "subject matter which has been confided exclusively to Congress by the Constitution is not within the police power of the State unless placed there by Congressional action."

We submit with great respect that the control of no branch of retail trade has been "confided exclusively to Congress by the Constitution;" and that the interstate commerce clause was never intended to do more than keep the great channels of commerce open, and to guard against such obstructions as State custom houses, State inspections, State taxes and the like on goods passing from manufacturer or wholesaler in one State to retail dealer or consumer in another.

It must be conceded that these clocks may be sent into this State in manufacturers' packages, and they may be sold in the same packages under the authority of the interstate commerce clause; but once in this State and the package opened by the consignee, the disposition of the separate articles at retail is infra-state traffic and subject to the police regulations that experience may show to be necessary for the protection of citizens in the comfort of their homes and the enjoyment of their property. To deny this power to the States, and to assert that the wandering and unscrupulous adventurers who buy their brass jewelery or worthless clocks on one side of a State line may, as agents of interstate commerce, invade any other State to cheat and defraud its citizens, is to degrade the whole subject and to create needless friction between the general government and the people of the several States.

It is suggested that these clocks standing on the shelves of purchasers belong to the Rhode Island corporation still. This overlooks the finding of the Court below that they were sold. It overlooks the testimony of the general agent of the corporation, who says distinctly "they were sold on monthly instalments."

Finally, the general principle that penal statutes are to be strictly construed is appealed to as a reason for reversing the judgment of the Court below. We cannot see its applicability. The statute forbids the peddling of clocks. The defendant was fairly and properly convicted on the evidence of violating the statute. He did exactly that thing which the statute commanded him not to do. No matter how strictly the statute may be construed he has been found guilty of violating it, and this finding is abundantly supported by the testimony. He should therefore suffer the penalty he has incurred.

If any vestiges of the police power of the tates remain to them for the protection of the property or of the comfort of the people, we must think the statute now before us is a proper exercise of that power, and that the States do not invade the jurisdiction of Congress when they seek to regulate a business conducted, in the language of the preamble to the peddler's Act, by "idle and vagrant persons," and in a manner that does "greatly impose on many persons in the quality and price of goods," and which results in the commission by these irresponsible vagrants of "felonies and other misdemeanors."

We cannot bring ourselves to doubt the validity of the statute of sixth February, 1830, or the justice of the conviction and judgment appealed from.

The judgment is affirmed.

Oct. '94, 311. November 9, 1894.

COMMONWEALTH *v.* COON.

This case was argued with the foregoing.

January 7, 1895. WILLIAMS, J. This case is ruled by Commonwealth *v.* Harmel, and for the reasons given in the opinion in that case and filed herewith the assignments of error are overruled and the judgment is affirmed. H. B.

Jan. '94, 479. January 9, 1895.

Gowen v. Pierson.

Arbitration—Agreement to refer, by parties to executory contracts—Finality of award as to matters which were within agreement to arbitrate, but which were not presented to the arbitrators.

Where parties to an executory contract agree that all disputes arising in relation thereto shall first be submitted to the arbitrament of one or more named persons, they are bound by the agreement and cannot seek redress elsewhere, until the person or persons so chosen have been discharged by having made an award or otherwise; *aliter*, where the agreement is to submit to persons to be afterwards agreed upon.

Where parties to an executory contract agree to submit any differences which may arise to certain named arbitrators and a dispute having arisen the arbitrators meet at the request of one party, and the other, although properly notified of the meeting and given full opportunity to attend, neglects to attend and an award is made against him, he cannot afterwards in an action on the award raise as a defence matter which he could have presented before the arbitrators.

Appeal of Francis I. Gowen, plaintiff, from the order of the Common Pleas No. 1, of Philadelphia County, discharging a rule for judgment

Digitized by Google

for want of a sufficient affidavit of defence in an action of assumpsit brought by him against Isaac K. Pierson. The plaintiff filed the following statement:

"On the 28th day of March, A. D. 1888, the plaintiff and defendant entered into a contract for the erection and construction, by the latter for the former, of a dwelling house, and in pursuance thereof the defendant proceeded to erect the house provided for therein, a true copy of which contract is hereto annexed, to which the plaintiff begs leave to refer as fully as if the same had been herein fully set forth. As will be seen by reference thereto, said contract contained the following provision: 'The above named architects, Cope & Stewardson, are hereby made arbitrators, to determine all questions arising under this contract, and no action shall be sustained by either party hereto for any alleged breach of the same until the said arbitrators shall have certified that there is a cause of action, and if they shall certify the amount due in respect of such breach, then no action shall be maintained except for the amount or sum so certified. And it is further agreed, that in case of the death of either of the said architects above named, the survivor of them shall have and exercise all power and functions hereby given to them jointly.'

"That disputes arose between plaintiff and defendant as to certain questions arising under said contract. And thereupon at the request of the plaintiff the arbitrators named in said contract did, in pursuance of the submission embraced in said contract, lawfully and duly proceed to hear and determine the matters in dispute between said plaintiff and defendant arising under the said contract, having first given due and legal notice to said defendant of their intention so to do and of the time and place fixed for the hearing of said matters, and did thereupon find that there existed a valid cause of action upon the part of the plaintiff herein against the defendant herein owing to a breach of said contract by said defendant, and further certified and found that there was due by said defendant to said plaintiff in respect of such breach the sum of $1,320.55.

"A true copy of said award is attached hereto.

"Plaintiff avers that the said defendant, though requested so to do, has declined to pay the amount of said award or any part thereof, and that the same remains unpaid, and is, with interest as aforesaid, justly due and owing by the defendant to the plaintiff.

"(Signed) FRANCIS I. GOWEN.

The award recited that the arbitrators, having been advised by Gowen, that a dispute had arisen, appointed December 5, 1889, at 3 P. M., for a hearing, and gave notice of such appointment to Pierson; that on the 5th, Gowen attended but Pierson did not; that they adjourned to December 13, at 3 P. M., and gave notice of the adjournment to Pierson, that on that day they were attended by Gowen but not by Pierson, whereupon they proceeded to hear the case, and having considered the testimony of Gowen, and also the claim of Pierson, so far as the same was shown by a bill for work done by him and rendered to Gowen and by the latter submitted to the arbitrators, they found that there was a valid cause of action by Gowen against Pierson for a breach of contract, and certified the amount due by Pierson to Gowen to be $1,320.55. The defendant filed an affidavit of defence, setting up:

I. That the contract set forth in the statement of plaintiff's claim, as being made between the plaintiff and defendant, was fully performed and executed by the parties thereto, the defendant having performed all of the conditions thereof on his part, and the plaintiff on his part having paid him in full all the sums mentioned in said contract, to wit, the sum of twelve thousand one hundred and fifty-three ($12,153.00) dollars for the several items mentioned therein.

II. That the said plaintiff on or about the 28th day of March, A. D. 1888, employed the said defendant to do and perform certain extra work and labor, and furnish certain extra material to enter into the construction of said house in addition to that theretofore furnished and done, amounting to the sum of four thousand four hundred and fifty-five dollars and thirteen and one-half cents ($4,455.13½), all of which work and labor was done and materials furnished as aforesaid by defendant to plaintiff. That of this sum the sum of four thousand one hundred and sixty-two and 36-100 dollars ($4,162.36), has been paid to defendant, leaving a balance of two hundred and ninety-two and 77-100 dollars ($292.77) still due and justly owing from the plaintiff to the defendant, and he will ask for a certificate therefor.

III. That the alleged award annexed to the statement of plaintiff's claim does not entitle plaintiff to recover thereon, because—

(*a*) There is nothing to show that the arbitrators had jurisdiction of the matter submitted.

(*b*) The payment of the entire contract price, together with the sum allowed for extra work, was in full performance of the contract and a waiver of the arbitration clause on the part of the plaintiff.

(*c*) The said award does not state that all matters in controversy were submitted or determined.

(*d*) The award does not allege any specific cause of action, or any breach of any particular

Digitized by Google

part or covenant of the contract which appears to have been the subject of said award.

(*e*) The said award is otherwise vague, uncertain, indefinite and is not in effect a statement under the Act of 1887 requiring an affidavit of defence.

A rule was taken for judgment for want of sufficient affidavit of defence, which, after argument was discharged by the Court.

The plaintiff took this appeal and assigned as error the discharge of the rule.

James E. Hood and *George Tucker Bispham*, for appellant.

When a contract for work to be done provides that an individual particularly named in and chosen by the contract, shall decide all disputes which may arise be tween contracting parties, neither party may seek another tribunal until the arbitrator has been discharged, either by making an award or by reasons which prevent him from so doing; it is not in the power of either of the contracting parties to revoke the appointment, and the arbitrator's award is binding, both as to fact and law and may not be reviewed for error.

Commercial Union Assurance Co. *v.* Hocking, 115 Pa. 414.
Snodgrass *v.* Gavitt, 28 Id. 221.
Monongahela Navigation Co. *v.* Fenlon, 4 W. & S. 205.
Reynolds *v.* Caldwell, 51 Pa. 298.
O'Reilly *v.* Kerns. 52 Id 214.
Connor *v* Simpson, 104 Id. 440
Brown *v.* Decker, 142 Id. 640.
Hartupee *v.* Pittsburgh, 97 Id. 107.
Hartupee *v.* City of Pittsburgh, 131 Id. 535.
Howard *v.* Allegheny Valley R. R. Co., 69 Id 489
McGheehan *v.* Duffield, 5 Id. 497.
Irwin *v.* Shultz, 46 Id. 74.
Quigley *v.* DeHaas, 82 Id. 267.
Hostetter *v.* City of Pittsburgh, 107 Id. 419.
Robinson-Rea Co. *v.* Mellon, 139 Id. 257.
Kennedy *v.* Poor, 151 Id. 472.
Scott *v.* Avery, 5 House of Lords Cases, 811.

The affidavit of defence was necessary in this case—there is disclosed a complete cause of action arising *ex contractu*, and all the elements for liquidation of damages are furnished.

Byrne *v.* Hayden, 124 Pa. 170.
Barr *v* McGary, 131 Id. 406.
Jones *v.* Gordon, 124 Id 263.
Heller *v.* Royal Ins. Co., 151 Id. 101.
Osborn *v* Bank, 154 Id 134.
Bayard *v.* Gilasspy, 1 Miles 256.

The agreement to submit rendered the award final, although it did not contain the usual clause that the award "should be final, conclusive and binding upon the parties."

Speer *v.* Bidwell, 44 Pa. 23.
Bowen *v* Cooper, 7 Watts 312.
Valentine *v.* Valentine, 2 Barb. Ch. 437.

Charles A. Chase (*Charles C. Lister* with him), for appellee.

The clause relied on by the plaintiff as an agreement to submit to arbitration; does not amount to an arbitration clause. It merely provides that the arbitrators may certify that in their opinion there is a cause of action, and the language of the contract would imply that a suit at law might be sustained in respect to the issue thus raised and certified by the arbitrators. This is the most liberal construction that can be placed upon this provision in favor of the appellant, and as the language of the contract is the law which governs the case, there is nothing in the contract to estop the defendant from setting forth the fact that he has a just and true defence to the plaintiff's claim.

The right to a trial by jury cannot be taken away by implication merely, and it must affirmatively appear that the arbitrators have exclusive jurisdiction of the matter in controversy in order that the right to trial by jury may be ousted.

Lauman *v* Young, 31 Pa. 306.

There is nothing in the award in the present case to show what was submitted or what was decided to give the arbitrators jurisdiction of the subject matter.

A fatal objection to the award is the fact that the same is not co extensive with the alleged agreement of submission. The contract provides that the architects "are hereby made arbitrators to determine *all questions* arising under this contract," etc. If the argument of the appellant is to be adopted that the defendant is absolutely concluded by the decision of the arbitrators, then he must be prepared to show that their award embraced all questions arising under the contract; that it is certain, final and conclusive, and that it disposes absolutely of all matters included in the submission.

Connor *v* Simpson, 104 Pa. 440

A glance at the award in this case will show that it does not dispose of all questions in controversy, or that it is certain or final, or that the arbitrators ever intended it should be. That it does not set forth any breach of the contract, or anything from which a breach could be inferred, and it does not say, except inferentially, that any breach has occurred, and the arbitrators find nothing more nor less than that in their opinion there is a valid cause of action by the plaintiff against the defendant. A defendant is not concluded by such a finding.

Hamilton *v.* Hart, 125 Pa 142.

The statement filed is not within the affidavit of defence law.

Rex *v.* Fisher, 6 WEEKLY NOTES, 558.
McCullough *v.* Boyd, 120 Pa. 552.

Digitized by Google

January 28, 1895. STERRETT, C. J. This action is on an award of arbitrators who were chosen by the parties to this suit in the concluding clause of a building contract executed by them on March 28, 1888. Said contract, and the award made in pursuance of the arbitration clause thereof, are fully recited in plaintiff's statement of claim. After providing for the erection of the house therein mentioned, etc., "according to and in all respects conforming with the plans and specifications prepared by Cope & Stewardson, architects," the contract expressly provides that any variations thereof, "made at the request of the party of the second part, will be executed by the party of the first part without additional charge, unless there is a written agreement entered into by the parties hereto upon the subject of such variations;" and then concludes with the said arbitration clause, thus: "The above named architects, Cope & Stewardson, are hereby made arbitrators to determine all questions arising under this contract, and no action shall be sustained by either party hereto for any alleged breach of the same until said arbitrators shall have certified that there is a cause of action, and if they shall certify the amount due, in respect of such breach, then no action shall be maintained except for the amount or sum so certified. And it is further agreed that in case of the death of either of the architects above named, the survivor of them shall have and exercise all power and functions hereby given to them jointly."

Disputes having arisen between the parties as to certain matters pertaining to the building contract, the action of said arbitrators was duly invoked by the plaintiff. After notifying the defendant of the time and place of meeting, etc., they proceeded to hear and consider the matters in dispute, and thereupon found that there existed a valid cause of action on the part of the plaintiff against the defendant, owing to a breach of said contract by the latter, and further found and certified that there was due by him to plaintiff, in respect of said breach, the sum of $1,320,55. This action of the arbitrators is fully set forth in their award. It is also stated therein that the defendant, although duly notified of the time and place of meeting, adjourned meeting, etc., failed to appear before them in person or otherwise.

Plaintiff's statement, in clear, precise and specific terms, presents a complete cause of action; and the only question is whether there is anything in defendant's affidavit that amounts to a valid defence. If there is, we have failed to discover it. Defendant does not deny that there were matters in dispute between himself and plaintiff in respect of the building contract; nor does he deny that after being duly notified of the meetings of the arbitrators, he stood aloof and refused to participate therein. No reason for this is even suggested, unless it be in the averment that he had received from plaintiff all that he was entitled to claim, except "a balance of $292.77 still due and justly owing from the plaintiff to the defendant," etc. This is no excuse for refusing to appear before the arbitrators and make such answer as he had to plaintiff's complaint. Having thus ignored the special tribunal which he assisted in creating and investing with full and exclusive authority, "to determine all questions arising under" the contract between plaintiff and himself, he is not in a position to raise questions which he might have presented to the arbitrators, or to re-open, in this action on their award, questions, upon which they were authorized to pass and did in fact determine in making up their award. According to the terms of the submission, the arbitrators were to determine all questions arising under the building contract; no action could be maintained by either party for any alleged breach of the contract until a cause of action was certified by the arbitrators, and if, as was done in this case, they certified "the amount due in respect of such breach," then no action could be maintained except for the amount or sum so certified.

The law applicable to such submissions and awards is well settled in a long line of cases, among which are, Monongahela Navigation Co. *v.* Fenlon, 4 W. & S. 205; Reynolds *v.* Caldwell, 51 Pa. 298; Hartupee *v.* Pittsburgh, 97 Id. 107; Hostetter *v.* Pittsburgh, 107 Id. 419; Commercial Assurance Co. *v.* Hocking, 115 Id. 407, 414; Kennedy *v.* Poor, 151 Id. 474.

In these and other cases that might be cited, the law is definitively settled that where parties to an executory contract agree that all disputes arising in relation thereto, shall be first submitted to the arbitrament of one or more named persons, they are bound by the terms of submission and cannot seek redress elsewhere until the person or persons so chosen have been discharged by having made an award or otherwise; but where the agreement is to submit to one or more persons to be afterwards agreed upon, the law is different. In Hartupee *v.* Pittsburgh, *supra*, the plaintiff was non-suited on the ground that his only remedy under the contract was on an award by the defendant's mechanical engineer who was final arbiter of any dispute under the contract in question, and no such award had been made.

We are satisfied that the affidavit of the defendant discloses no available defence and the rule for judgment should have been made absolute.

It is therefore ordered that the record be re-

Digitized by Google

mitted to the Court below with directions to enter judgment against the defendant for the sum claimed by plaintiff, unless other legal or equitable cause be shown why said judgment should not be so entered.

H. B.

Oct. '94, 241. November 2, 1894.

Groetzinger v. Kann & Co.

Contract, construction of—Warranty—Evidence.

Plaintiff wrote to defendants after dispute as to the character of leather furnished by the former, "our leather is now thoroughly tanned, will re-ship Saturday" to which defendant replied, "if your leather is thoroughly tanned now and all right in other respects we would take it as before."

Held: (1.) that these letters made a contract that the leather to be sent, must be thoroughly tanned leather.

(2.) Defendant was entitled to show that the leather was to be used as harness leather and in order to be of use must be thoroughly tanned.

Appeal of W. L. Kann, trading as W. L. Kann & Co. defendant, from the judgment of the Common Pleas No. 2, of Allegheny County, in action of assumpsit brought by J. C., C. G., and R. W. Groetzinger, trading as G. Groetzinger's Sons. The facts as they appeared at the trial before MAGEE, J., are sufficiently stated in the opinion of the Supreme Court, *infra*.

The Court directed the jury to render a verdict for plaintiff. Verdict accordingly and judgment thereon.

The defendant appealed assigning for error, *inter alia*, the above direction and the refusal of defendant's offers to prove that the leather was purchased for the purpose of making harness, that this was known to the plaintiff and that only thoroughly tanned leather could be used for that purpose.

Abraham Israel, (*Josiah Cohen* with him), for appellant.

Defendant had a right to stipulate that the leather should be of a certain quality.

Warren *v.* Philadelphia Coal Co., 83 Pa. 487.
Mining Co. *v.* Jones, 108 Id. 63.

The letter constituted a contract stipulation that the leather should be *thoroughly tanned.*

Phila. & Reading Coal Co *v.* Hoffman, 4 Atl. Rep. 848.
Holloway *v.* Jacoby, 120 Pa. 583.
Dailey *v.* Green 15 Id. 125.
Holt *v.* Pie, 120 Id. 440.
Pratt *v.* Paules, 4 Atl. Rep. 751.

There was an implied warranty that the leather should be harness leather.

Borrekins *v.* Bevan, 3 Rawle, 23.
Lord *v.* Grow, 39 Pa. 91.
Biddle on Warranties, Sec. 151.
Edwards *v.* Hathaway, 1 Phila. 547.

There was an implied warranty that the leather should be merchantable.

Johns McCleave, (*D. T. Watson* with him), for appellees.

The letter constituted no warranty, it was a mere statement.

Wetherill *v.* Neilson, 20 Pa. 448.
Ryan *v.* Ulmer, 108 Id. 338.

In an ordinary sale of personal property there is no implied warranty of quality.

Warren *v.* Philadelphia Coal Co., 83 Pa. 437.
Whittaker *v* Eastwick, 75 Id. 229.
Fraley *v.* Bispham. 10 Id. 320.
Shisler *v* Baxter, 109 Id. 443
Jackson *v.* Wetherill, 7 S. & R. 480.
McFarland *v.* Newman, 9 Watts 55.
Holmes *v.* Tyson, 147 Pa. 305.

There is no implied warranty that goods sold shall be merchantable.

Selser *v.* Roberts, 105 Pa 246.
Ryan *v.* Ulmer, 108 Id. 332.

January 7, 1895. GREEN, J. When the plaintiffs wrote to the defendant, on February 19th, 1891, "our leather is now thoroughly tanned, will re ship on Saturday hoping the same will exist as before," and the defendant, replying thereto, on Feb. 20, 1891, wrote, "but if your leather is thoroughly tanned now and all right in other respects we would take it as before in order to have it when trade will be better," etc., the subject of the negotiation between them must be considered as "thoroughly tanned leather." That is what the defendant was willing to buy, and that was what the plaintiffs said was the character of the leather they would ship. The defendant said "If your leather is thoroughly tanned," etc. The word "if" made the order conditional and when the plaintiffs shipped leather after that, to the defendant, it was upon the express condition that it should be "thoroughly tanned." As we understand the correspondence this condition attached to all shipments to be made subsequently to the correspondence. We have no hesitation in placing the contract within the line of cases illustrated by Phila. & Read. Coal Company *v.* Hoffman, 4 Atl. Rep. 848, in which the contract was for the sale and delivery of iron "strictly neutral" and we said, "We are clearly of opinion that the contract of sale in this case created a warranty as to the quality of the iron."

Holloway *v.* Jacoby, 120 Pa. 583, is another instance of the same kind. The defendant offered by letter to sell plaintiff a carload of corn. Plaintiff replied by letter saying, "We will give 55c.

Digitized by Google

per bushel for car corn provided it is good salable corn." Defendant answered, "We will accept your offer for one car load of corn." We held that there was a warranty that it was good salable corn. Mr. Justice PAXSON, delivering the opinion, said: "The acceptance of the plaintiff's offer was an agreement to send him a car load of good salable corn, and not a car load of corn generally without regard to quality as was assumed by the referee. We are of opinion that there was an implied warranty that the corn was good salable corn. It was this the plaintiff bought and the corn delivered was not of this description."

In Holt *v.* Pie, 120 Pa. 440, the defendant ordered lumber by letter from the plaintiff in the following words, "Enter the following order of good sound hemlock lumber." Plaintiff by letter accepted the order and shipped lumber which it was alleged was not good sound hemlock. Our brother WILLIAMS in the opinion said, "If when the lumber reached its destination it was not good, sound hemlock such as Holt ordered and Pie agreed to furnish, to that extent performance of the contract was defective. Holt was not under obligation to accept any quality of lumber except that for which he had contracted, and he had a right to decline to pay for lower grade."

In Pratt *v.* Paulus, 4 Atl. Rep. 751, the plaintiff ordered slate from defendant, saying in his letter, "Shipment must be strictly No. 1, in quality, no graybacks or scabs." Defendant replied, "Can fill your entire order at once." We held that these communications created an express warranty, saying, "He (plaintiff) was entitled to receive slate of quality No. 1 free from scabs and graybacks."

So in the case at bar the plaintiffs said to the defendant after complaints had been made by the defendant to the plaintiffs that their leather had come back to him from his customers because it was not thoroughly tanned: "Our leather is now thoroughly tanned. Will re ship on Saturday hoping the same will exist as before." And the defendant replying to that letter said: "But if your leather is thoroughly tanned now and all right in other respects we would take it as before," etc. These letters make a contract to which both parties assent, that the leather to be sent must be thoroughly tanned leather, and not merely leather generally. There were special reasons why the defendant was obliged to have that particular quality of leather. He wanted harness leather and he offered to prove that harness leather must be thoroughly tanned and could not be used as such unless it was. He certainly should have been permitted to make such proof. All the offers of testimony by defendant were rejected. We are clearly of opinion they should all have been received so that the case could go to the jury on its merits. The assignments of error are all sustained.

Judgment reversed and new venire awarded.

W. M. S. Jr.

Oct. '94, 199. October 31, 1894.

Patrick v. Smith.

Promissory Notes—Accommodation endorser and maker—Married woman—Act of June 3, 1887.

Whilst the Act of June 3, 1887, declares that a married woman may bind herself by many contracts which theretofore she could not legally make. it expressly continued her disability to become an accommodation endorser, guarantor, or su ety for another A note made by a married woman, as security for the debt of her husband, is simply a device to evade an express statutory enactment to create by form a liability, where by law none in fact existed.

Real Estate Co. *v.* Roop, 132 Pa. 496, followed.

Appeal of Henrietta C. Smith, defendant, from the judgment of the Common Pleas No. 1, of Allegheny County, in an action of assumpsit wherein W. W. Patrick, doing business as R. Patrick & Co., was the plaintiff.

The facts are fully stated in the opinion of the Supreme Court below.

The Court, (COLLIER, J.), charged the jury as follows:—"I will have to instruct you to find for the plaintiff in this case. I regard the evidence as only showing that this married lady, Mrs. Smith, did what she had a perfect right to do. We will therefore take your verdict for the plaintiff."

Exceptions to this charge were filed, and this appeal taken.

James R. Macfarlane, for appellant.

The meaning of the proviso of the Married Person's Property Act, of June 3, 1887, (P. L. 332), as follows:—"that nothing in this or the preceding section shall enable a married woman to become accommodation endorser, guarantor or surety for another," is that any undertaking, by which a married woman becomes security for another, whatever the form, is void. That when, on the importunity of the husband, she signs an obligation to aid him, and which is not for her benefit, she is not liable.

Real Estate Co. *v.* Roop, 132 Pa. 496.
Koechling *v.* Henkel, 144 Id. 215.
Bauck *v.* Swan, 146 Id. 444.
Milligan *v* Phipps, 153 Id 208.
Adams *v.* Grey, 154 Id. 258.
Spott's Estate, 156 Id. 281.

If the mere form of the undertaking governs, the proviso is in vain and frauds upon the law

Digitized by Google

could be most readily perpetrated. A better example could not be found than this case, where by an accidental change of form, an accommodation endorser on the renewal of the paper becomes maker, and the Court should look to the original transactions and to the real position of the defendant. If, however, there are no disabilities except those expressed, defendant is not liable, for she was in fact a surety. An accommodation maker by the law merchant of Pennsylvania is not (when *sui juris*) permitted to show that he is merely a surety and is not relieved by time being given to the payee, who was endorser. Yet as to the party for whose benefit the note is made, the maker is but a surety.

Stephens *v.* Monongahela Bank, 88 Pa. 157.
2 Am. Leading Cases, 454.

The proviso of the Act of 1887 as well as that of the Act of June 8, 1893, (P. L. 344), creates a class of persons, viz: married women, who, while in most cases able to make valid notes, are not bound by the ordinary principles of accommodation paper that, although "surety for another" they cannot allege it against a third party. The Act not only says "surety or guarantor" but "surety or guarantor for another" as if to emphasize the exception, and the wording covers the case of the accommodation maker, who is in fact surety for another, although estopped when *sui juris*, from claiming to be legally a surety. There was no consideration to support the promise. There was no moral consideration. On the original draft defendant was but an accommodation endorser, there being no benefit to her; on its maturity there was no legal liability, and under the law of this State no moral obligation.

Stebbins *v.* Crawford Co, 92 Pa. 289
Kennedy *v.* Ware, 1 Id. 445.
Brooks *v.* The Bank, 125 Id. 394.

An executory contract must have consideration to support it.

Carhart's Appeal, 78 Pa. 100.
Reading R. R. Co *v.* Johnson, 7 W. & S. 317.
Paul *v* Stackhouse, 38 Pa. 302.
Conmey *v.* MacFarlane, 97 Id. 361.

The position that a married woman could pay her husband's debts and could give her note in payment, is not supported by the evidence, and if so, it is an executory (not an executed) contract to pay the antecedent debt of another, and is not binding. The question is, what was she when she made the note, or endorsed the draft; what did plaintiff know her to be? Was she attempting to loan her credit to her husband—to become surety for him—or was she not?

It is true that a married woman could before, as well as after, all of the enabling Acts, give a mortgage as security for, or in payment of, her husband's debt, and she could assign any personal securities, such as bonds or stocks, as collateral, whenever she could make a transfer.

Black *v.* Galway, 24 Pa 18.
Seldon *v.* Bank, 69 Id. 424.
Dando's Appeal, 94 Id. 76.

But the reason for this is plain, and, in the essence of the transaction, she is but a surety, the pledge holding good, but no general liability is created on the suretyship, *e. g.* on the bond accompanying the mortgage, or on the note with which the collateral is given, and it by no means follows, that she can be bound generally by an executory promise to pay the debt of another. One transaction is an executed transfer, the other an executory promise.

Jamison *v.* Jamison, 3 Wharton 456.
Black *v* Galway, *supra.*
McIntyre *v.* Velte, 153 Pa. 350.

But it was held in Sheidle *v.* Weishlee, 16 Pa. 134, that she is entiled to all the rights of a surety as against her husband, and in Zeller *v.* Henry, 157 Pa. 1, that where the husband and wife mortgaged property in which each had certain interests, she was a surety and while her land was pledged for the debts, she had an equity to require the mortgagee to first sell her husband's land.

Dando's Appeal, 94 Pa. 76.

This case cannot be decided on the ordinary rules of commercial paper for the reason that the Act creates an exception, and a Court should look into the real situation of a married woman making or endorsing paper; and the plaintiff, knowing her position to be that surety cannot recover. The provisos of the Act of 1887 and the Act of 1893 must be interpreted along these lines, or they are frittered away.

George D. Riddle, for appellee.

It is true a married woman is prohibited by law from becoming "an accommodation endorser, guarantor or surety for another," but no averment is made in appellant's affidavit of defence that she was either an accommodation endorser, guarantor or surety; and even if the note in suit was given to pay a draft upon which she was an endorser, and she voluntarily gave her own note to pay the draft, which in fact was a debt of her husband, she cannot now be permitted to say that she was an endorser and not the maker of the note in suit, there being no allegation of fraud, accident or mistake in the execution and delivery of the same, without striking down the long established rules of pleading. No averment of fraud, accident or mistake was set up in her affidavit of defence, and, in fact, there is nothing whatever in the evidence to sustain such an allegation, even if it had been set up.

Steinman & Co. *v.* Henderson and Wife, 94 Pa. 313.

Digitized by Google

Appellee loaned this money to appellant by discounting her note, the proceeds of which was placed to her credit and drawn out of bank upon her own check.

Spott's Estate, 156 Pa. 281.
Harrar *v.* Croney, 2 District Reports, 375.

Real Estate Co. *v.* Roop, 132 Pa. 496, does not apply to this case, for the reason that the questions of pleading and evidence raised by the record at bar do not arise in that case. A married woman may assign her personal property as security for her husband's debt: and the assignment is good, though the husband made false representations to his wife to secure the assignment, if the creditors had no knowledge of the fraud. In such case the husband cannot be considered as agent of the creditor to secure the assignment.

Kulp *v.* Brant, 162 Pa. 222.

"The Act of June 3, 1887, P. L. 332, worked a radical change in the contractual capacity of a married woman. It emancipated her from her common law disabilities and authorized her to contract as a *femme sole;* instead of being strictly and narrowly exceptional, as it was under the Act of 1848, her capacity to contract has practically become the general rule."

Gockley *v.* Miller, 162 Pa. 271.

This case should be decided on the ordinary rules of commercial paper. The appellant is subject to the same rules of pleading as a single woman, and being so, she has neither in the affidavit of defence nor under the evidence brought herself within the exceptions of the Act of 1887, and, therefore, the Court below under the pleadings and the evidence, was compelled to direct the jury to find in favor of the plaintiff.

January 7, 1895. DEAN, J. The defendant is the wife of Edward A. Smith. The husband, in August, 1888, presented to plaintiffs', bankers, of the city of Pittsburgh, a draft in the sum of $1,700, endorsed by himself, in which his wife had no interest, for discount. Plaintiffs declined to discount it without an endorser. Smith offered to get his wife to endorse; plaintiffs agreed to accept it with her endorsement, if she would draw a check for the proceeds; to this the husband assented, took the paper to his home, and at his request, the wife endorsed it, then drew a check on Patrick & Company, for proceeds payable to her husband's order. He received $600 in cash, which he used for his own purposes, and the balance he applied to the payment of a debt owing by him to the bank. When the draft matured, the husband paid on it, of his own money, $600, and at the request of Patrick & Company, obtained from his wife her note at three months, to her husband's order, for the balance, $1,200, and again her check for proceeds to his order. She neither received nor expected to receive any of the money; her part in the transaction was solely for the accommodation of her husband, which fact was well known to the plaintiffs.

On these facts, the learned Judge of the Court below peremptorily instructed the jury to find a verdict for plaintiffs, saying:—"I regard the evidence as only showing that this married lady, Mrs. Smith, did what she had a perfect right to do." The defendant appeals, arguing that under the proviso to the Married Persons' Property Act of June 3rd, 1887, in force when the contract was made, endorsement of the draft, and signature to the note were void.

The proviso referred to, is this:—"Provided however, that nothing in this or the preceding section shall enable a married woman to become accommodation endorser, guarantor or surety for another."

Although the Act of 1887 was expressly repealed by that of June 8th, 1893, this proviso, almost word for word, was incorporated in the later Act. It was the expressed intent of both Acts to enlarge the powers of married women to contract, and this Court has sought to give full effect to this intent in interpretation. While this primary intent is not to be restricted by interpretation, plain restrictions are not to be enlarged by the same means. This Act declared the married woman might bind herself by many contracts which theretofore she could not legally make, yet it expressly continued her disability to become an accommodation endorser, guarantor or surety for another.

This married woman, on the first draft, was both in fact and in name an accommodation endorser for another, her husband. It is admitted that if default had been made, and suit brought on this paper, there could have been no recovery. But it is argued her situation is changed by the execution and delivery of the note for $1,200, of which on its face she is neither endorser, guarantor nor surety. If there was nothing in the case but the note, the presumption would be that it was for a debt she could lawfully contract. Formerly her capacity to contract was exceptional, and her disability general; now the disability is exceptional and her capacity general; the burden is on her, when she seeks to avoid her contract, to bring it within one of the few exceptions. This she has sought to do in this case by proof of the facts already stated. Her liability is not determined alone by the form of the obligation. If the object was to evade the disability created by the statute, the fact and not the form will determine her liability. In Real Estate Co. *v.* Roop 132 Pa. 496, the

Digitized by Google

case of a judgment note signed by both husband and wife, to raise money to aid the husband in his business, it was said:—"If not given as surety for her husband, it was given upon his importunity, and to aid him in his business, one of the very perils from which the law ought to protect a married woman," and the judgment was stricken off. This case depended on the interpretation of this proviso.

Take the facts here; the husband had a time draft, was pressed for money; he was refused a discount without an endorser; the banker agrees to accept the wife, if she will draw a check for the proceeds, thus apparently giving her the benefit of the discount; her husband importunes her, and she accedes. He, with the full knowledge of the banker, gets all the money. When the draft matures, the husband is able to pay but $600, leaving $1200 to be provided for; then, at the banker's request, the husband induces her to sign a note for the $1200 and another check in favor of her husband for the proceeds, as if it were for her benefit. She receives not a single dollar from the beginning. She was accommodation endorser for the husband on the draft, and accommodation drawer for him on the note; and all the time was, with the full knowledge of, in fact at the suggestion of, the plaintiffs. The Act does not use the words, accommodation drawer; in substance, what is an accommodation drawer but a surety for him to whom the paper is delivered and for whose benefit it is made? "The undertaking in suretyship is immediate and direct that the act shall be done; if not done, the surety becomes at once responsible." Reigart *v.* White, 52 Pa. 440. The debt here was that of the husband; as between him and the banker, he alone was bound to pay it; the wife gave her own obligation, by the terms of which she at once became responsible, and hence a surety for her husband's debt, or the debt of another. If the note under the statute, had bound her, and she had been compelled to pay, she would have had a right of action against him, on the principle of her suretyship for him, and in no other right.

The whole transaction was a transparent device adopted by the plaintiffs and the husband, to evade an express statutory enactment; to create by form, a liability, where by law none in fact existed. As she received no benefit, as the plaintiff was in no way deceived, she was under neither moral nor legal obligation to pay, and there should have been no verdict against her.

The judgment is reversed.

W. C. S.

Oct. '94, 198. October 31, 1894.

Willock's Estate.

Forsythe's Appeal.

Decedent's estates—Loan to distributee—Married woman's obligation, when enforced.

Where a married woman gives to her father a bond for money loaned, at his death it becomes part of his estate in her possession She cannot render it valueless by disaffirming it and repudiating her contract; she would thereby defeat his purpose under the will to give her only an equal share with his other children who were beneficiaries.

The married persons Act is for the purpose of preventing the perpetration of fraud upon one under coverture, but not of enabling a married woman with impunity to defraud others.

Bucknor's Estate, 136 Pa. 23, followed.

Appeal of Delilah Ann Forsythe, from the decree of the Orphans' Court of Allegheny County, in the matter of the estate of John Willock, deceased.

At the audit of the account of the executors of John Willock, deceased, the following facts appeared:—

In consideration of $5,977, J. E. McCormick conveyed to Mrs. D. A. Forsythe by deed dated January 21, 1884, certain land.

John Willcock, the decedent, father of Mrs. Forsythe, loaned her $4,800 for which she gave him her mortgage dated April 1, 1884, on the land aforesaid. The money she received from him she paid to McCormick at the time she took his deed. Her husband, Lewis K. Forsythe, was joined with her in the mortgage but not in the bond.

John Willock died, leaving a will dated February 11, 1890, and republished December 7, 1891, by which he directed his executors to convert all his estate into money, and "upon said estate or any part or parcels thereof, real, personal or mixed, being so converted into money," he directed the same to be divided into six equal parts, and gave one equal part to each of his children, Samuel M. Willock, Sarah Jane Weir, Mary Elizabeth Brown, Delilah Ann Forsythe, John Perry Willock and Mariah Belle Rhodes, and further provided:—

"And as to all the rest, residue and remainder of my estate, real, personal or mixed, of whatever nature or kind, or wheresoever situate at the time of my decease, I give, devise and bequeath the same to my aforenamed six children, share and share alike, their heirs and assigns absolutely forever."

This will was proved September 28, 1892. The executors, in their account, claimed credit, *inter alia*, against the other legatees

Digitized by Google

named for "rents," "accounts," "notes" and "interest," and against Mrs. D. A. Forsythe for her bond and mortgage as follows, viz: "Mrs. D. A. Forsythe, B. & M. $4,800" and showed a balance in hands to close account of $9,355.24.

The Court, HAWKINS, P. J., decreed the addition of the said "rents," "accounts," "notes" and "interest" as assets to the balance of $9,355.24, making the true balance for distribution $34,098.42, further decreeing payment of the same in accordance with an appended schedule of distribution unless appealed from within twenty days, the decree concluding with the following words, viz: "Note: The indebtedness of Mrs. Delilah A. Forsythe, due the estate of decedent on May 1, 1894, viz: mortgage and interest amounts to $7,220, which is greater than her distributive share in above decree, therefore no distribution is made to her therein, but she is entitled to a credit thereon of $6,454.68. PER CURIAM."

To this decree Mrs. D. A. Forsythe filed exceptions, setting forth, *inter alia*, the following reasons, viz:

"That at the date of said mortgage and accompanying bond, exceptant was under the disability of coverture, and said obligations did not create or evidence a legal debt against her personally.

"That the debt which they do evidence is against the land only in the said mortgage described.

"And that in satisfaction of exceptant's mortgage to testator, exceptant hereby tenders the executors of the will of the testator a deed for said land subject as in said mortgage."

No exception was taken to the sufficiency of said deed as a conveyance, but the Court in its opinion dismissing the exceptions, said: "The tender which she has made of a deed for the property subject to her mortgage is not repayment of the debt. It is neither legal nor equitable tender. The debt might or might not be realized out of the property, and it is unfair to subject the parties interested to the risk, expense and delay of conversion."

Mrs. Forsythe took this appeal and assigned as error, *inter alia*, the dismissal of her exceptions and the entry of the decree.

Joseph Forsythe, for appellant.

This is an attempt to collect in the Orphans' Court a mortgage debt by setting it off against the legacy of the mortgagor, a married woman, given her by the will of the mortgagee, her deceased father, and to deprive the mortgagor of the benefit of her contract, which the law restricted to mortgaging her land, and of the benefit of the restriction of the remedy on the mortgage by scire facias to the land. In Bucknor's Estate there was a void note, here, a void bond, with that the parallel ends. There, the decedent died intestate, here, testate. There, a void note only was given, here, with a bond, void except for the purpose of recital, was given a valid mortgage in which it was cited. There, the debt was repudiated, here, it was acknowledged by the tender of a good deed for the land described in the mortgage, to which the law in relation to *femes covert* limited the contract and the law of the remedy on the mortgage limited the recourse. There, the transaction was held substantially a bailment, here, a debt. There, the subject of the bailment was in effect restored without interest to the estate by set-off, here, interest was added to a debt *in rem*, the *rem* rejected and the debt set off against the legacy of the mortgagor. If that case rules this then it must either hold that this will is inoperative as to the clause directing the conversion of all the testator's estate into money and the division of the money, among others to this appellant, or that the will authorizes the setting-off, or charging, appellant's mortgage against her legacy, but there was no will in that case. It must either hold that this mortgage is void, or that the remedy on it is not restricted to the land, but in that case there was no mortgage.

Miller's Appeal, 107 Pa. 221.
York's Appeal, 110 Id. 74.

All that she could give as security at the date of the mortgage, she gave. The decedent, as shown by the mortgage, was aware of the coverture of his daughter, and he must be presumed to have known the legal consequences. He was *sui juris* and there is no allegation of fraud, accident, or mistake. He must be presumed to have taken the bond and mortgage, knowing that he took no remedy on the one, and that his remedy on the other was restricted to the land. He must be presumed to have agreed to the restriction. He had a perfect right to do as he pleased with his own; a perfect right to consent that his daughter should have any advantage which might accrue to her by that restriction; and his daughter had a perfect right to profit by his consent to a limitation which the law would not permit her to over-pass. After he had taken the bond and mortgage the rights of both were fixed. He could not, if he desired, have escaped from the limitation of his remedy to the land.

Sawtelle's Appeal, 84 Pa. 306.

With regard to the mortgage, the remedy given by the Act of 1705, sec. 6, 1st Smith's Laws 59, on default of payment, is by scire facias, the judgment executed by levari facias, the price to be rendered the mortgagee or creditor, and the land "for want of buyers to be delivered to the

Digitized by Google

mortgagee or creditor." Even if the Intestate Act of April 8, 1833, P. L. 315, applied to this case, that Act in nowise changes the remedy on the mortgage.

Holliday *v.* Ward, 19 Pa. 485.
Westfield Borough *v.* Tioga Co, 150 Id. 162.

Mrs. Forsythe's husband, although not joined in the bond, was joined in the mortgage, which being regular and properly executed and acknowledged, is valid. The remedy on the mortgage is *in personam* only as it is directed against a mortgagor entitling him to the notice prescribed by law, but for the rest it is *in rem.*

Shryock *v.* Buckman, 121 Pa. 248.
Hartman *v.* Ogborn 54 Id. 120.
Brown *v.* Scott, 51 Id. 364.
Wickersham *v.* Fetrow, 5 Id. 261.
Scott *v.* Fields, 7 Watts, 360.
Dolman *v.* Cook, 14 N. J. Eq. 56.
Bird *v.* Davis, Id. 467.
Troup *v.* Haight, Hopk. Ch. (N. Y.) 239.

No exception was taken to the deed tendered as a conveyance, the error arises from overlooking the alternative condition of the mortgage and the fact that it was not an assumption of personal or general liability. There was no recourse on it but to the land. It was not simply a lien. It was a deed vesting in the mortgagee an estate in the land, to be defeated only by payment of the debt.

Youngman *v.* Elmira etc, R. Co, 65 Pa. 285.

J. M. Shields, (*W. K. Jennings* with him), for appellees.

The radical error in the argument of appellant's counsel, is that he considers the decree of the Court as an attempt to collect a debt due from the appellant to the estate "by setting it off against the legacy of the mortgagor, a married woman, given her by the will of the mortgagee, her deceased father." The Court acted upon no such theory, but upon the principle that the appellant had in her possession funds of the estate amounting to more than her distributive share, and was therefore not entitled to receive anything from this distribution. If the relation between the appellant and her father's estate were simply that of debtor and creditor there might be some force in her contention, and according to the analogy of the ruling in Light's Estate, 136 Pa. 211, it might be that the Court could not set-off the alleged debt against appellant's distributive share, because only a valid subsisting debt not barred by the statute of limitations can thus be applied. The appellant, however, by denying any binding legal indebtedness and pleading her coverture, disaffirms her contract with her father and thus dissolves the relation of debtor and creditor, if any ever existed. Her bond having been signed prior to the Act of 1887 and after she had been married, her father could not have enforced the contract during his life, neither can his estate do so after his decease, either by a suit at law or by setting off the debt against her claim as a distributee. But by this action she placed herself in a new relation, viz: that of recipient or custodian of funds belonging to the estate. But the learned counsel argues that this case is not ruled by Bucknor's Estate, because in that case the decedent died intestate; in this there was a will, and says that "as testator he could have relieved his estate from the restriction by directing in his will that the mortgage debt should be set-off or charged against the distributive share of the mortgagee as legatee. He did not do so. Just as he took the remedy he left it, and that which he declined to do for the benefit of his other legatees, no Court can do for them under any pretence of equity." The utmost that can be claimed by this argument is that the omission of the testator to secure himself against a plea of coverture by a provision in his will indicated an intention on his part to look to the real estate for his security; but the answer to that argument is that he was dealing with his own daughter and presumed that she would not take advantage of his kindness and by setting up a legal disability acquire a larger portion of his estate than any of his other children. There can be no question as to the moral obligation on her part to repay the loan.

The other arguments of the appellant's counsel have no bearing upon the case at bar, because they all relate either to the enforcement of a married woman's contract or the foreclosure of a mortgage.

January 7, 1895. FELL, J. The testator had loaned nearly the whole of his personal estate to his children. The loans were made at different times to meet their necessities or to serve their business interests. The executors charged themselves with the total amount due by the children, and in distribution deducted from their respective shares the amount due by each. All assented to this except the appellant, to whom her father had loaned $4,800 to enable her to purchase a farm on which she resided with her husband. The money received by her was used in payment for the farm, and a second mortgage executed by her and her husband with her separate bond were given to secure it. She disaffirmed the contract to repay the money received as far as it was a personal obligation, for the reason that it was not legally binding, but recognizing its validity as to the land purchased tendered to the executors a conveyance of the farm.

The learned Judge of the Orphans' Court, following Bucknor's Estate, 136 Pa. 23, held that

Digitized by Google

this was not a repayment of the debt, and decreed that the amount of her indebtedness should be deducted from her distributive share.

We see no ground on which this case can be distinguished from Buckner's Appeal, *supra*. That the appellant's bond was capable of enforcement against the land does not change her position. Her promise remained unfulfilled. The tender of the deed was in no sense a repayment of the money. It was simply an offer of the thing purchased with the borrowed money in pischarge of the debt. The farm, subject to a drior mortgage, may or may not have had value, and whether it had or not does not affect the principle. Her bond was a part of her father's estate. If she could render it valueless by disaffirming it and repudiating her contract she would defeat his purpose under the will to give her only an equal share with his other children who were beneficiaries. The bond represented the money which she had received and promised to repay, and which until repaid should in equity for the purpose of distribution be considered a part of his estate in her possession. In Buckner's Appeal it was said by the present Chief Justice: "The Orphans' Court is practically a Court of equity; and, when it appears that the appellant, who was there claiming a full distributive share of her mother's estate, had virtually in her possession money which should have formed part of the fund for distribution, the Court might well act on the maxim of equity, that what ought to have been done has been done, and proceed to distribute the fund accordingly."

The decree of the Orphans' Court is affirmed and the appeal dismissed at the costs of the appellant.

W. C. S.

Oct. '94, 6 and 7. October 1, 1894.

Fredonia National Bank v. Borden et al., Defendants, and Collins, Terre Tenant.

Mortgagee—Lien of—Release.

The consent of the mortgagee to a sale of the timber on the mortgaged land, and the receipt by him of the proceeds of such sale, operates as a release of the timber from the lien of his mortgage.

Pratt *v.* Waterhouse, 158 Pa. 45, followed.

Appeal of T. D. Collins, terre tenant, from two judgments of the Common Pleas of Forest County, entered upon two writs of scire facias sur mortgage for want of a sufficient affidavit of defence.

The Fredonia National Bank, assignee of James Waterhouse, issued two writs of scire facias sur mortgage against Andrew Borden and H. P. Perrin. T. D. Collins, who had purchased the timber on the mortgaged lands, was, on petition, allowed to appear and defend in said suits as terre tenant, and filed the following affidavit of defence:—

"T. D. Collins, being sworn, says he has a just and complete defence to the foreclosing of the mortgage in this case so far as he has any estate or right in the mortgaged premises, which is as follows:—

"That he purchased on the third day of September, 1891, from J. A. Waterhouse, the timber on the whole or a part of the mortgaged premises, and took a deed of conveyance thereof. That at the time of said sale the said J. A. Waterhouse obtained the consent of said plaintiff to make the same, and the purchase money paid by affiant to said Waterhouse was paid over to and received by plaintiff, with full knowledge that it was the proceeds of the sale of said timber. That affiant paid three thousand ($3,000) dollars for said timber, which was its fair value at the time. Wherefore, your affiant avers that if said mortgage ever was a lien upon the estate in the timber now held and owned by him, the said timber was redeemed therefrom and the lien thereon satisfied and extinguished by the plaintiff's receipt of the proceeds of the sale thereof. That affiant will prove on the trial of this case the facts hereinbefore set forth.

"T. D. Collins."

On motion of plaintiff the Court made absolute a rule for judgment for want of sufficient affidavit of defence. Collin's thereupon took this appeal, assigning for error the action of the Court.

Samuel T. Neill, (*T. F. Richey* with him), for appellant.

The acceptance by the mortgagee of proceeds of the sale of the timber was equivalent to a release of the timber from the lien of the mortgage.

Pratt *et al. v.* Waterhouse, 158 Pa. 45.

The owner and mortgagor had a right to sell the timber.

Hoskins *v.* Woodward, 45 Pa. 42.

M. H. Byles, (with him *J. M. McClure* and *P. M. Clark*), for appellee.

The affidavit was not specific enough, and does not state the sources of affiant's information.

Mitchell, Motions and Rules, 67.
Endlich, Affidavit of Defence, 301.
Eshleman *v* Bolenius, 8 Lanc. Law Rev. 9.

January 21, 1895. McCollum, J. The appellant having purchased the timber on three

Digitized by Google

hundred acres of land included in several mortgages on which suits were brought, was allowed "to appear and defend in said suits as a terre tenant" of the timber right and estate he acquired by his purchase. In this suit and in No. 7, October term, 1894, he filed an affidavit of defence in which he averred that the timber was sold to him with the knowledge and consent of the plaintiff, and that the latter received the entire proceeds of the sale of it. In No. 8, October term, 1894, he filed an affidavit in which he stated that he was informed, and that he believed and expected to be able to prove on the trial of the case, that one of the mortgagees assented to and advised the sale of the timber to him, and received the benefit of it in the application of its proceeds, to the extinguishment of the mortgage debts upon the premises, and that he consented to such application. Inasmuch, however, as it appears to be conceded that the Fredonia National Bank is the real plaintiff in all the suits, and was the owner of the mortgages when the timber was sold, there is but one question for our determination, and that is whether the bank having consented to and received the proceeds of the sale of the timber can now appropriate it on either of the mortgages in suit. The learned Court below thought it could do so, and accordingly entered a judgment in each case in favor of the plaintiff, for want of a sufficient affidavit of defence. In justice to that Court it ought to be stated in this connection that the judgments were entered before the decision of this Court in Pratt *et al.* to use, etc., *v.* Waterhouse *et al.*, 158 Pa. 45, was announced. The use plaintiff in that case is the use plaintiff in the cases we are considering, and the decision in the former was based on the facts relied on as a defence to the latter. In the case referred to we decided that the bank's consent to the sale of the timber and its acceptance of the proceeds of the sale operated as a release of the timber from the lien of the mortgages it then held, and raised an equity in the purchaser which required that in enforcing a judgment on a first mortgage which it purchased more than a year after the sale the execution should be confined, in the first place, to the land. It was conceded that Pratt and Phillips, the assignors of the mortgage, had done nothing to raise the equity, and the decision was distinctly based upon the ground of the bank's consent to the sale of the timber and its acceptance of the proceeds of such sale. It is clear, therefore, that the decision in the case cited requires a reversal of the judgments in the cases before us. But aside from this decision, the injustice of allowing the plaintiff to sell the timber on either of the mortgages in suit, and to retain the proceeds of a former sale to which it consented, is so obvious, that the appellant should have an opportunity to establish the facts interposed by him as a defence.

The judgment in No. 6 is reversed and a procedendo awarded. W. M. S., Jr.

COLLINS'S APPEAL.

January 21, 1895. McCollum, J. For reasons given in No. 6, October term, 1894, judgment reversed and procedendo awarded.

W. M. S., Jr.

Oct. '94, 8. October 1, 1894.

Perrin et al. v. Waterhouse et al., Defendants, and Collins, Terre Tenant.

Appeal of T. D. Collins from the judgment of the Common Pleas of Forest County.

To a scire facias issued by Perrin *et al.*, Collins, who was permitted to appear and defend, filed the following affidavit:—

"T. D. Collins, being sworn, says he has a just and complete defence to the proceedings of foreclosure on the mortgage in this case so far as he has any estate or right in the said mortgaged premises, the nature of which is as follows:—

"That on the 3d day of September, 1891, he purchased the timber on said mortgaged premises, or on part thereof, from the defendant, J. A. Waterhouse, who then owned it, and took a deed of conveyance thereof, which was duly recorded about October 8, 1891, and paid for said timber the sum of three thousand ($3000) dollars, which was the full value thereof at that time. That said Waterhouse represented that said timber was then unencumbered. That affiant is informed, and believes and expects to prove on the trial of this case, that said plaintiff, H. P. Perrin, assented to and advised said Waterhouse to make the sale of said timber to affiant for the purpose of assisting in the payment and extinguishment of said mortgage, and took and received the benefit of said sale in the application of the proceeds of said sale to the extinguishment of the mortgage debts upon said premises, with full knowledge and consent that it should be so applied, and that it was the purchase money for said timber, and affiant avers that said timber right and estate now held by him was redeemed from said mortgage, and that if it ever was a lien thereon, it ceased to be thereafter.

"T. D. Collins."

The Court made absolute a rule for judgment and Collins appealed. The case was argued with the preceding cases by

Digitized by Google

Samuel T. Neill, (*T. F. Richey* with him), for appellant.

M. H. Byles, (with him *J. M. McClure* and *P. M. Clark*), for appellees.

January 21, 1895. McCollum, J. For the reasons stated in No. 6, October term, 1894, judgment reversed and procedendo awarded.

Oct. '94. 258. November 7. 1894.

Friend v. Oil Well Supply Co.

Landlord and Tenant—Eviction—Injunction, effect of.

When an eviction is alleged positively in an affidavit of defence, the Court is hardly at liberty to treat the averment as the mere assertion of a conclusion of law.

Where the defendant alleges that an injunction issued to restrain it from interference with the work of a railroad company prevents its possession and use of the premises leased, and that this amounts to an eviction the full facts should be heard and determined by a jury.

Appeal of the Oil Well Supply Company, defendant, from the judgment of the Common Pleas No. 3, of Allegheny County, in an action of assumpsit wherein J. W. Friend was plaintiff.

This was an action to recover rent alleged to be due upon a lease. The statement claimed $6000 as rent which had accrued from August 1st, 1892, inclusive, the lease being dated March 12, 1892 and the term beginning July 1, 1892. The defendant filed an affidavit of defence setting up—

"That on the 1st day of July, 1892, the day of the commencement of the term mentioned in the agreement, a copy of which is attached to the plaintiff's statement of claim, the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company by virtue of title paramount to that of the plaintiff, evicted the defendant from said premises, and the said defendant has never used or occupied the same; that there has therefore been a total failure of consideration for the rent reserved in said article of agreement; that on or about the 27th day of May, 1892, the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company brought an action in equity in this Court at No. 120, August Term, 1892, against said Oil Well Supply Company and said James W. Friend, a copy of the bill being hereto annexed and marked exhibit No. 1, that such proceedings were had in such action, that on the 14th day of June, 1892, an injunction was issued against the said Oil Well Supply Company, and said James W. Friend, a copy of which is hereunto annexed and marked Exhibit No. 2." By the bill annexed it appeared that the railroad company was engaged in reconstructing its bridge which passed over the demised premises and the injunction commanded the plaintiff and defendant in the present action to desist from interfering with or molesting the plaintiff, or its contractors, or their servants or employés from entering upon the property under said viaduct and occupying so much thereof as may be necessary during the reconstruction of said bridge, and for temporarily removing or transferring to any adjacent ground so much of any structures, or materials upon said grounds as may be necessary; with the proviso, however, that the plaintiff shall not before the first day of July, 1892, do anything upon the grounds which shall stop or seriously interfere with the operation of the defendant's mill, until the further order of the Court.

The Court granted judgment for want of a sufficient affidavit of defence.

The defendant took this appeal and assigned as error the entry of the judgment.

James C. Boyce and *M. A. Woodward*, for appellant.

Every lease where rent is reserved implies a covenant for quiet possession and this is the consideration for the rent. The railroad company had a title paramount, and by aid of the injunction evicted the Oil Well Supply Company from possession. The Oil Well Supply Company has received no benefit from the term, and ought not to be liable to pay rent. This is not a case where a tenant loses possession by proceedings to condemn property under the right of eminent domain. In such a proceeding, where viewers are appointed, the lessee can claim damages from the railroad company, and in many decided cases, it is ruled that the reason why the tenant is not discharged from the payment of rent is because the law provides for damages and compensation for his loss. Such is not the case here. No viewers were appointed; no damages were awarded and no opportunity was given prior to the eviction to the Oil Well Supply Company to claim any damages from the railroad company. All these proceedings had been taken and the right of the railroad company settled in 1855. The general rule that an eviction by paramount title determines the relation of landlord and tenant applies.

Schuylkill & Dauphin Improvement & R. R. Co. *v.* Schmoele, 57 Pa. 271.
Peters *v.* Grubb, 21 Id. 455.
Workman *v.* Mifflin, 30 Id. 362.

A tenant evicted by title paramount is not liable for rent.

Bauders *v.* Fletcher, 11 S. & R. 419.
Ross *v.* Dysart, 33 Pa. 452.
Taylor on Landlord and Tenant, 8 Ed. Sect. 377.

Digitized by Google

Edwin W. Smith (with him *P. C. Knox* and *James H. Reed*) for appellee.

Where a continuous and apparent easement or servitude is imposed upon the land a purchaser in the absence of an express reservation or agreement on the subject, takes the property subject to the easement or servitude.

Cannon *v.* Boyd, 73 Pa. 179.
Geible *v.* Smith, 146 Id. 276.
Ormsby *v.* Pinkerton, 159 Id. 458.
Eby *v.* Elder, 122 Id. 342.

An eviction is thus defined: "Any actual expulsion of the tenant or intentional disturbance by the landlord, or by any other person acting by his authority or by virtue of a legal right vested in them in any manner, which so seriously disturbs the tenant's possession as to compel an abandonment of the premises by him, or which deprives him of their beneficial enjoyment, amounts to an eviction and the rent is suspended from the time of such disturbance."

Wood's Landlord & Tenant, Section 447.

There is nothing of this sort in our case. The landlord did nothing. The railway merely entered upon its own right of way, under a title which had accrued long before the making of the lease and of which title the Oil Well Supply Company were charged with notice. The railway company either had or had not a right to enter and repair. The defendant, by his pleading, concedes that they had the right. If it had the right under its title which accrued before the defendant's, then the defendant was charged with notice of that right.

Washburn on Easements, page 411.

January 7, 1895. GREEN, J. The defendant's affidavit does allege an actual eviction from the leased premises by title paramount to that of the plaintiff, and that the defendant has never used or occupied the same, and therefore, that there has been a total failure of consideration for the rent reserved. Of course an actual eviction by title paramount to that of the lessor suspends the rent, and we are hardly at liberty to say that when an eviction is alleged positively in an affidavit of defence we can, or will, treat the averment as the mere assertion of a conclusion of law.

The affidavit also discloses a decree against the defendant and the plaintiff, for a preliminary injunction restraining them from interfering with or molesting the railroad company or its contractor, or agents and employés, in entering upon and occupying so much of the premises under the viaduct as may be necessary for use during the reconstruction of the bridge, and from removing and transferring to any adjacent ground so much of any structures or materials upon said grounds as may be necessary. Of course it is impossible for a Court to judge how much the terms of such an order will interfere with the possession and use of the premises leased, by the defendant, but as the defendant alleges under oath that it amounts to an eviction, we think it is entitled to have the full facts heard and determined by a jury. Upon the development of all the facts on the trial the Court can much more intelligently judge whether an eviction has been established, and how to administer justice between the parties.

Judgment reversed and procedendo awarded.

W. C. S.

Oct. '94, 253. October 17, 1894.

Bartley et al. v. Phillips.

Ejectment—Oil lease—Covenants—Forfeiture—Non-suit—Practice—Evidence.

Abandonment is a mixed question of acts and intention and is therefore ordinarily for the jury.

Abandonment of an oil lease does not depend exclusively on the length of time during which the lessee ceases operations, but also on the intention, and that is largely dependent upon the agreement and understanding of the parties.

No one can take advantage of an abandonment of an oil lease except the lessor, and those who succeed to his rights, therefore when a plaintiff in ejectment shows a lease to himself and a cesser of operations thereunder for a long time, it is error to enter a non-suit on the presumption of an abandonment, as under that evidence it does not appear under what title the defendant claims.

The forfeiture clause in oil or mining leases is for the benefit of the lessor and no act of the lessee can produce a forfeiture without the concurrence of the lessor. Where a lease requires work to be prosecuted with "due diligence" until "abandonment," parol evidence of the understanding of the parties with reference to "due diligence and abandonment' is admissible, as it does not modify the written contract, but tends to define the words and show the sense in which the parties used them.

Wills *v.* Gas Co., 130 Pa. 222 and Cochran *v.* Pew, 159 Id. 184, followed.

Munroe *v.* Armstrong, 96 Pa. 307, and Venture Oil Co. *v.* Fretts, 152 Id. 451, distinguished.

This was an appeal from the judgment of the Common Pleas of Butler County, refusing to take off a compulsory non-suit entered in an action of ejectment wherein W. E. Bartley, W. J. Burton, A. R. Burton, T. H. Burton and E. E. E. Young, surviving partners of Williamson Bartley, late partners, trading and doing business as the Farmers' Oil Company, and W. C. McCandless and W. J. Marks, partners, trading and doing business as McCandless & Marks, and

Digitized by Google

J. J. Leidecker and L. E. Brackney, were plaintiffs, and Thomas W. Phillips, defendant.

The plaintiffs were lessees of J. A. Hartzell of a tract of oil land of some seventy acres in Penn Township, Butler County, which was leased to them September 8, 1888.

The defendant was the assignee of one Walker, who was lessee by lease dated November, 1891, of one Ziegler, to whom the defendant's abstract alleged J. A. Hartzell had conveyed the tract in question.

The lease held by the plaintiffs was for the term of ten years. By the terms of the contract the plaintiffs were to commence operations for mining purposes within thirty days from the execution of the lease, and when work was commenced it was to be prosecuted with due diligence until completion or abandonment. The plaintiffs commenced operations upon the land within fifteen days after the execution of the lease and drilled a well, finishing it the latter part of October, 1888, at an expense of from twenty-five hundred to three thousand dollars. The well was a failure. The plaintiffs then in January or February, 1889, took their materials off the property. Plaintiffs, upon the trial, offered to show that in January, 1890, when Hartzell was about to sell the land to one Ziegler, Hartzell recognized the lease as a valid subsisting lease, and made an effort to get the plaintiffs to surrender it. This offer was rejected. (First assignment of error.)

Plaintiffs also offered to prove that Hartzell had not made any claim of forfeiture or loss by abandonment of the lease. This was rejected. (Second assignment of error.)

T. C. Campbell, (with him *Levi McQuistion* and *W. A. Forquer*), for appellants.

A motion for a non-suit is properly denied where the evidence shows a former possession in the plaintiff, or one through whom he claims, and there is no evidence at the time of the motion of title in the defendant.

Wells *v.* Jackson Iron Manufacturing Co., 47 N. H. 235; S. C. 90, Am. Dec. 575.

A plaintiff in ejectment is entitled to recover against a mere intruder without title, upon showing that his ancestor died in possession of the land.

Mobley *v.* Bruner, 59 Pa. 481.

The lessor has the right to elect, when default is made, whether he will forfeit the contract or assent to its continuance.

Wills *v.* Gas Co , 130 Pa. 222.

A forfeiture must not be unconscionable.

Thompson *v.* Christie, 138 Pa. 249.

If the forfeiture is once waived strict compliance with the terms of the lease cannot afterwards be insisted upon without reasonable notice that a forfeiture would be claimed.

Duffield *v.* Hue, 129 Pa. 94.

Where the parties themselves have disregarded the strict terms of the lease as to the time of payment of rentals a forfeiture will not be permitted without previous notice given that it would be insisted upon.

Gas Co. *v.* DeWitt, 130 Pa. 235.

Plaintiffs should have been allowed to make defendant show his title.

Weaver *v.* Craighead, 104 Pa. 288.

John M. Thompson and *Clarence Walker*, for appellee.

January 7, 1895. MITCHELL, J. Plaintiffs offered in evidence their abstract, whereupon defendants admitted title in Hartzell. Plaintiffs then proved the lease by Hartzell to them, their entry under it, and the putting down of one well. They thus made out a complete *prima facie* case, which called on defendants to show a better title. But it is said, and the Court below appears to have adopted this view, that plaintiffs went further and gave evidence of an abandonment of their possession. This, however, will not support a compulsory non-suit. Abandonment is a mixed question of acts and intention, and therefore is ordinarily for the jury, and there is nothing in this case to take it out of the rule, for the abandonment was denied in plaintiff's abstract, and was therefore incumbent on defendants to prove before they could avail themselves of it. Whether the evidence on the part of plaintiffs showed an abandoment by them did not depend exclusively on the length of time that operations had ceased, but also on the intention, and that again was largely dependent on the agreement and understanding of the parties. The plaintiffs denied the intention and the Court therefore could not declare the abandonment as a matter of law, but should have left it as a fact to the jury.

The plaintiffs further offered evidence by Burton and Hartzell to show the agreement of the parties as to due diligence and abandonment. This should have been admitted. It was not in any sense an attempt to modify or alter a written contract. The lease provided that the work when commenced, should "be prosecuted with due diligence until completion or abandonment," but what should constitute due diligence was a question of fact on which the parties might agree, either at the time or afterwards, and if they did, then neither Court nor jury had any right to adopt a different standard. If due diligence had been defined in the writing no pre-

Digitized by Google

tence of such right could have been set up. But parol proof of the understanding and agreement of both parties was just as effective as a writing, for it went not to a construction of the paper, but to the definition of a fact referred to. Whether any such understanding not expressed in the paper would affect others subsequently acquiring rights from one of the parties, without notice, we need not consider, for there is no evidence that any such others are before us. The case was not allowed to get that far.

But the non-suit was erroneous for another reason. Even if there had been a want of due diligence and an abandonment by plaintiffs, no one could take advantage of it but the lessor or one succeeding to his rights, and there was no such party yet in the case. So far as the evidence showed, defendants had neither Hartzell's title nor any other beyond that of mere squatters. As against them, plaintiffs, as already shown, had made out a *prima facie* case. The error of the appellees, and apparently of the Court below, was in regarding the estate of plaintiffs under the lease as terminated *ipso facto* by the failure in diligence or the abandonment. But it required the act of the lessor. Repeated decisions of this court from Wills *v.* Gas Co., 130 Pa. 222, to Cochran *v.* Pew, 159 Id. 184, have established that the clause of forfeiture or termination of the estate is for his benefit, and no act of the lessee can produce that result without his concurrence. Still less can any action of a stranger enforce it. As against any but the grantor, an abandonment is not complete until the statutory period of limitation, or the end of the term granted, and possession may be resumed by the grantee at any time previous.

There is nothing in the cases cited, Munroe *v.* Armstrong, 96 Pa. 307, and Venture Oil Co. *v.* Fretts, 152 Id. 451, in conflict with these views. In the former the lessor had expressly declared the forfeiture and made a new lease to the plaintiff, and in the latter he had asserted it by implication by a new lease to parties who defended under his title.

But it is said that appellees here, defend under Hartzell's title and that their abstract shows the fact. The abstract, however, was not in evidence, as it should have been if relied on for affirmative proof. The practice in the analogous case of statements and affidavits of defence, which under rule of Court are to be taken as admissions of all material facts not denied therein, is shown in Neely *v.* Bair, 144 Pa. 250. The respective abstracts of title in ejectment filed by the parties under the rule of Court in the present case, stand upon the same basis, having the same object as stated by the present Chief Justice in Neely *v.* Bair, to narrow the trial down to material matters which are really disputed. The defendants may be in possession under Hartzell's title, and the case therefore analogous to Venture Oil Co. *v.* Fretts, but it has not yet been shown to be so. The issue was determined prematurely.

Judgment reversed and procedendo awarded.

W. D. N.

Jan. '94, 132 and 133. April 13, 1894

Link, minor, v. The Phila. & Reading R. R. Co.

Link v. The Phila. & Reading R. R. Co.

Negligence—Railroad companies—Evidence of negligence by—When a question for the jury — Contributory Negligence — Answers to points—Evidence as to matters subsequent to the accident.

When in an action against a railroad company the evidence of the plaintiff is clearly sufficient to show that the company was remiss in the performance of its duty, the fact that this evidence is directly contradicted in every essential particular by the witnesses of the defendant, does not authorize a peremptory instruction by the Court to find for the defendant. The question must be submitted to the jury.

One L. approaching along a public highway a railroad crossing, where there were five tracks, on two of which trains were standing, with their engines blowing off steam, and one train in such a position as to interfere with a view of the tracks, was struck as he reached the fourth track, by a rapidly moving train and killed. It appeared that in the vicinity of the crossing he stopped, looked and listened, and that any sounds he might have heard were deadened by the noise made by the standing engines:

Held, that there was nothing in the evidence which warranted the Court in declaring as a matter of law that there was contributory negligence on the part of the deceased.

Held, also, that the question whether L. stopped at the best point to look for the approach of a train was a matter in dispute to be submitted to the jury.

The defendant asked the Court to charge that, if the jury believed that the engineer of the train which injured L. blew his whistle at the proper point and that such whistle could be heard at the crossing, there could be no recovery.

Held, that as this point ignored the condition of the crossing at the time of the accident, it was not error for the Court to refuse to affirm it absolutely.

It was in evidence that an electric bell, one of the signals for this crossing, was out of order, and that before the accident it rang so lightly that it was difficult to hear it.

Held, that evidence to show that the defendant repaired it a day or two after the accident was properly admitted.

Appeal of the Philadelphia and Reading Railroad Company, defendant, from the judgment of the Common Pleas of Berks County, in actions of trespass brought by Warren W.

Digitized by Google

Link, a minor child of Ammon T. Link, deceased, by his next friend, Lott W. Reiff, against said defendant to recover damages for the death of his father, Ammon T. Link, caused by the alleged negligence of said defendant; and by Simon Link against said defendant to recover damages for the loss of his horses and injuries to his wagon in which Ammon T. Link was driving at the time of his death.

These two cases were tried before the same jury. Upon the trial before ENDLICH, J., the following facts appeared: On the 9th of December, 1891, between one and two o'clock in the afternoon, a passenger train of the Philadelphia and Reading Railroad Company bound from Allentown to Reading, struck a team and wagon which Ammon T. Link was driving over a crossing near Blandon Station. The horses were killed, the wagon was damaged, and Link was so badly hurt that he died the same evening. These two suits were brought to recover damages for the injuries sustained by this accident. It appeared that Link came from his home, somewhere south of the railroad, with a two horse open wagon, for coal, which he intended to procure from a coal dealer, whose place of business was immediately to the north of the railroad. At the point where the public highway crossed the railroad there were five tracks, first, two sidings, then the east and west bound tracks, and then the private track of the coal dealer. About forty feet from the railroad was the caution board, placed on the public highway. It appeared that before Link went on the track he stopped and looked and listened. At that time the second railroad siding was occupied by a gravel train of some length. This train was cut in two across the highway, leaving a space claimed by the plaintiff's witnesses to be twenty-five feet, and by the defendant's witnesses to be fifty feet. The engine of this gravel train and also the engine of a freight train at the station were blowing off steam. This noise and the blocking up of the tracks by the broken train rendered it almost impossible to hear or see an approaching train between a deep cut east of the crossing and the place where the accident happened. After stopping, Link went on, and as he reached the west bound track he was struck by a passenger train coming from Allentown. It was in evidence that the train was late and running very fast, and while the engine driver gave the usual signals as he came out of the cut a little less than half a mile east of the crossing, it appeared that he gave no further notice, until he saw the wagon, too late to avoid the accident. The testimony as to these facts was contradicted by the defendant's witnesses, who claimed that after leaving the cut he kept on ringing the bell. At the crossing the railroad company maintained an electric apparatus with a bell on a post fifteen feet in the air, and another bell at the station, and when a train approaching the crossing gets within 1,448 feet of the crossing, the electric bells ring. It appeared that the electric bell at the station rang, both from plaintiff's and defendant's witnesses, and one of the defendant's witnesses testified to the electric bell ringing at the crossing; but the defendant offered the following evidence to show that the bell at the crossing was out of order.

Q. How about that bell? Was that in working order that day? A. I do not know whether it was in working order that very day, but the day following or two days following, they had the repairsmen there.

Mr. Snyder: I object; if he didn't see them that day, it is not evidence; it is irrelevant.

THE COURT: Admitted; exception for defendant.

By Mr. Jacobs: Q. How was that? A. I noticed they were repairing it a few days afterwards.

Q. Was it the next day, or when, afterwards? A. The following day, I think.

Q. They repaired that bell? A. The man was there quite a time; previous to that, I knew that at different times it rang so lightly when a train was passing and I was fifteen feet away I could not hear it; I tried it. (Fifth assignment of error.)

Defendants submitted, *inter alia*, the following points:

1. There is no evidence in the case that the defendant was guilty of any negligence which caused or contributed to the accident which resulted in the death of Ammon T. Link, and the verdict must be for the defendant. *Answer*. Declined. (First assignment of error.)

2. Under all the evidence of the plaintiff the verdict must be for the defendant. *Answer*. Declined. (Second assignment of error.)

3. Under all the evidence in the case the verdict must be for the defendant. *Answer*. Declined. (Third assignment of error.)

4. If the jury believe that the engineer of the train that injured Ammon T. Link blew his whistle at the signal board, which, according to the testimony, is about two thousand feet away from the place of the accident, and that the signal so given could be distinctly heard at and beyond the crossing, there can be no recovery in this case, and the verdict must be for the defendant. *Answer*. If, when the whistle was blown, the deceased was in a situation to hear it, he must be presumed to have heard it, and if he then went upon the crossing he did so at his own risk, and there can be no recovery for the resulting injury. (Fourth assignment of error.)

Verdicts for plaintiffs and judgment thereon.

Digitized by Google

Whereupon the defendant took these appeals, assigning for error, the admission of evidence, and the answers to its points, as above.

Jeff. Snyder (with him *Philip S. Zieber* and *George F. Baer*), for appellant.

There was no proof of the appellant's negligence. It was in evidence that the usual signals were given and that the electric bells rang. In the face of this testimony, the fact that some of plaintiff's witnesses did not hear the bells is of no avail.

Hauser *v.* Central Railroad Co., 29 WEEKLY NOTES, 471.
Urias *v.* Penna. R. R. Co., 31 Id. 353.

The case is to be distinguished from that of Ellis *v.* The Lake Shore, etc., R. R. Co., 27 WEEKLY NOTES 145, for here the evidence shows that the defendant had taken every precaution to protect this crossing from such accidents.

There was ample evidence that if Link had taken ordinary care, he could have avoided the accident.

Lees *v.* Phila. & Reading R. R. Co, 154 Pa. 46.
Myers *v.* Baltimore & Ohio R. R. Co., 30 WEEKLY NOTES, 492.
Newhard *v.* Penna. R. R. Co., 32 Id. 54.

The answer to the fourth point was error, because it made the railroad company's negligence depend on the traveler's failure to hear a signal duly given, when that failure was not caused by the employés of the company.

Phila. & Reading R. R. Co. *v.* Ritchie, 102 Pa. 431.

There being no evidence that at the time of the accident the electric bell at the crossing was out of order, it was error to admit evidence that two days after the accident repairsmen were at work upon it.

J. H. Jacobs, *H. P. Keiser* and *Rieser* (*Schaffer* with them), for appellees.

The evidence in this case was such that the question was necessarily left to the jury.

Ellis *v.* The Lake Shore, etc., R. R. Co., 27 WEEKLY NOTES, 145.
Penna. R. R. Co. *v.* Garvey, 108 Pa. 369.

The question of negligence in a case like this does not depend upon any certain rule, but shifts with the circumstances, and cannot therefore be determined by the Court.

Phila. & Reading R. R. Co. *v.* Killips, 88 Pa. 412.
Penna. R. R. Co. *v.* Coon, 17 WEEKLY NOTES, 137.
Penna. R. R. Co. *v.* Peters, 19 Id. 418.
Smith *v.* Baltimore & Ohio R. R. Co., 158 Pa. 83.
McGill *v.* Pittsburgh & Western Ry. Co., 31 WEEKLY NOTES, 355.
Neiman *v.* Delaware and Hudson Canal Co., 149 Pa. 92.

The accident was caused by the condition of the crossing at that time, which required greater precautions on the part of the railroad company.

4 Am. and Eng. Encyc. of Law, 920.
Thomas *v.* Delaware, etc., R. R. Co., 8 Federal Report 729.
Mackay *v.* N. Y. C. R. R. Co., 35 N. Y. 75.
Kissenger *v.* N. Y. & Harlem R. R. Co., 56 N. Y. 538.
Brown *v.* Hannibal, etc., R. R. Co, 50 Mo. 461, S. C. 11 Am. Rep. 420.
Ritchie *v.* Caledonian R. R. Co, 7 Scotch Sess. Cas. (4 Series, 1879) 148.

January 7, 1895. McCOLLUM, J. The defendant company's principal contention is that there was no evidence introduced on the trial which warranted an inference that there was negligence on its part which caused or contributed to the death of the plaintiff's father. There was evidence, however, submitted by the plaintiff, to the effect that the train was late and running very fast, and that the usual signals given on approaching the crossing were omitted. According to this evidence the whistle was not blown after the train left the cut, a half mile from the crossing, until the moment of the collision; the engine bell was not rung and the electric bell by the roadside was out of order and did not announce the approach of the train. This evidence, if believed, was clearly sufficient to show that the company was remiss in the performance of its duty to the traveling public at the point where the accident occurred. It is true that this evidence was directly contradicted in every essential particular by evidence submitted by the company in reference to the same matters, but the conflict in the testimony did not authorize a peremptory instruction by the Court to find for the defendant. There was nothing in the evidence which warranted the Court in declaring as matter of law that there was contributory negligence on the part of the deceased. When in the vicinity of the crossing, he stopped, looked and listened, for the purpose of ascertaining whether a train was approaching. Before him were five tracks, the east and west bound tracks and three sidings. A freight train was then standing on the east bound track, and a gravel train on the siding south of and next to it. The gravel train was cut at the crossing so as to afford an open space of at least twenty-four feet, for travelers on the highway to cross the tracks. The engines attached to these trains were near the crossing and blowing off steam. The cars interfered to some extent with the view of the west bound track, and the discharge of steam by the engines affected somewhat the ability to hear the usual signals of an approaching train. Whether the deceased stopped at the best point to look for the approach of a west bound train was a matter in dispute under the

Digitized by Google

evidence submitted by the contending parties. It was therefore clearly a question for the jury.

We cannot say that the learned Court erred in its answer to the defendant's fourth point. The point entirely ignored the condition, at and in the immediate vicinity of the crossing, to which reference has already been made. For this condition the defendant company was responsible, and in view of it, we think the answer to the point was unobjectionable. Nor can we discover any error in the ruling complained of in the fifth specification. There was, as we have already seen, evidence from which it might be fairly inferred that the bell at the crossing was out of order, and failed to give notice of the approach of the train, and that before the occurrence in question it was noticed that it rang so lightly that a person within fifteen feet of it could not hear it. In connection with such evidence it was proper to show that a day or two after the accident the bell was repaired by the defendant company.

The specifications of error are overruled.

Judgment affirmed.

LINK *v.* PHILA. & READING R. R. CO.

January 7, 1895. McCollum, J. This case was tried in the Court below and argued here with 132 Jany. T., 1894, just decided. The material questions in that case were the same as in this, and for the reasons stated in the opinion filed in that, the judgment in this is affirmed.

S. H. T.

Oct. '94, 259. November 7, 1894.

Laird v. Pittsburgh Traction Company.

Passenger railway companies — Transfer tickets—Rights of passengers holding—Measure of damages—Regulations as to transfer checks—Reasonableness of.

It is an inexcusable trespass to eject a passenger from a railway car, unless by some act of his he has put himself in the wrong.

In such a case it is not error to refuse to charge, "That if the plaintiff is entitled to recover at all in this action, he is only entitled to recover damages for the trouble and inconvenience, caused him by the delay in being put off the cable car at Craig street, and the additional expense necessary to complete his journey into the City of Pittsburgh."

To sanction such a measure of damages, as is suggested in this point, would tend to encourage rather than prevent the commission of indignities to which no well behaved passenger in a public conveyance should be subjected.

L., a passenger on an electric car, having paid his fare within two or three minutes of nine o'clock in the morning, received from the conductor a transfer check punched at nine o'clock, so as to entitle him to a ride upon a cable car of another company which connected with the electric company. The conductor of the cable car, however, refused to receive the transfer ticket, because it was also punched at 7.30 A. M. L. assured him that he had received it at nine o'clock, but the conductor called a policeman and L. was ejected from the car without violence:

Held, that L. was entitled to use the transfer check, and was not bound to inquire why it was also punched at 7.30 A. M.;

Held, that if the two punchings raised a doubt in the conductor's mind, he had no right to resolve that doubt against L. and eject him from the car.

The transfer check by its terms required the holder to satisfy himself that the date and hour were correct:

Held, that such a regulation to be reasonable would require the transfer check to be given to the passenger a sufficient time before he leaves the car to enable him to read it and if necessary have it corrected.

Appeal of the Pittsburgh Traction Company, defendant, from the judgment of the Common Pleas No. 2, of Allegheny County, in an action of trespass, brought by William M. Laird against said defendant, to recover damages for his being unlawfully put off a car of the defendant company for non-payment of rent.

Upon the trial, before White, J., the following facts appeared:

The Duquesne Traction Company, a corporation, operated a line of electric railway along certain streets, including North Hiland avenue to the central portion of the City of Pittsburgh, and the Pittsburgh Traction Company, another and entirely distinct corporation, operated a line of cable railway from East Liberty, also to the central part of the city.

During the summer of 1893, and for some time previous, there existed between these two companies an arrangement or agreement by which passengers of one road were transferred to the other for a single fare, upon certain conditions. Passengers taking a car of the Duquesne Traction Company at any point on North Hiland avenue could, if they chose, be carried on that car without change to the city, or, if they desired, by obtaining a transfer check from the conductor of the Duquesne Traction Company car could change at the corner of North Hiland and Penn avenues to a car of the cable line of the Pittsburgh Traction Company, and proceed by that car to the city.

On the morning of June 17, 1893, at about 8.50 A. M., William M. Laird, the plaintiff, became a passenger on a car of the Duquesne Traction Company, at the corner of McCully street and North Hiland avenue. When the car of the Duquesne Traction Company reached the corner of Penn and North Hiland avenues, the plaintiff

Digitized by Google

received from the conductor of that car a transfer check, which entitled him to ride upon a cable car of the Pittsburgh Traction Company to the end of the line in the City of Pittsburgh. It appeared that the plaintiff asked for this transfer ticket some time before leaving the car, but it was not given to him until he was in the act of so doing. By the conditions printed on the ticket, it was only good upon the first car leaving the point of transfer after the time punched in the margin, and this transfer ticket was punched as of 7.30 A. M., and also of 9 A. M. Within a minute or two after leaving the Duquesne Traction Company car, the plaintiff entered a cable car of the Pittsburgh Traction Company. The transfer ticket by the terms printed thereon required the passenger to examine the date and time and see that they were correct. In the hurry of getting off there was no time for the passenger to do this until after he was in the Pittsburgh Traction Cable Company car, and when he did look at it he noticed the double punching. When the conductor came to collect his fare, the plaintiff tendered him this tranfer check, which the conductor refused to accept, because it was old. The conductor demanded several times that the plaintiff should pay his fare or leave the car, and upon reaching Fifth avenue and Craig street, a distance of nearly two miles from the point at which the plaintiff entered the car, the conductor stopped the car and as the plaintiff still refused to pay his fare or get off the car, he called in a policeman, at whose request the plaintiff left the car. Neither the conductor nor the policeman used any violence or force towards the plaintiff.

The defendant submitted, *inter alia*, the following points:

First. That if plaintiff is entitled to recover at all in this action he is only entitled to recover damages for the trouble and inconvenience caused him by the delay in being put off the cable car at Craig street, and the additional expense necessary to complete his journey into the City of Pittsburgh. *Answer*. Refused. (First assignment of error.)

Third. Plaintiff cannot recover under the evidence and pleadings in this case, and the verdict must be for the defendants. *Answer*. Refused. (Second assignment of error.)

Verdict for plaintiff for $143 and judgment thereon.

The defendant took this appeal, assigning for error the refusal of his points as above.

George C. Wilson, (*William D. Evans* with him), for appellant.

The plaintiff's remedy, if he had any, is against the Duquesne Traction Company for the negligence of its conductor in issuing to him a wrong ticket; but he cannot insist upon his right to travel on the wrong ticket, or without it where it has been taken up, and recover damages for the refusal of the carrier to permit him to do so.

Ray's Negligence of Imposed Duties, 198, 201.
Frederick *v.* Marquette H. & O. R. Co., 37 Mich. 342.
Townsend *v.* New York Central & H. R. R. Co., 56 N. Y. 295.
Shelton *v.* Lake Shore & M. S. R. Co., 29 Ohio St. 214.
Down *v.* New York & M. H. R. Co., 36 Conn. 287.
McClure *v.* Phila. W. & B. R. Co., 34 Md. 532.
Yorton *v.* Milwaukee L. S. & W. R., 6 Am. & Eng. Railroad Cases, 322.
Bradshaw *v.* South Boston R. R. Co., 135 Mass. 407.
Dietrich *v* Penna. Railroad Co., 71 Pa. 432.
L. S. & M. S. Railway Co. *v.* Rosenzweig, 18 WEEKLY NOTES, 162.
Bowers *v.* R. R. Co., 158 Pa. 302.

The present case is a much stronger one for the defendant than those above cited, for the ticket in question was not issued by an agent of the defendant company.

The cases cited by the plaintiff are not material, for in them the tickets issued were all proper tickets.

Willis F. McCook, for appellee.

The cases quoted by the appellant are to be distinguished from the one at bar, because in the latter case there was evidence on the face of the ticket to corroborate the plaintiff's statement that he had received the ticket about nine o'clock; and he was not bound to explain the fact of the other punches in the ticket.

This case is fully covered by—

Perry *v.* Passenger Railway Company, 153 Pa. 236.
B. & O. R. R. Co. *v.* Bambrey, 16 Atlantic Rep. 67.
N. Y. L. E. & W. R. R. Co. *v.* Winter, 143 U. S. 60.

January 7, 1895. STERRETT, C. J. In view of the undisputed facts and circumstances of this case, the ejection of plaintiff from defendant company's car was an inexcusable trespass. There was therefore no error in refusing to withdraw the case from the jury and direct a verdict for the defendants; nor was there any error in refusing to charge: "That if plaintiff is entitled to recover at all in this action, he is only entitled to recover damages for the trouble and inconvenience caused him by the delay in being put off the cable car at Craig street, and the additional expense necessary to complete his journey into the city of Pittsburgh."

To sanction such a measure of damages, as is suggested in this point, would tend to encourage rather than prevent the commission of indignities to which no well behaved passenger in a public conveyance should be subjected.

Digitized by Google

Having paid his fare on the electric car, plaintiff, on leaving the same at the corner of Penn and Highland avenues within two or three minutes of 9 o'clock on the morning in question, received from the conductor a transfer check so punched that it clearly entitled him to ride thence in defendant company's car to the western terminus of its road in the City of Pittsburgh. He thereupon entered a car about leaving, and three or four minutes later handed his transfer check to the conductor, who shortly afterwards returned it, saying he could not receive it—that it was "two hours old;" and then demanded payment of the usual fare. Plaintiff assured him that he had received the check from conductor of the electric car at 9 o'clock A. M., immediately before entering defendant company's car, and refused to pay additional fare. This demand was repeated and refused several times. During one of the interviews, the conductor's attention was called to the fact that the 9 o'clock A. M. hour was punched, but he obstinately insisted that the 7.30 o'clock A. M. punch must govern, and that plaintiff must leave the car unless he paid his fare. When Craig street was reached he called a police officer and directed him to remove plaintiff from the car. Not wishing to create any disturbance, plaintiff, in obedience to the officer's order, withdrew without offering any resistance.

On margin of the check were figures indicating the hours, as well as every ten minutes, of both forenoon and afternoon. The 7 o'clock A. M. hour had two punches, one of which was partially in the square containing the figures 30—indicating minutes. This punching was manifestly intended for 7.30 o'clock A. M., as already stated, the 9 o'clock A. M. hour was also punched. All these punches were identical in character—evidently made by the same conductor. For these double punchings, plaintiff was in no way responsible. The check in question was undoubtedly issued to him at the time it was punched for, 9 o'clock A. M. If he had carefully read and examined it, there is nothing on it to indicate that he could not use it on the car leaving at 9 o'clock A. M. How or when the other figures 7.30 were punched he, of course, did not know and was not bound to inquire. The right hour for him—9 o'clock A. M.—was correctly and properly punched, and that was sufficient for his purpose. Why the conductor so obstinately insisted on ignoring the 9 o'clock A. M. punch and recognizing only the 7.30 o'clock A. M. punch, it is impossible to understand. If it was pursuant to instructions from any of his superiors, so much the worse for the defendant company. It is very evident that the exercise of ordinary common sense would have obviated all trouble. Assuming that the double punching created a doubt in the conductor's mind, he had no right, in the circumstances, to resolve that doubt against the plaintiff and eject or cause him to be ejected from the car. There is no doubt as to the genuineness of the 9 o'clock A. M. punch, and that just as clearly entitled plaintiff to remain in the car until he reached his destination. The conductor owed no duty to his employer or to himself that justified him in doing what he did.

Undue importance was attached by the defendants to the so-called contract or condition by which it is sought to make it the duty of passengers to examine date, etc., of the transfer check "and see that the same are correct." If that is intended to be regarded as a reasonable regulation, the check should be given to the passenger before he leaves the car a sufficient length of time to afford him at least an opportunity of reading it and, if wrong, having it corrected. In this case, a timely request for the transfer check was made by plaintiff, but it was not given to him until he was in the act of leaving the car. But, as has already been said, if he had read and examined the check ever so carefully he would have found nothing on it to admonish him that it was not good for passage on the 9 o'clock A. M. car. On the contrary, he would have seen that it was correctly punched for that hour and bore the proper date. Why or when the other punches were made was not his affair.

There appears to be no error in the record of which the defendants have any reason to complain.

Judgment affirmed.

S. H. T.

Oct. '94, 240. October 17, 1894.

Collins v. The London Assurance Corporation.

Corporation — Fire Insurance — Covenant — Title in land—Execution—Act of April 22, 1874, P. L. 109—Agreement—Practice.

Where property is insured by a policy against fire which contains a proviso that if the interest of the insured in the property be divested by judicial process her interest in the policy should determine; the interest in the property is not, for the purposes of the policy, divested by the levy of the property upon writ of execution against the insured, but continues while the insured property is sold at sheriff's sale, and title is made to the sheriff's vendee by delivery of the deed, and up to the time of the delivery the policy remains in force.

When a policy of insurance declares that it shall be avoided if foreclosure proceedings be commenced against

Digitized by Google

the insured property by virtue of any mortgage or trust deed, a proceeding upon a general judgment to levy and sell the said property is not equivalent for the purposes of the policy to a foreclosure.

By an agreement to submit the case to the Court under the Act of April 22, 1874, worded, "and to submit the case to the decision of the Court on the facts and questions of law raised by defendant in the affidavit of defence, which facts are to be taken as admitted as alleged in said defence," the plaintiff does not admit inferences or conclusions from the facts in the affidavit.

Appeal from the judgment of the Common Pleas of Butler County, entered against the London Assurance Company, in an action of assumpsit (submitted to the Court under the Act of April 22, 1874, P. L. 109), wherein Susan Collins, in her own right and to the use of John D. Hill, was plaintiff, and appellant, defendant.

The facts appear in the opinion of the Court.

The Court having given judgment for plaintiff, defendant appealed, assigning as error this action.

H. H. Goucher, for appellant.

"A policy of insurance, with its clauses, conditions, and stipulations is the law of the legal relation between the insurers and insured by which their mutual rights and liabilities are to be measured."

Weisenberger *v.* Harmony Ins. Co., 56 Pa. 442.
West Branch Insurance Co. *v.* Helfenstein, 40 Id. 289.
Fire Association *v.* Williamson, 26 Id. 196.
Brown *et al. v.* Commonwealth Mutual Insurance Co., 41 Id. 187.
Kensington National Bank *v.* Yerkes, 86 Id. 227.

If plaintiff recovers at all, he must recover on the contract with its conditions unimpregnated by any acts or violations on his part. He cannot recover on a contract the conditions of which he himself has broken. The materiality of the warranty or broken condition to the risk is of no consequence. Compliance with it is a condition precedent to any recovery on the contract.

State Mutual Fire Insurance Company *v.* Arthur, 30 Pa. 315.

And the interest of a mortgagee to whom the policy is assigned or made payable in case of loss, is subject to all the stipulations and conditions of the contract on the part of the insured.

May on Insurance, 3d Ed., Vol. 2, sect. 379.
Loring *v.* Manufacturers' Insurance Company, 8 Gray (Mass) 28.
State Mutual Fire Insurance Company *v.* Roberts, 31 Pa. 438.
Lycoming Insurance Company *v.* Mitchell & Boyle, 48 Id. 367.

"Alienation, if absolute, works a forfeiture, whether so stipulated in the policy or not, if the property remains out of the insured at the time of the loss."

Wilson *v.* Hill, 3 Met. (Mass.) 66.
Ætna Insurance Company *v.* Tyler, 16 Wend. 385.
May on Insurance (3d Ed.), Vol. 1, sect. 264.

An insurance without interest is a gambling contract, and against public policy.

Pritchet *v.* Insurance Company of N. A., 3 Yeates, 464
May on Insurance, 3d Ed., Vol. 1, sect. 75.
Elliott *v.* Insurance Company, 117 Pa. 553.

A purchaser at a sheriff's sale of real estate acquires an interest in the title the moment it is knocked down to him; and such interest will be bound by the lien of a judgment. When the deed is acknowledged and delivered the title relates back to the day of sale, and not merely from the date of the deed.

Hoyt *v.* Koons, 7 Harris, 277.
Morrison *v.* Wurtz, 7 Watts, 437.
Bosler *v.* Kuhn, 8 W. & S. 186.
McCormick *v.* McMurtrie, 4 Watts, 192.
Stoever *v.* Rice, 3 Wharton, 21.
Hardenberg *v.* Beecher, 104 Pa. 20.

By the purchase he acquires the equitable title, and for the purposes of insurance he is to be regarded as the sole and unconditional owner.

Susquehanna Mutual Fire Insurance Co. *v.* Staats, 102 Pa. 529.
Imperial Fire Insurance Company *v.* Dunham, 117 Id. 460.
Millville Fire Insurance Co. *v.* Wilgus, 88 Id. 107.

Thus it is conclusively established that a purchaser at a sheriff's sale acquires an interest in the title to the premises sold from the moment the property is knocked down to him, and if the premises are destroyed by fire, or even swallowed up by an earthquake, the loss would be his.

Reed *v.* Lukens, 44 Pa. 200.
Siter, James & Co.'s Appeal, 26 Id. 180.
Millville Fire Insurance Co. *v.* Wilgus, 88 Id. 107.

Non-compliance with the conditions of the policy discharges the insurers.

McClure *v.* Watertown Fire Insurance Co., 90 Pa. 277.
Pottsville Mutual Fire Insurance Company *v.* Fromm, 100 Id. 347.
Girard F. & M. Insurance Company *v.* Hebard, 95 Id. 128.
Hench *v.* Insurance Co., 122 Id. 128.
Diehl *v.* Adams Co Mutual Insurance Co., 58 Id. 443.

T. C. Campbell, (with him *S. F. Bowser* and *A. E. Reiber*), for appellee.

Particular words or expressions in a written agreement are to be construed in reference to the subject-matter of the agreement. Words should not be taken in their broadest import where they are equally appropriate in a sense limited to the object the parties had in view, and that limited construction is most favorable to the promisee.

Digitized by Google

Teutonia Ins. Co. *v.* Mund, 102 Pa. 89.

When the general terms and scope of a policy of insurance are such as to cover a loss, conditions in the policy restricting liability so expressed as to be capable of two meanings should be held to have the meaning most favorable to the insured.

Burkhard *v.* Ins. Co., 102 Pa. 262.

In construing an insurance policy the mere letter will be disregarded in aid of the real purpose of the contract.

Bole *v.* Ins. Co., 159 Pa. 53.

Until one has actually perfected the conveyance of property he has an insurable interest in it.

Insurance Co. *v.* Updegraff, 21 Pa. 513.

Under a policy containing a condition that "when any property insured by this company shall be aliened by sale or otherwise, the policy shall therefore be void," etc., the buildings insured were sold at Orphans' Court sale. Before the confirmation of the sale the buildings were burned. Held that before confirmation of the sale by the Court there was no such alienation as avoided the policy.

Ins. Co. *v.* Graybill, 74 Pa. 17.

The title acquired by a purchaser at a sheriff's sale is analogous to that acquired by a purchaser under proceedings in the Orphans' Court.

One who bids in property at Orphans' Court sale has not a perfect title until confirmation.

Demmy's Appeal, 43 Pa. 155.
Morgan's Appeal, 110 Id. 271.

The interest of an heir at law in the land of a decedent is not divested by an Orphans' Court sale of the estate of the decedent therein for the payment of debts, until the confirmation of such sale by the Orphans' Court and the execution and delivery of a deed to the Orphans' Court vendee.

Greenough *v.* Small (2), 137 Pa. 132.

That the title of a purchaser of real estate at sheriff's sale before acknowledgment and delivery of sheriff's deed is not absolute but conditional, and that the owner still has an interest in the land is shown by—

Thomas *v.* Connell, 5 Pa. 13.
Garrett *v.* Dewart, 43 Id. 342.
Hardenburg *v.* Beecher, 104 Id. 20.

"The contract of the purchaser with the sheriff, being imperfect before it has had the sanction of the Court, is in law, and in fact, no sale at all."

Per GIBSON, C. J., in Scheerer *v.* Stanley, 2 Rawle, 276.

January 7, 1895. DEAN, J. Susan Collins, the plaintiff, was the owner of 53 acres of land, having thereon a frame dwelling house and barn, in Parker township, Butler County. On June 23, 1883, she, joined by her husband, executed to Matthew Storey a first mortgage on the land as security for a debt of $800; no bond or personal obligation accompanied the mortgage. On the 27th of June, 1885, Storey assigned the mortgage to Phillip Daubenspeck; there was then due upon it only $105 of the original debt to Storey. In addition to the mortgage security for this, which stood unimpaired, Susan Collins and her husband, also one W. C. Collins, more than five years afterwards, on 20th November, 1888, gave to Daubenspeck their personal note for the balance of $105, with power of attorney to confess judgment; on the 8th of December, 1888, Daubenspeck entered judgment on this note for debt, interest and costs. On 20th of November, 1888, a second mortgage on the same property was executed by Mrs. Collins and her husband to one John D. Hill, to secure the payment of their judgment bond to him, in the sum of $1,265. Judgment was entered on this bond in favor of Hill on the 24th of November, 1888. By agreement between Daubenspeck and Hill the same day, the lien of the first mortgage was postponed in favor of Hill's mortgage. Mrs. Collins having made default in payment of debt and interest on Daubenspeck's judgment, he, on 2d of December, 1889, issued execution, and levied on certain personal property; this, by direction of plaintiff's attorney, was returned with a levy on personal property 2d December, 1889. Four days before this, on 28th November, 1889, this defendant, "The London Assurance Corporation," issued to Susan Collins a policy of insurance against fire on the dwelling house and barn on the land, and household goods in the dwelling, in the sum of $2,000; to be in force from said date for three years, ending at noon on 28th of November, 1892. On the policy, bearing same date, was this endorsement by the agents of the company: "Loss, if any, under this policy, first payable to J. D. Hill as his interest may appear."

The Daubenspeck mortgage and judgment having in the meantime been assigned to Hill, he, on the 9th of October, 1891, caused another execution to be issued upon the judgment, and on it all the personal property of Susan Collins was levied, and so returned; then Hill issued a third writ and levied on the farm of 53 acres, which was sold and bought by him for $165, and deed duly acknowledged to him, at 2 o'clock P. M. of the 8th of June, 1892. At 10 o'clock A. M. of same day the insured buildings were destroyed by fire. The plaintiff, averring her loss on dwelling house and furniture to be $1,400,

Digitized by Google

made the required proof of it to the company, and demanded payment, which was refused for a number of reasons, some of which were abandoned at trial.

Those assignments of error of any merit, pressed here, involve an interpretation on the admitted facts of four expressed conditions of the policy. It was to be void, if:—

1. "The hazard be increased by any means within the control or knowledge of the insured."

2. "If the interest of the assured be other than the unconditional and sole ownership."

3. "If with the knowledge of the assured foreclosure proceedings be commenced, or notice of sale of any property covered by this policy by virtue of any mortgage or trust deed."

4. "If any change other than by the death of the insured, take place in the interest, title or possession of the subject of the insurance, whether by legal process or judgment, or by voluntary act of the insured or otherwise."

There are many other conditions, but they are not material on the admitted facts of this issue. Any real defence the company has must be based on a violation of one or more of these four conditions of the policy.

The parties submitted the case on law and facts to the Court under Act of 22d April, 1874. There was judgment for plaintiff for amount of her claim, and defendant now appeals.

Much of the argument of the learned counsel for appellant is based on a misapprehension of the issue in the Court below, as framed in the submission. The writing states that the parties "hereby agree to dispense with a trial by jury, and to submit the said case to the decision of the Court on the facts and questions of law raised by defendant in its affidavit of defence, which facts are to be taken as admitted as alleged in said defence."

From this agreement on the facts and questions of law raised by the affidavit, it is argued that plaintiff admitted she had no right or title to the dwelling house when the fire occurred; admitted the title had been transferred by suit or foreclosure with her knowledge before the loss; admitted the hazard of the company was greatly increased by reason of levy and seizure; admitted a violation of a number of the conditions, which made void the policy; and it is asked, how can the plaintiff, standing upon these confessed violations and broken conditions of her contract, hold the defendant liable?

If these violations were admitted by the written submission to the Court, clearly, that was the end of plaintiff's case, and no argument by appellant was necessary, either in the Court below or here, to have judgment in its favor. But the trouble with appellant's case is, plaintiff admits none of these inferences or conclusions from the facts in the affidavit; she admits the case turns on the facts and questions of law raised by the affidavit, and admits the facts, but she makes an entirely different answer to the questions of law than that made by appellant. We concede a much better agreement for submission could have been made than the one before us; one in which the facts standing by themselves might have been orderly and concisely stated, leaving the conclusions which they warranted to be drawn by counsel in the argument, and by the Court in its opinion and judgment. As they now stand they are almost smothered in the legal verbiage of a very elaborate affidavit of defence. Still, if the time be taken, we think the facts substantially as we have narrated them, will be apparent in the affidavit and the papers which are made part of the case. The questions of law raised by them were to be answered not by the affidavit but by the Court after trial and argument.

As to the first point made by the defendant, it is admitted no representations of any kind were made as to incumbrances by Mrs. Collins when the policy was issued to her. The Daubenspeck judgment for $105 was entered of record the 8th of December, 1888. The policy was issued the 28th of November, 1889. The judgment was assigned to Hill the 2d of December, 1889. He also, at the date of the policy, had of record his own bond and mortgage for $1,265. As the assured made no statement as to incumbrances, it must be presumed, if it was a matter of any consequence to the company, it knew from the record of the incumbrances. It is also to be fairly presumed from the endorsement made by the company on the policy, of an equity in Hill entitling him to share in the indemnity, it also knew Hill was the owner of the incumbrances.

It is alleged, however, that the condition expressed in the words: "If the hazard be increased by any means within the control or knowledge of the insured, the entire policy shall be void," was violated by plaintiff in suffering a sale of the land on the Daubenspeck judgment. These being the words of the insurer, must not be stretched to cover that which is not fairly to be implied from them. The hazard to the company was from a judgment of record, ripe for execution, of which it had full knowledge. This judgment had been entered nearly a year before the policy, and was payable in ninety days from date; the insured had defaulted in payment for nearly nine months. The company knew she had no control over the judgment; the plaintiff and the law controlled it; execution could issue at any time without her consent and against her protest. The hazard, if any, was not in the issuing of execution upon the judg-

Digitized by Google

ment, but in the judgment itself, upon which the plaintiff could, uncontrolled by her, issue execution without her knowledge. If she had possessed the money she might have paid off the judgment, or execution, either after or before the levy, but there is not a spark of evidence that at that time she had the means of paying, and it may be presumed, a debtor who has the means will pay his debts to save property of much greater value from seizure and sale. This condition, we think, has no relation to the judgments, and was not intended to have when the contract was made. Obviously it was intended to protect the property during the life of the policy from fire, by change in structure, methods of heating, addition of new outbuildings on the premises, and like means within her knowledge and control as owner, whereby the hazard might be increased.

It is further argued that the policy was void because of this condition: "If the interest of the insured be other than the unconditional and sole ownership." This clearly relates to the ownership of the property at the date of the issue of the policy. The sheriff's sale was had before the fire, and whatever force the argument might have had, if this stipulation had by apt words referred to the ownership at that date, we cannot add such words in interpreting the contract.

Further, to move the Court to declare a forfeiture, this clause is invoked: "If, with the knowledge of the insured, foreclosure proceedings be commenced, or notice of sale of any property covered by this policy, by virtue of any mortgage or trust deed," then this policy shall be void. The sale was had by execution on the judgment entered on the personal obligation signed by Mrs. Collins and her husband and W. C. Collins, on 20th November, 1888; the mortgage, as before noticed, was given 23d June, 1883, by the wife and her husband alone, on the land described in it, to secure a debt of $800, which was evidenced by no personal obligation; from that time until the execution of the judgment bill, more than five years, any proceeding to collect the debt would have been necessarily a proceeding *in rem* on the mortgage, for sale of the land bound by its lien, and would have been when the sale was consummated, technical foreclosure. But here the sale was had, not, it is true, on a security having no connection with the mortgage, but on an additional security given long afterwards, with a new obligor, W. C. Collins. The mortgage was not to secure this obligation, for it had no existence at the date of that instrument; probably the obligation given was to secure the mortgage, which was postponed; and a sale by execution on this judgment, of the land bound by the lien, was not a foreclosure of the mortgage. That it worked in one particular the same result, extinguishment of the mortgagor's equity of redemption, will not warrant us in holding the proceedings to have been a foreclosure of the mortgage. The means to attain the same end, satisfaction of the debt, by the writs levari facias and fieri facias, are different; the powers of the officers under them are not the same; on the one, the particular land described in the writ can alone be levied upon and sold; in the other, all the goods, chattels, lands and tenements of the debtor can be seized in satisfaction of the debt.

As the sale in this case was not a foreclosure proceeding by virtue of a mortgage or trust deed, it did not make void the policy, under the terms of this condition.

As to the fourth point made, that by the sheriff's sale a change took place in the title of the subject of insurance before the loss, it may be conceded that this raises the most serious question in the case. The acknowledgment of the sheriff's deed in Court was four hours after the destruction of the property by fire. Concerning the household goods destroyed, it is not alleged, the title or possession of them had changed, and plaintiff was clearly entitled to judgment for their value, $150. But if the sheriff's sale passed to the purchaser the title to the land, that carried with it the house, and there was a change of title within the meaning of this condition. In fact, the company contracted in express terms, only for that which the law, without the condition, would have given it. If the title passed from her by the sale, the plaintiff had no interest; if she had no interest, she sustained no loss for which she can call upon the company to indemnify her.

It would, after the title had passed, have been as much a gambling contract, as if she had taken a policy of insurance against fire on the house of a stranger. But did the title pass by the sheriff's sale before the acknowledgment of the deed? It certainly did not, as has been well settled, pass the right of possession until confirmation by the Court. In Hawk *v.* Stouch, 5 S. & R. 157, where proceedings to obtain possession by the sheriff's vendee had been commenced before acknowledgment of the deed, it is held that: "The purchaser at sheriff's sale cannot call for the possession until the return of the writ and deed acknowledged; he cannot support ejectment; nothing is completed until the sale is confirmed by the Court by the receiving and acknowledgment of the deed. . . . . No right attaches to the purchaser until he receives the deed." Scheerer *v.* Stanley, 2 R. 276 was a claim on the tenant by the purchaser at sheriff's sale for rent accruing after the sale, but not paid at acknowledgment of deed. The judgment was in favor of Stanley, the tenant, and against the

Digitized by Google

sheriff's vendee. This Court, GIBSON, C. J., in affirming the judgment, says: "On receiving the sheriff's deed, the title of the purchaser may for some purposes be referred to what is popularly called the sale. . . . . But the contract with the sheriff being imperfect before it has had the sanction of the Court, is in law and in fact no sale at all. . . . It would seem, therefore, that the title of the purchaser is but coextensive with his character of landlord, which is expressly limited to commence at the acknowledgment."

Hall *v.* Benner, 1 P. & W. 402, was an ejectment by the purchaser at sheriff's sale against a tenant in possession under the former owner. At the trial, the plaintiff offered in evidence a lease for years executed to defendant by him in the interval between sale and acknowledgment; the lease was admitted under exception; then plaintiff made the point, that defendant having leased from him as tenant, could not dispute his landlord's title, and the Court below so held. In the opinion of this Court, reversing the judgment, it is said: "It would seem to be very clear that a man cannot make a valid lease to another who is in possession of land, when such lessor has no interest, title, possession, or right of possession in the premises he lets. . . . . There is a wide difference between the case of a lease from a person having title or possession, and that of a lease from one having no title, no possession, or no right to possess, as to the conclusiveness of the evidence."

In Garrett *v.* Dewart, 43 Pa. 342, it is held, that while, "it is true that a bidder at a sheriff's sale to whom the property has been struck down, has an inceptive interest in it, which may be bound by the lien of a judgment, even before the acknowledgment of the sheriff's deed; yet it by no means follows from this, that after he has obtained his deed, his title relates to the date of his bid, in any such sense, as to divest from that time the ownership of the debtor, whose land has been sold. Undoubtedly it does not. . . . . Although he may have a possible or inceptive interest, like a purchaser by articles, who has paid no money, he has acquired no title to the present enjoyment."

To the same effect are other cases, where the question was, what title passed by a sheriff's sale before acknowledgment of deed? As between the purchaser and his creditors, he has an inceptive title, which is bound by the lien of a judgment, if the sale be confirmed. As between him and the debtor, he is entitled to rents falling due from tenants after acknowledgment of deed, but not to unpaid rents falling due between sale and acknowledgment. And he is awarded the rents falling due after the delivery, partly accrued before, only because of the inconvenience of apportionment. As between the sheriff's vendee and the debtor, he is without title or interest, until acknowledgment and delivery of deed, if no title have passed to him, then it has passed to nobody, and remains in the debtor as before the sale. Up to the moment of acknowledgment, his purchase may be defeated by the debtor tendering the amount of execution and costs, when, if there had been mere inability to pay, and nothing censurable in the conduct of the debtor, the Court would probably make such order as would restore both parties to their condition as before the sale, and refuse to confirm it. Or gross inadequacy of price, with the slightest irregularity in procedure, would warrant the Court in refusing to confirm the sale. There is a close analogy in the condition of the title, to that of a vendee of insured property under articles, who has paid nothing. The condition of the policy against alienation of the subject of insurance, any interest therein or part thereof, will not defeat a recovery by the insured. Ins. Co. *v.* Updegraff, 21 Pa. 513; Hill *v.* Protection Co., 59 Pa. 474, and other cases. And STRONG, J., in Garrett *v.* Dewart, *supra*, suggests this analogy.

It is also analogous to the state of title of land purchased at an Orphans' Court sale, between the date of bid and confirmation by the Court. In Insurance Co. *v.* Graybill, 74 Pa. 17, the policy had this condition: "When any property insured by this company shall be aliened by sale or otherwise, the policy shall be void." After the sale but before confirmation, the buildings on the land were burned. It was held, the policy was not avoided by the condition against alienation.

The cases referred to by us are not in conflict with Susquehanna M. F. Ins. Co. *v.* Staats, 102. Pa. 529; Imperial Ins. Co., *v.* Dunham, 117 Pa. 471, and others, to which the appellant's counsel call our attention. A purchaser at sheriff's sale acquires, before confirmation, inceptive title, which may be, as between him and his creditors, an asset for payment of debts; may be the subject of insurance as between him and any company which chooses to take such a risk; that is all these cases hold. But as between him and the debtor, the debtor's title and interest, although in extreme peril, does not actually pass from him until acknowledgment of the deed. In all its legal incidents, it is his estate as before the sale; and as neither the law nor this contract declare otherwise, the right of plaintiff has not been defeated.

With the profusion of conditions in this policy issued, too, twenty-five years after the decision in Ins. Co. *v.* Graybill, *supra*; and with a judgment of record ripe for execution staring it in the face, this company probably did

Digitized by Google

not want to stipulate that it should be void if the property were put up and knocked down at judicial sale; otherwise it would have added one more to the many conditions it did insert. The assignments of error are overruled, the judgment is affirmed and appeal dismissed at costs of appellant.

W. D. N.

Common Pleas.

C. P. No. 1. February 2, 1895.

Amheim v. Dye Works.

Practice—Pleading—Plea of Abatement—Procedure Act of 1887.

Where the general issue is pleaded and also a special plea that this cause of action has been tried and disposed of in an earlier proceeding, the case is not to be placed on trial until the special plea, which is in effect a plea in abatement, has been either replied to or stricken off.

Rule to restore case to trial list without payment of costs.

This was an action of trespass. The defendant pleaded not guilty and also specially that the same cause of action had been the subject of two prior actions, in both of which verdicts were found for the defendant. The case was ordered upon the trial list and when called for trial before BREGY, J., was on motion stricken off, on account of the pending of the special plea.

Charles F. Linde, for motion.

There was no right to file any plea but "not guilty."

Act May 25, 1887, P. L. 272.

Therefore the mere filing of the special plea did not keep the case from being at issue or deprive it of the right to be tried.

[BREGY, J. You should either file a replication or move to strike the plea off.]

The plea may be treated as a nullity; the Act says no other plea except not guilty shall be filed.

Richard C Dale, contra.

The plea is in effect a plea in abatement. The Act of 1887, does not abolish the distinction between pleas in bar and in abatement. The latter may still be filed.

Slatteny v. Penna. R. R. Co., 21 WEEKLY NOTES, 556.

Rule discharged.

H. B.

U. S. Circuit Court—Eastern District.

February 8, 1895.

Playford v Lockard.

Practice—Pleading in equity—When plea must be supported by an answer.

Where a bill alleged that the amount in controversy is over $2,000, a plea filed that denied this, must be supported by an answer giving discovery of all matters material to the issue raised by the plea, concerning which the respondent had been specifically interrogated.

Argument on sufficiency of plea.

Mark Wilks Collet, for complainant.

A negative plea should be supported by an answer giving full discovery of the matters set up by the bill and denied by the plea.

Taylor v. Duncannon, 20 District of Columbia, 505.

This question can be raised by setting down the plea for argument.

Hagthorp v. Hooks' Administrator, 1 Gill & J. 270.
Armingand v Condert, 27 Fed. Rep. 247.

Bradbury Bedell, for respondent.

A plea to the jurisdiction never has to be supported by an answer, and the question if raised should have been raised by exceptions.

January 15, 1895. DALLAS, J. The bill in this case, which prays for an accounting by the defendant, alleges upon information and belief, the fact being peculiarly within the knowledge of the defendant, that the amount in controversy (the balance claimed) exceeds the sum of $2,000. The defendant, by plea, asserts the contrary. This plea, if true, is a good one. It challenges the jurisdiction of the Court. The plaintiff, however, is entitled to have the issue of fact thus presented determined, and it is manifest that this should be done, if possible, before the litigation is further proceeded with. The burden is upon the plaintiff, and one means by which he may meet it, perhaps the only one in this case, is by asserting his right to complete discovery from the defendant with respect thereto. This he has done by filing five specific interrogatories, all of which are plainly pertinent to the averment of the plea; but the defendant, though he has filed an answer in support of his plea, has refused to reply to any of the interrogatories. I think he should be required to do so, and that all other questions should be reserved, pending his compliance with that requirement.

The defendant is ordered to answer the interrogatories within ten days.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, FEB. 22, 1895.* [No. 2.

Supreme Court.

Oct. '94, 323. November 12, 1894.

In Re Estate of William P. Shinn, Deceased.

Orphans' Court—Administrator—Accounts—Surcharge.

An administrator appointed by a register of wills in Pennsylvania will not be surcharged on account of expenditure of funds of the estate in an effort to preserve assets in another State; but he takes the risk of failure should he expend funds in a speculative manner, albeit he acts in good faith and on the advice of those upon whom decedent relied.

Appeal of William H. Shinn, from the decree of the Orphans' Court of Allegheny County, dismissing his exceptions to the adjudication of the said Court whereby he was surcharged some $44,736.

The facts are sufficiently set forth in the opinion of the Court.

Willis F. McCook, for appellant.

The chattel interest in the lease vested in the administrator.

Williams on Executors, sec. 680.

The domicile of decedent does not affect the right of administrator to further the interests of the estate in another State.

Shakespeare *v.* The Fidelity Co., 97 Pa. 173.
Potter *v.* Hiscox, 30 Conn. 508.
Magraw *v.* Irwin, 87 Pa. 139.

James Balph, (with him *R. A. Balph*, *A. M. Brown*, *John S. Lambie*, and *J. E. McKelvy*), for appellee.

January 7, 1895. DEAN, J. William P. Shinn died intestate May 5, 1892, leaving as his next of kin Joseph A. and John K. Shinn. The assets real and personal in Pennsylvania amounted to $211,126.92, and debts $202,648.-27. Before his death he had taken the leasehold interest of a tract of iron ore land in Westchester County, New York, granting the right for twenty years to mine and remove the iron ore therefrom at a price or royalty of fifty cents per ton, and fixing a minimum production of not less than ten thousand tons, or $5,000 per year. William P. Shinn, in his lifetime, had expended more than $100,000 in improvements and patents for the production and preparation of the ore for furnaces. Besides the royalties and certain rentals stipulated to be paid, there was upon the leasehold a chattel mortgage and other charges amounting to about $40,000. To make this operation a success the administrator took from the general fund $44.736.36 and expended it in patents, test or exploring shafts, and for other purposes in and about the ore lease, and claimed credit therefor in his account. The auditing Judge surcharged him with these expenditures, and the administrator appeals.

We are not disposed to affirm this decree on the opinion of the learned Judge of the Court below. In that opinion, the surcharge is sustained for two reasons; the first and controlling one, because the accountant had no authority to go beyond the limits of the State and attempt to manage a part of the estate in a foreign jurisdiction, and to that end appropriate a part of the assets realized in the State of the domicile. As to this the Court says: "The action of the accountant was therefore clearly a breach of official duty."

Neither the facts in this case, nor the law applicable to them, warrants such a sweeping conclusion. The question raised here is not being tried in the Courts of New York with adverse claimants of that State against the right of the administrator to remove the assets to another jurisdiction. Nor is it being tried in the Courts of this State, with home creditors contesting the right of a New York administrator to remove the fund beyond the reach of our Court. In either case, the legal title of the administrator, and his intermeddling with the fund, might be effectually denied. But the question here is, what may an administrator do with reference to personal assets beyond the jurisdiction, without subjecting himself to the peril of a surcharge? It is answered that he should have immediately converted the assets into money and for that purpose should have raised an ancillary administrator within the jurisdiction of the New York Courts, whose duty it would have been to sell and distribute the fund, first, to the creditors there, and then pay over to him the balance for distribution among the general creditors in Pennsylvania. But suppose an immediate sale would have been impossible or unwise, and that the expenditure of a limited amount would have made the asset marketable at a fair price, and thus have saved a large sum for the estate? If it had been reasonably probable, as appellant claims, that the expenditure of about $7,000 in completing a shaft would have made the property worth in the market at least $75,000 and thus have saved the larger part of the more than

Digitized by Google

$100,000 already expended upon it, certainly a Court of equity would not have surcharged such a trustee with the $7,000, merely because the money had come out of the general fund, and had been paid outside the State. Even an executor *de son tort* is entitled to re-imbursement for payments properly made in relief of the estate. It is argued, an ancillary administrator should have been appointed to do this. If he had been first appointed he would have had no money to expend, unless he received it from the Pennsylvania administrator, and the same fund would have been depleted for the same purpose. When an administrator assumes the office, and has delivered to him assets of the character of these, the exigency may require that he, within a limited extent, shall act beyond the jurisdiction. The intestate here had pledged in New York banks collateral, largely exceeding in value the amount of the obligations for which they were pledged; the administrator paid off the obligations out of the general fund, lifted the collateral, sold it, and thereby swelled the general fund. No one of the creditors claims that he be surcharged with the amount paid on the notes, because the money to pay them was taken from the general fund and paid outside the jurisdiction. If he had paid no attention to the matter, and permitted the collateral to be sacrificed, the creditors could properly have claimed a surcharge because of neglect of a plain duty. This leasehold was a chattel in New York State, and is so treated there, and a chattel mortgage under laws of that State given upon it. The administrator finds the instrument among the other personal assets of his intestate. To decide that the mere fact that he expended money beyond the State to save valuable assets warrants a surcharge, is carrying the doctrine which confines the administration of assets to the jurisdiction of the domicile, too far, and beyond anything ever intended to be decided by this Court.

As early as 1803 it was decided in McCullough *v.* Young, 1 Binn. 63, that it had "been uniformly understood, both before and since the revolution, that letters of administration granted in a sister State are a sufficient authority to maintain an action here; and such has been the practice without regard to the particular intestate laws of the State where they have been granted. There may be, indeed, great inconveniences from the law, but it lies within the Legislature to remedy them." This case was virtually overruled in Brodie *v.* Bickley, 2 Rawle, 431, decided in 1830, in which it was held that an action would not lie against an administrator in this State on a judgment obtained against another administrator of the same estate in another State. The Court says: "The authority of an administrator under letters granted in a sister State to meddle with the assets here is an anomaly produced by an unexampled spirit of comity in the Courts of this State which will probably be attended in this respect with perplexity and confusion." This was followed by Mothland *v.* Wireman, 3 P. & W. 185, decided in 1831. The real question for decision in this case was whether Wireman, an administrator in Pennsylvania, was chargeable with assets received by his co-administrator, who was both a resident of Maryland and surviving partner of decedent in certain iron works in that State, and by reason of his survivorship had received money belonging to the estate. This Court held the Pennsylvania administrator was not liable except for assets received within the jurisdiction, although the bond was joint. That the money received from the iron property by the surviving partner and co-administrator must be accounted for in the Courts of Maryland. The decision is grounded on Brodie *v.* Bickley, *supra*, decided the year before. It is true, GIBSON, C. J., in delivering the opinion, says, he is unable to see why, if even the assets in Maryland had come into the hands of the administrator in Pennsylvania the latter should be charged with them; but this was wholly outside the case, for there was no pretence that the Pennsylvania administrator had actually received any part of the fund. The decision is good law for just what is decided, that the Pennsylvania administrator was not liable for the fund received by his co-administrator, a resident of Maryland, on assets located in Maryland. The Court again speaks in deprecatory terms of that "injudicious spirit of comity" which prevailed in the Courts of this State, evidently having in mind the decision in McCullough *v.* Young, *supra*.

Then, apparently moved by these criticisms, the Legislature passed the Act of 15th March, 1832, in which it is enacted that: "No letters testamentary, or of administration or otherwise, purporting to authorize any persons to intermeddle with the estates of a decedent, which may be granted out of this Commonwealth, shall confer on such person any of the powers and authority possessed by an executor or administrator under the letters granted within this State." This was a severe blow to the doctrine of comity on which McCullough *v.* Young was based, and which GIBSON, C. J., in the subsequent cases thought insufficient to warrant the decision.

But this Act was found inconveniently rigorous, so it was amended by that of June 16, 1836, enacting that it should not apply to shares of stock in any incorporated company within this State; and then again by Act of 15th of May, 1850, that it should not apply to any loan of any incorporated company within this State. So

Digitized by Google

that in a spirit of comity, a foreign administrator could come into this State and manage and collect such assets without having ancillary letters issued.

A number of cases arose requiring an interpretation of the Act. Dent's Appeal, 22 Pa. 514, held that although distribution of foreign assets must be made according to the law of the domicile, it was not required that such distribution should be made in the place of the domicile; that this was a question not of jurisdiction but discretion. In Moore *v.* Fields, 42 Pa. 467, it was decided that where a debt against an administrator of an estate in New York had been settled by final decree of the Surrogate Court, an action would lie against the administrator in this State by the public administrator of New York, without the issue of ancillary letters in this State. In Shakespeare *v.* Deposit Co., 97 Pa. 173, it was held that United States bonds on special deposit could be sued for by a foreign administrator in the Courts of this State. In Musselman's Appeal, 101 Pa. 165, it was decided that letters testamentary to a Pennsylvania citizen, upon the estate of a resident of another State, gave no jurisdiction to Pennsylvania Courts over the accounts. Lines *v.* Lines, 142 Pa. 149, held that a Court of equity in this State had no jurisdiction over the personal property of a decedent of another State which would authorize it to take such property out of the hands of those in possession.

But in no case has it been decided that the mere fact of an administrator's expending money in any reasonable effort to save the property of his intestate situated in another State is sufficient to convict him of a *devastavit.* As is said by Justice SHARSWOOD in Shakespeare *v.* Fidelity Company, *supra,* "The point has never been decided in this State."

A voluntary payment by a debtor of this State to a foreign administrator, when no ancillary letters had previously issued, would not be that offensive "intermeddling" with the assets in this State as would make it a mispayment under our statute; and we will not assume that in a spirit of comity the mere payments by this administrator beyond the jurisdiction from that fact alone should be declared unlawful.

Nor will we assume that if he had sold the property and had paid the claims upon it he would not be answerable in this State for the surplus. The argument to the contrary has nothing to support it but the dictum in Mothland *v.* Wireman, *supra,* and is not in accord with any of the adjudicated cases. The ruling in Wilkins *v.* Ellett, 9 Wall. 740, is sounder in principle: "The foreign administrator's title is recognized to receive a voluntary payment and to give a valid acquittance therefor, provided no ancillary letters have been previously granted. The payment being voluntary the executor has not intermeddled." In Potter *v.* Hiscox, 30 Conn. 508, a guardian had among his ward's assets the note of a citizen of another State. He made no effort to collect because the debtor was not within the jurisdiction. The Court surcharged him with it, saying, with persuasive reason, that the domiciliary guardian was bound to use reasonable care and diligence in endeavors to save his ward's estate. To hold that the representative of the personal estate within the domicile owes no duty whatever either to creditors or next of kin, with reference to personalty outside the jurisdiction, is to invite neglect and consequent waste and dissipation of assets. That he has no standing as a suitor in a foreign jurisdiction does not alone fix the measure of his duty, nor has it ever been so regarded in practice. In thus holding, we do not intimate that he must go into a foreign jurisdiction and institute suits which could not be sustained, or offensively intermeddle with assets, so as to defy or disregard the jurisdiction of the Courts of the *situs.* There are often many things he may do, many things he ought to do, which suggest themselves to the prudent business man, tending towards the preservation of the estate, and are neither obnoxious to the law nor antagonistic to the interests of foreign creditors.

But while we do not sustain the decree of the learned Judge of the Court below on his first reason, we think it fairly supported by the second. On the facts found, the action of the administrator was wholly unwarranted. The iron ore operation was a speculative venture which the decedent, in his lifetime, had a perfect right to enter upon. His business was to accumulate an estate; if his ventures turned out successful, he reaped the profits; if unsuccessful, no others were interested or had a right to complain. But the business of this administrator was not to make money for the estate by hazardous ventures, but to save that which came into his hands, for creditors and kin, by prudent business management. Speculative ventures were not prudent business management. The ore was uncertain, both as to quantity and quality, as is apparent on a mere reading of the stipulations in the lease; the cost of production was not known with even approximate certainty, for the methods of mining and cleaning were purely experimental. Besides these risks, the value of the ore when ready for the furnace was wholly uncertain, because it was certain to be subject to the wide fluctuations of the iron market. Without consultation with the creditors, with no cautionary order from the Court on a statement of the facts, he put into this plant in hopes of profit, this large sum of money; money realized from the estate in Penn-

Digitized by Google

sylvania. The business proved a most disastrous failure. The whole was sold under legal proceedings in New York and did not bring the amount of claims against it. He advised with no one as to the judiciousness of expending this $45,000 of the creditors' money, except those whose interests were, in a certain sense, antagonistic to the creditors. His New York advisers were interested in keeping the plant in operation whether it made money or lost. Joseph A. and John K. Shinn, next of kin, examined the property, and they advised him to continue it in operation. It was their interest to do so. They doubtless knew, as did the administrator, that unless at least a portion of the large amount invested in this operation by decedent, in his lifetime, was saved, the estate was practically insolvent. If it proved successful, there would be a surplus to go to them, the next of kin; if unsuccessful, they were no worse off, as the loss would fall upon the creditors. Yet the administrator took the creditors' money and invested it in a wild speculation. He might, almost as safely, have invested it in stocks on the prospect of a rise. This was not ordinary business sagacity or prudent management. His conduct, on the facts found by the auditing Judge, therefore, warranted the surcharge.

The decree is affirmed and the appeal dismissed at costs of appellant. W. D. N.

Oct. '94, 19. November 12, 1894.

In Re Estate of William P. Shinn, Deceased.

Appeal of Trenton Iron Company.

Orphans' Court—Administrator — Account—Commissions.

Even though in respect to certain conduct of an administrator the Court surcharge him, yet if it appear that in all other respects his management of the estate shows sagacity and industry, an allowance of full commissions by the Orphans' Court will not be reversed.

Appeal of the Trenton Iron Company from the decree of the Orphans' Court of Allegheny County in dismissing exceptions to that part of the adjudication of the account of William P. Shinn, administrator, which allowed him commissions. The main facts of this case appear by the opinion of the Supreme Court in the immediately preceding case; in addition and as especially affecting this appeal it appeared that the appraisement of the personal estate of decedent was $114,358.63, that of this amount $103,435 was the valuation at which certain stocks of decedent were placed; that this stock was pledged to secure loans amounting to $77,736.03; that the available cash was $1,539.89; that employing a firm of bankers, for whose services he expended $384.24, the administrator secured the redemption of the pledged stock, selling it and realizing over the indebtedness $21,237.21.

The Trenton Iron Company, a creditor of the estate, objected to his being allowed commission, because of the expenditure of $40,000 of the funds of the estate in a New York mine property of decedent and with which he was surcharged by the Court. (See Shinn's Appeal, *ante* p. 33). The Orphans' Court, however, allowed the commission, and the Trenton Iron Company took this appeal.

John S. Lambie, (with him *A. M. Brown* and *John Sparhawk, Jr.*,) for appellant.

The compensation to be paid to executors, administrators and others acting in a fiduciary capacity is so much governed by circumstances that no general and unbending rule can be fixed.

Snyder's Appeal, 54 Pa. 67.
Pusey *v.* Clemson, 9 S. & R. 204.
Heckert's Appeal, 24 Pa. 482.

Compensation is the idea that should control in fixing the commission. Compensation for the faithful performance of a duty and not for a disregard of it.

Pusey *v.* Clemson, *supra.*
McCahan's Appeal, 7 Pa. 56.
Stehman's Appeal, 5 Id. 413.
Norris' Appeal, 71 Id. 106.

The right to compensation is destroyed by sloth, ignorance, reckless confusion and delay on the part of the trustee, by which the interests of the *cestui que* trust are impaired.

Stehman's Appeal, *supra.*

In a case where it became necessary to refer the account to an auditor for re-statement and correction, the accountant was not allowed the usual commissions allowed to a careful and intelligent accountant.

Wistar's Appeal, 54 Pa. 60.

A commission of five per cent. was allowed to the accountant in the case at bar upon the sum of $3,732, being the amount of errors and duplications and uncollected assets. This Court has decided in Vanderford's appeal, a case not reported in the State reports, but found in 12 Atlantic Reporter, 491, that such commissions could not be allowed.

A commission should only be allowed on the amount which actually passed through the hands of the executor.

Stevenson's Estate, 4 Wharton, 98.

In the settlement of a complicated estate, extending through nine years and involving grea

Digitized by Google

responsibility and trouble, where the account showed debits amounting to $127,387.07, and credits amounting to $74,821.16, the executor claimed compensation for his services of $4,435.75. The auditor reduced the compensation to $4,000, and upon appeal this Court sustained the auditor.

Stewart's Appeal, 110 Pa. 410.

It is undoubtedly true as stated in Price's Estate, 81 Pa. 263, that where an accountant was not guilty of fraud or bad faith it would be a harsh rule to hold that he should be deprived of all commissions merely because he was surcharged. But he will not be allowed a commission on the sum surcharged.

Landis *v.* Scott, 32 Pa. 495.
Gilson's Estate, 18 WEEKLY NOTES, 570.

Willis F. McCook, for appellee.

The general rule in Pennsylvania for compensation of executors and administrators is five per cent. on personal property, and two and one-half per cent. on real estate, and should not be departed from except for good cause. The burden of proof that the compensation should be less than custom has fixed, is upon the exceptant.

Eshleman's and Gyger's Appeal, 74 Pa. 42.
Rockafield's Estate, 4 Lanc. Law Rev. 113.

A commission of five per cent. on a balance of $27,000, $25,000 of which was unconverted from the original securities, was allowed by the Court, which discretion the Supreme Court refused to disturb.

Davis' Appeal, 100 Pa. 201.

The allowance of commissions and counsel fees made by the Court below, under all the evidence should not be disturbed.

Harbster's Appeal, 125 Pa. 1.

January 7, 1895. DEAN, J. The facts in this case are about the same as in the appeal of William H. Shinn, administrator, opinion filed this day. The appeal here, however, is from that part of the decree which allows the administrator commissions.

The Court, although surcharging the administrator with a large sum of money, expended on an iron ore operation in New York, nevertheless finds that he acted in good faith, and allows him his commissions. We are not inclined, on the facts, to disturb this decree. The appellant was compelled to give very heavy bonds, covering nearly $200,000 worth of property, for which he paid to the surety companies $500. For this, the Court allowed him no credit. While we saw much to condemn in his conduct with reference to the New York property, we see nothing but diligent, astute business management of the Pennsylvania property. With no cash on hand, except about $1,500, he saved from peril $103,000 of stocks pledged by the decedent for small loans, both within and without the State; these he then sold for $21,000 more than they were appraised at; more than twice as much as they would have sold for at any time since. The appellant claims, that it was through the aid of reputable bankers he accomplished this; let that be so; a trustee who has the sagacity to select efficient aids in the management of delicate and responsible interests intrusted to him, is all the more deserving of remuneration, especially as the bankers charged for their services less than $400. Besides these stocks he performed most vexatious labor in the sale and management of the real estate, which was heavily mortgaged, and realized on that $64,500, an amount considerably in excess of the liens. His commissions, as allowed, amount to about $7,000. The Court below did not think, in view of the actual services and time devoted to his duties, and the large responsibilities involved, that this was unreasonable. We are not convinced there was any error in the allowance.

The decree is affirmed, and the appeal is dismissed at costs of appellant.

W. D. N.

Oct. '94, 243. November 5, 1894.

Fife v. Miller.

Wills—Codicil—Construction of—Modification of will, by codicil—Limitation of.

Where devises have been made by express words in a will, the presumption is that they continue until they are displaced by equivalent phrases; and a codicil will not be construed so as to revoke or modify them beyond the necessary implication of the language used.

T., by his will devised to his daughter M. certain land "to be used and controlled by her and her husband F., during her lifetime for their own profit and advantage (and in case she dies without children, her husband, if he survives her, shall have the use of it for his benefit during his lifetime, and then," a devise over); in a codicil T. subsequently declared, "I hereby alter that part of my will found recorded on second page of this will, and at the end of the twenty second line that is now cancelled to the middle of the thirty-second line marked in parenthesis, so that it should read that my son-in-law, F., instead of only having a life estate in it shall own and possess it as his own without let or hindrance."

Held, that M. and her children were preferred devisees of the testator; and it was only on the event of her dying without children, and her husband surviving her, that he would become entitled to any interest in the land in severalty and possession.

Held, that while the effect of the codicil was to enlarge the *quantum* of F.'s estate it did not revoke the double

Digitized by Google

contingency. His estate was still subject to his surviving his wife, and her dying without children.

Appeal of I. J. M. Miller, defendant, from the judgment of the Common Pleas No. 2 of Allegheny County, upon a case stated, wherein Samuel Fife, and Margaret, his wife, were plaintiffs, and I. J. M. Miller was defendant, to recover the sum of $2,100 purchase money of a tract of land in Bethel township, Allegheny County.

The facts as set forth in the case stated were as follows: Andrew W. Tidball died seized, *inter alia*, of a tract of land, which, by his will, dated May 29, 1868, with a codicil thereto dated January 23, 1869, duly probated since his death, he devised, *inter alia*, as follows: "To my daughter Margaret I will the mansion house, already mentioned, and with it fifty-one acres, twenty three perches of land, more or less, being the one-half of one hundred and two acres and forty-six perches, as will appear from the plot of said land, to be used and controlled by her and her husband during her lifetime for their own profit and advantage, subject to the dower already mentioned and to the legacies yet to be mentioned (and in case she dies without children her husband, if he survive her, shall have the use of it for his benefit during his lifetime, and then it is my will that it shall go to and be inherited by my grandchildren, viz, the children of my son Alexander and daughter Rachel, both deceased, to be theirs and their heirs after them forever, and to be divided amongst them in equal proportions)"

In said codicil he provided as follows:

"First. I hereby alter that part of will found recorded on second page of this will, and at the end of the twenty-second line that now is cancelled to the middle of the thirty-second line marked in parenthesis; so that it shall read that my son-in-law, Samuel Fife, instead of only having a life estate in it, shall own and possess it as his own without let or hindrance, except as subject to the legacies, of which he is to bear his part as mentioned in the body of the will."

Testator's daughter Margaret intermarried with Samuel Fife, and being childless, Samuel Fife and his wife Margaret, entered into a contract with I. J. M. Miller by a writing dated January 6, 1894, to sell and convey to him in fee simple, free and clear of all incumbrances, a certain tract forming a portion of the land above divised for the sum of $7,509.62, excepting and reserving certain mining rights and privileges; the said purchase money to be paid, $200 on the signing of the agreement, $2,100 on the delivery of the deed, and the balance to be secured by a bond and mortgage. On April 2, 1894, the plaintiffs, in pursuance of said agreement, tendered to the defendant a deed for the purpose of conveying said premises, and demanded from him the said cash payment and the bond and the mortgage for the balance unpaid of said purchase money. The defendant refused to accept the deed and to pay the purchase money. It was agreed that the land was free from the charge of the dower and legacies mentioned in the will, and that the deed reserved the same coal and mining rights as provided in the agreement, also that Margaret Fife was childless. The Court entered judgment in favor of plaintiffs. The defendant took this appeal, assigning for error the entry of judgment for plaintiffs.

J. C. Boyer, for appellant.

It was not the intention of the testator to revoke the devise given by this will, but only to modify it.

Haynes *v.* The State, 15 Ohio, 455.

The life estate given by the will and for which the fee given by the codicil, was substituted, was a contingent life estate. By the codicil this contingent life estate, in remainder, is enlarged to a contingent fee in remainder.

To go farther than this is to do violence to the original will and established rules of construction.

Murch *v.* Marchant, 6 Man. & Gran. 813.
Spang *v.* Hill, 2 Woodw. 45.
Lewis' Appeal, 42 Legal Int. 336.
Reichard's Appeal, 19 WEEKLY NOTES, 501.

The disposition of a will will not be disturbed further than to the extent necessary to give effect to the codicil.

Schreiner's Appeal, 53 Pa. 106.
Hard *v.* Ashley, 117 N. Y. 606.

Alexander Gilfillan, for appellees.

The words used in the codicil, "alter," to change entirely, "cancel," to strike or cross out, to annul, to obliterate or expunge, taken at the number of the line at which the change is to begin and end, together with the parenthesis, certainly show a clear intention on the part of the testator to revoke the devise over.

Evans' Appeal, 58 Pa. 238.
Fuguet's Estate, 11 Phila. 75.
Warner *v.* Warner's Estate, 37 Vt. 362.

January 7, 1895. STERRETT, C. J. While the codicil is somewhat obscure, yet when read in connection with the original will of Alexander W. Tidball, deceased, it is plain that the contingent character of Mr. Fife's estate was not intended to be changed. The preferred object of testator's bounty was his daughter, Mrs. Fife, and her children. It was only in the event of her dying without children, or her husband surviving, that the latter could by any possibility

Digitized by Google

become entitled to a life estate in severalty and possession. Mrs. Fife living, his interest was purely contingent; if she survived him. or died leaving children, it could never vest in possession, but must thereupon end; and there need be no citation of authorities to show that the benefits so intended for testator's daughter and her children could not be taken away and given to Mr. Fife, a stranger in blood, without express words, or necessary implication.

It is conceded by appellant that the effect of the codicil was to enlarge the *quantum* of Mr. Fife's estate; but did it revoke the double contingency so that he took a vested fee in remainder dependent on the life of his wife? It is insisted on the part of the plaintiffs that this is implied in the use of the word "cancelled." But if the parenthetical clause be stricken out in accordance with this suggestion, and the codiciliary provision substituted, the result would be insensible. The devise would then "read": "To my daughter Margaret, the mansion house . . . . to be used and controlled by her and her husband during her lifetime for their own benefit and advantage . . . (my son-in-law, Samuel Fife, instead of only having a life estate in it, shall own and possess it as his own without let or hindrance . . . " It will be seen at a glance that this "reading" must be abandoned. It is clear that the codicil cannot operate by way of cancellation and substitution.

On the other hand, if the purpose of the codicil was that of alteration simply, and the parenthetical clause be filled, it ought to furnish the measure of change. "I hereby," says the testator, "alter that part of (my) will . . . in parenthesis, *so that* it shall read that my son-in-law, Samuel Fife, instead of only having a life estate in it, shall own and possess it as his own without let or hindrance." The "life estate," it will be seen, is here made the starting point of alteration. "Instead" of this, Mr. Fife "shall own and possess" what? Certainly nothing which can avail as against Mrs. Fife or her children. As they had been by express words made preferred devisees, the presumption must be that they would so continue until they should be displaced by equivalent phrases, and none such was used. There are neither express words nor necessary implication of alteration as respects them. Even were the matter in doubt, the doubt must be resolved in their favor. If the clause of alteration be operative at all, it can only be so as against those whose interests had been postponed to Mr. Fife's "life estate."

So far as appears, therefore, on the face of the codicil, Mrs. Fife and her children are still preferred devisees, and the double contingency, upon the happening of which Mr. Fife could take any interest in remainder, remains unaltered. If he should die leaving his wife or she should leave children, whatever interest he has, whether under the will or codicil, must thereupon end. Mr. and Mrs. Fife can, of course, convey such limited interest as they have; but cannot warrant as against the possibility of issue, nor as against the children of testator's son Alexander and daughter Rachel, who have not been made parties to this proceeding. It follows that they cannot convey a good title to the land which was the subject of devise, and hence the judgment of the Court below must be reversed. This conclusion renders it unnecessary to express any opinion as to the question of sufficiency in the form of the deed tendered.

Judgment reversed, and judgment on the case stated is now entered in favor of defendant with costs. S. H. T.

Oct. '95, 205. October 16, 1894.

Gilchrist v. Brown et al.

Equity—Ejectment—Evidence to establish resulting trust—Power of chancellor—Practice.

Where the question at issue is as to the existence of a resulting trust the Judge sits as a chancellor, and if the evidence in his judgment is insufficient to sustain a verdict, it is his duty to take the case from the jury.

If the Supreme Court is of opinion that the lower Court was correct in taking a case from the jury, improper answers to points for the jury will be disregarded.

Appeal of Matthew J. Brown and Mary M. Brown, from the judgment of the Common Pleas of Butler County, in favor of J. K. Gilchrist, guardian, in an action of ejectment.

The material facts and the assignments of error sufficiently appear in the opinion of the Supreme Court, *infra*.

The Court, HAZEN, P. J., directed the jury to find for the defendants. Verdict accordingly and judgment thereon.

The plaintiff appealed, assigning for error this direction and answers to points.

Lev. McQuistion (*J. C. Vanderlin* with him), for appellees.

The facts were sufficient to create a resulting trust.

Campe *v.* Horne, 158 Pa. 512.
Light *v.* Zeller, 144 Id. 571.
Dyberry School District *v.* Mercer, 115 Id. 559.
Miller *v.* Baker, 160 Id. 172.

It was error to say that the husband and wife constituted but one witness.

Yost *v.* Mensch, 141 Pa. 85.

Newton Black (*George W. Fleeger* with him), for appellee.

Digitized by Google

The resulting trust was barred after five years.

Act of April 22, 1856.
Folmar's App., 68 Pa. 482.
Way *v.* Hooton, 156 Id. 8.

The defence was an equitable one, and the Court sitting as a chancellor had a right to take the case from the jury.

Wylie *v.* Mansley, 132 Pa. 65.
Reno *v.* Moss, 120 Id. 67.
Piersol *v.* Neill, 63 Id. 420.
O'Hara *v.* Dilworth, 72 Id. 397.

January 7, 1895. WILLIAMS, J. This action was brought by a purchaser at sheriff's sale to obtain possession of a farm bought by him under a judgment against Matthew J. Brown. No question is raised over the regularity of the proceeding or the validity of the sheriff's sale. On the contrary it is conceded that the purchaser acquired the title of the defendant. The defence set up relates to an undivided three-fifths of the farm which, it is alleged, Mary M. Brown, wife of Matthew J. Brown, is entitled to under a resulting trust originating in 1868. The facts relied upon to raise the resulting trust are as follows: Brown was the owner in 1868 of a farm on which he resided containing thirty-seven acres. Margaret E. Christie owned another farm in the same region containing one hundred acres. For their mutual benefit an exchange of these farms was agreed upon, the difference in value to be left to three men selected by the parties to determine, and to be paid by Brown to Margaret Christie so as to meet the liens resting on her farm. In pursuance of this agreement the three appraisers valued the Christie farm at eighteen hundred and seventy-five dollars, and the Brown farm at twelve hundred. This left a difference of six hundred and seventy-five dollars to be paid to Margaret E. Christie in money. Deeds were exchanged in October, 1868, and Brown assumed the payments of the judgments against the Christie farm amounting to four hundred and thirty-two dollars and fourteen cents, and gave his bond to Miss Christie for two hundred and forty-two dollars and eighty-six cents to make up the full sum of six hundred and seventy-five dollars, the difference between the appraised values of the two farms. Mrs. Brown alleges, and it does not seem to be seriously controverted, that she furnished the money to pay the judgments and the balance due to Miss Christie, from her separate estate. This she claims she did upon an agreement that she was to have an interest in the land corresponding to the part of the whole price paid by her. By virtue of this agreement and the payment of the six hundred and seventy-five dollars of the purchase money, she contends that her husband became a trustee for her as to such part of the title as was paid for with her money. The learned Judge, after having heard the testimony, was of opinion that the evidence in support of the alleged contract was wholly insufficient to justify a chancellor in sustaining a verdict in its favor. He said, speaking of the evidence on this subject, "It is too loose, and we could not support a verdict upon such evidence if rendered. If it was a question before the Court sitting as chancellor in a proceeding in equity, it would be the duty of the Court to decide against the defendants." This was a sufficient reason for withdrawing the case from the jury and directing their verdict. The answers to points become therefore practically unimportant since the case turned upon the sufficiency of the proofs to justify the submission of the existence or effect of the alleged contract. If this was not so several of the assignments of error would require us to reverse this judgment. The answers to the first and second of the plaintiff's points require qualification, for as they stand they would be misleading. It is not necessary that the money of the wife should have gone "into the land at the inception of the husband's title" by an actual payment of it at that date. It is enough if it be paid as instalments or incumbrances fall due, provided such payments are made in pursuance of the contract under which the title was acquired, and upon the agreement that she is to receive the title to so much as she pays for in exchange for her money. The same error runs through the answers to other points, particularly that to the defendant's fourth point. This point asked an instruction upon the sufficiency of certain assumed facts to raise a resulting trust. The answer was in these words, "This is not affirmed unless the jury also find that the money, or some of it, was actually paid in consideration of the land at the inception of the title, and the other or remainder was actually set apart at the time for the purpose of paying for land." This would be understood as an instruction that payments of purchase money made subsequently to the date of the contract, although in strict compliance with its terms, would not support a resulting trust no matter how clear and distinct the agreement might be that she should be treated as a purchaser to the extent of the money furnished by her. If the case had gone to the jury the instruction could have been successfully complained of. The fifteenth assignment raises a question that has no practical importance in this case. If the testimony of Brown and his wife had been submitted to the jury it would have been important that the jury should know whether they were to be treated by them as one or as two witnesses; but as the testimony of both of them was in the judgment of the learned Judge too loose, indefinite and unsatisfactory to sustain a verdict, and was for this reason withheld from the jury, the

Digitized by Google

question played no part in the determination of this case in the Court below, and in this Court it is a question *in thesi* merely. The last assignment alleges error in the withdrawal of the case from the jury. We cannot sustain this assignment. The Judge was, as to the questson of the existence of the resulting trust, a chancellor. If the evidence was in his judgment insufficient to sustain a verdict, it was his duty to withhold it from the jury: Reno *v.* Moss, 120 Pa. 67; Wylie *v.* Mansley, 123 Id. 65. In such case it becomes unnecessary to answer points asking instructions to the jury since the case does not go to them. It is enough if the Judge puts upon the record his reasons for refusing to submit the case to the jury so that they may be reviewed by this Court. That was done in this case. We are satisfied with the reasons given, and upon that ground the judgment is affirmed.

W. M. S., Jr.

Oct. '93, 37. October 15, 1894.

Hollister to use, etc. v. Vanderlin.

Sheriff's sale—Inadequacy of price—Discretion of Court—Advertisement—Act June 16, 1836, Sec. 63, P. L. 772.

The requirement of the Act of 16th June, 1836, sec. 63, (P. L. 772), that a sheriff's sale of lands "shall be advertised once a week during three successive weeks" is fulfilled when the advertisement is made in a newspaper in one day of each of three succeeding weeks although there may not have been twenty-one days between the first publication and the day of the sale.

The Supreme Court will not review the discretion of the Common Pleas Court in refusing to set aside a sale when the advertised dates of sale appear to conflict.

Mere inadequacy of price alone is insufficient ground to set aside a sheriff's sale.

Appeal of Robert Vanderlin, defendant, from the decree of the Common Pleas of Butler County, confirming a sheriff's sale under a *venditioni exponas* issued on a judgment obtained against him by A. F. Hollister to the use of A. G. Egbert and George R. Sheasly.

At a sheriff's sale held by the sheriff of Butler County, a tract of 540 acres of land was sold as the property of the appellant and bought by the appellee for $8,000. To the confirmation of the sale appellant filed, *inter alia*, the following exceptions:

1. "He protests against the acknowledgment of said deed for the reason that the sale was not properly advertised and was misleading, the land being advertised to be sold on the 19th day of August, 1893, and at the same time advertised to be sold on the 28th day of August, 1893, neither of which sales was at the regular term. On the 19th day of August the sale was stayed until 2 o'clock of the 5th day of September, 1893, by the Court, and then on that day until 4 o'clock of said day, at which time the sale was made, after the great majority of the people in attendance on the sheriff sales had gone home, and the plaintiffs in the writs had the bidding all their own way. The public did not know of the orders of Court staying said sale. They look in the usual places, the public newspapers and in the printed hand-bills which the law requires. Had there been such notices at the regular term a much higher price would have been bidden, as exceptant verily believes."

2. "The land having been advertised to be sold subject to two mineral mining grants belonging to the plaintiffs in the writs, had the effect of keeping or deterring bidders from bidding on the land; and all for the purpose as exceptant believes, to keep away bidders." And, "Deponent, as a further reason against the confirmation, files the following bid on the land sold of nine thousand ($9,000) dollars. Said bid is made jointly by John and Eli Vanderlin, they owning in fee simple over six hundred acres of land in said county, unincumbered, valued at a low estimate of ten thousand dollars, the same being *bona fide*."

The plaintiffs offered to increase their bid from $8,000 to $10,000, giving an additional credit of $2,000 on their judgment. Two brothers of the appellant then offered to bid $11,000. The sheriff's sale was advertised for 28th of August, 1893, but was stayed until September 5, 1893, and was advertised on August 11, 18 and 25, 1893.

The Court dismissed the exceptions of defendant and he then appealed.

John M. Thompson, (with him *L. McQuistion* and *J. C. Vanderlin*), for appellant.

Notice of a sheriff's sale must be published twenty-one days before the sale.

Act June 16, 1836, Sec. 63, P. L. 772.
Erie Savings Fund *v.* Thompson, 13 Phila. 511.
Barclay *v.* Robb, 5 Pa. C. C. R. 646.
Good *v.* Maule, 6 Kulp, 89.
Smith *v.* Tinicum Fishing Co., 1 Del. Co. Rep. 127.

Once a week for twelve successive weeks means twelve full weeks or eighty-four days.

Early *v.* Rogers, 16 How. 609.

An application to set aside a sale should be granted where it is accompanied by an offer to increase the highest bid at the sale.

Germer *v.* Ensign, 155 Pa. 464.

J. H. Osmer and *S. F. Bowser*, (with them *A. L. Bowser*, *C. Heydrick* and *Carl I. Heydrick*), for appellees.

Digitized by Google

Property lawfully exposed to public sale must take its chances.

Swires *v.* Brotherline, 41 Pa. 135.
Cooper *v.* Wilson, 96 Id. 409.

The *bona fide* purchaser, at a public sale of land, the moment it is knocked off to him, if he complies in all respects with the conditions of sale, instantly acquires a vested right in the property sold, and is bound by his bargain thus made. The vendee should certainly have the advantage of a purchase below the value, when he is bound by the purchase at a price greatly exceeding the true value.

Young's Appeal, 2 P. & W. 380 (382).

The Act of June 16, 1836, sec. 63, P. L. 772, enacts, then, under a penalty, that the sale should be advertised *once a week, during three successive weeks, previous to such sale.* It is not pretended that this requires that the successive advertisements should be at the distance of a week from each other. A week is a definite period of time commencing on Sunday and ending on Saturday (Ronkendorff *v.* Taylor's lessee, 4 Peters, 361). In the case before us the law has been literally complied with. There was an advertisement on some day of the three weeks which preceded the sale. It is difficult to perceive any warrant in the words or spirit of the Act, for the idea that the advertisement, "once a week," has relation to the full expiration of the whole week, from the date of the first advertisement, and so as to the remaining three weeks.

Troubat & Haley, Vol. 1, p. 807 (2nd edition).

The order was not for notice "during three successive weeks," nor "by a given number of insertions in newspapers in *successive weeks*," but it required a certain duration of time before the time of meeting.

In re North Whitehall Twp., 47 Pa. 156 (160).

Review of the action of the lower Courts in taking the acknowledgment of a sheriff's deed or setting aside a sheriff's sale has not heretofore been favored by this Court. It has often been refused—in some of the earlier cases with question of the power of review.

Sloan's Case, 8 Watts, 194.
Crawford *v.* Boyer, 14 Pa. 380 (383).
Hoffa's Appeal, 82 Id. 297.
Germer *v.* Ensign, 155 Id. 464.
Ritter *v.* Getz, 161 Id. 648.
Jackson *v.* Morter, 82 Id. 291.

January 7, 1895. MITCHELL, J. The objection to the sheriff's sale that it was not of the defendant's interest, but of the land, "subject to two mineral mining estates" owned by the use plaintiffs, has been disposed of by the decision in Porter *v.* Vanderlin, 158 Pa. 146.

The further objection is made to the advertisement of the sale that it was not made three full weeks before the day fixed for the sale. The language of the Act of June 16, 1836, sec. 63, P. L. 772, is that the officer making the sale shall give notice by advertisement "once a week during three successive weeks." Does this require that the first notice shall be three full weeks, or twenty-one days, before the day of sale? It does not appear that this point has ever been expressly decided by this Court, and the decisions of the Courts of Common Pleas are not uniform upon it. The general practice, however, has been against such requirement, and to regard the statute as referring to calendar weeks, or specified periods of time, and an advertisement in each of three successive periods of the kind, although the advertisements may not have been all on the same day of the week, and there may not have been twenty-one full days between the first and the date of the sale. This is the rule laid down in the books of practice, 1 Troubat & Haly, sec. 1250, and has been recognized by this Court inferentially at least *In re* North Whitehall Township, 47 Pa. 156, where a notice directed to be given "three weeks before the time of meeting" was held to mean twenty-one full days, and was expressly distinguished by STRONG, J., from a notice "during three successive weeks," or one for "a given number of insertions in successive weeks." Many hundreds of titles have been made under this view of the law, and it would require a very clear case of error to justify us in throwing a doubt upon them by a contrary construction. No such showing has been made. This objection cannot be sustained.

The remaining exceptions by the appellant are to matters of discretion in the Court below. The sale was at first advertised for August 19, but subsequently for August 28. As the advertisements for the 28th were complete and regular and the sale was regularly adjourned from that date, there was no legal right of appellant violated. If intending bidders were in fact misled by conflict of dates, presumably it could have been shown. What the mistake was which induced the re-advertisement does not appear, but the whole matter was before the Court below, and there is nothing to show that its discretionary power was not rightfully exercised. The proceedings being regular, appellant's application to set aside the sale was left to depend on inadequacy of price, and this has been uniformly held not to be of itself sufficient. The application might therefore have been dismissed without more, and the sale confirmed at the price bidden thereat. Appellant would have had no ground of complaint, and he is certainly no worse off because the Court accepted the offer

Digitized by Google

of the purchasers to give an additional credit on their judgment. The circumstances were peculiar. The beneficial plaintiffs had a judgment which was the first lien, larger than any bid made at any time for the property. They purchased at the sale, receipting to the sheriff for the amount of their bid. There were no proceeds of the sale to go to any one else. When, in order to put an end to the contention, or possibly to satisfy any doubt in the mind of the Judge arising from the offer of one thousand dollars advance by the Vanderlins, the purchasers offered to give an additional credit on their judgment, and the Court accepted the offer, the appellant was just that much better off by the reduction of his debt, and no one else was injured. There was no feature of auction by the Court about the transaction. Auction, on the contrary, would have been started had the Court then entertained the new bid from the Vanderlins. This he properly refused to do. All that he did was to accord the appellant a benefit *ex gratia*, of which he has no reason to complain.

Judgment affirmed.

W. D. N.

Oct. '94, 244. October 17, 1894.

Burford to use, etc., v. Fergus.

Set-off—Burden of proof.

The burden of establishing a fact by proof rests upon the party asserting it.

A. drew a note under seal to order of B. and on the same day B. assigned it to C. who assigned it to D. In an action by D. against A., the latter offered in evidence, under plea of set-off, an overdue note of B. to order F. and assigned to A.

Held, 1. That by producing note, A. had established a valid set-off; he was not bound to establish that he had no notice of the assignments of B.'s original note to plaintiff.

2. To defeat the right of set-off thus established the onus was upon the plaintiff to prove the assigament to him and that defendant had notice of the set-off.

Pennell *v.* Grubb, 15 Pa. 551, distinguished.

Appeal of R. Burford for use of J. M. Braden and A. S. Sprowls, now for use of Samuel Hazlett, from the judgment of the Common Pleas of Washington County.

On the trial, before McILVAINE, P. J., plaintiff offered in evidence a note under seal of S. P. Fergus, the defendant, to the order of R. Burford for $750 and proved assignment to Braden and Sprowls, and from them to plaintiff. The defendant, under plea of set-off, offered in evidence an overdue note given by Burford to Town Brothers and purchased by defendant before action brought. The execution of and consideration for both notes were admitted.

The plaintiff requested the Court to charge the jury as follows:

1. Before the defendant can use the Town note as a set-off in this case, he must satisfy the jury by a preponderance of evidence that he was the *bona fide* holder of that note before he or his attorney had notice of the assignment of the Burford note to Braden and Sprowls.

Answer: This point, as drawn, is refused, as an unqualified affirmance might mislead the jury. It is true that the jury must be satisfied by a preponderance of the evidence that the defendant was a *bona fide* holder of the Town note before he or his attorney had notice of the assignment of the Burford note to Braden and Sprowls, but if the defendant has shown to the satisfaction of the jury that he was the *bona fide* holder of the Town note before his note to Burford became due, then the plaintiff must show that the Burford note was assigned to Braden and Sprowls (if the note does not already appear in the evidence) before the defendant became the *bona fide* owner of the Town note. (Second assignment of error.)

2. The burden of proof is on the defendant to show that he had a right to use the Town note as a set-off before he or his attorney had knowledge of the assignment of the Burford note to Braden and Sprowls.

Answer: Refused. The burden of proof is on the defendant to show that he became the owner of the Town note before his note to Burford became due, and before suit was brought, this will entitle him to his set-off unless it appears in the evidence that he or his attorney had notice of the assignment of the Burford note to Braden and Sprowls before he became the owner of the Town note. (Third assignment of error.)

The Court charged the jury, *inter alia*, as follows:

"But now come the plaintiffs and in reply to this claim of the defendant say, granting that this $859 note was assigned on the 3d day of June, 1893, and that the title actually did pass to Mr. Fergus, the $750 note of Burford's which S. P. Fergus signed and became bound to pay, was not the property of R. Burford at the hour or time that this $859 note that is offered as a set-off became the property of Mr. Fergus. They say that R. Burford's $750 note, which he held against S. P. Fergus was assigned to Messrs. Braden and Sprowls before Samuel Fergus got the title to this $859 note. Now, the law, as we understand it, casts the burden on the use plaintiff, if there is a dispute as to the hour of the assignments on this 3d day of June, to show that the assignment of the $750 note was before the time the $859 note

Digitized by Google

was assigned to Fergus. We say the burden of proof is on the use plaintiff."

Verdict for defendant and judgment thereon.

Plaintiff appealed, assigning for error the answers to the above points and the portion of the charge quoted.

James E. Barnett and *R. W. Irwin* (*A. M. Linn* with them), for appellant.

One who claims set-off must have obtained possession of set-off before the assignment of original claim to *bona fide* holder.

Northampton Bank *v.* Balliet, 8 W. & S. 318.
Miller *v.* Bomberger, 76 Pa. 81.
Kountz *v.* Kirkpatrick, 72 Id. 385.

The burden is upon him to prove that he owned the claim before he received notice.

Pennell *v.* Grubb, 13 Pa. 551.

A. M. Todd, for appellee.

The facts left to the jury by the Court were: 1. Was the defendant the *bona fide* owner of the Town note? 2. Did he acquire said note before notice had been given to him or to his attorney of any assignment either of the note given by him to Burford or of Burford's claim? The jury were told that they must be satisfied of these facts "by a preponderance of the evidence." They found both in favor of the defendant and this should be an end of further controversy.

January 7, 1895. FELL, J. The case presents but one question, and that relates to the burden of proof. The action was on a note under seal made by the defendant to the order of R. Burford, the legal plaintiff, and by him assigned to the equitable plaintiffs. The defendant before suit brought purchased the overdue note of the legal plaintiff to the order of Town Brothers, and at the trial offered it in evidence under the plea of set-off. The execution and consideration were admitted as to both notes, but it was claimed by the equitable plaintiffs that the defendant had notice of the assignment to them of the note of Burford before he purchased the note of Burford to Town Brothers which he sought to use as a set-off.

In the answers to the points, and in the portion of the charge excepted to, the jury was instructed that the burden of proof was on the defendant to show that he was a *bona fide* holder of the Town note before suit was brought, but that the burden rested on the plaintiffs to show notice to the defendant of the assignment of his note to them before he acquired the set-off. The single question related to the burden of proof of the notice of assignment.

This was a theoretical rather than a practical question, as the testimony was presented in a regular and orderly manner at the trial and the jury was instructed in a clear and well considered charge which covered the points of the case in the order in which they had arisen, and particular directions were given as to the preponderance of evidence which should influence their finding. The burden of establishing a fact by proof rests upon the party asserting it. It may be shifted by the pleadings, or changed in the course of the trial by the order in which the testimony is presented. When the plaintiffs put the note in evidence, with the assignment to them, they established *prima facie* a right of recovery against the defendant. When the defendant offered the Town note with proof of his ownership before suit brought he established a valid set off. He could have rested there, as he was not bound to show more. He had answered the plaintiffs' case fully. The fact of the assignment to them did not affect the right of set-off; proof of notice of it to the defendant before he acquired the claim used as a set-off would have done so. Proof of no notice was not required to establish the right of set-off, but proof of notice was necessary to defeat the right.

The recovery sought was in the right of the legal plaintiff, and it would have been defeated in the first instance by any defence that was good as between the original parties. If the use plaintiffs had a right superior to that of the legal plaintiff which prevented the use of the note as a set-off, it was founded upon the fact of the assignment to them, which they had proved, and upon the fact of notice to the defendant, which they had not proved. A superior equity in them could arise only upon proof of the two facts necessary to establish it—the assignment and notice, and the *onus probandi* as to both rested with them.

In the case of Pennell *v.* Grubb, 13 Pa. 551, relied on by the appellant, the question of the burden of proof of the time of the acquisition of a cross demand by the garnishee against the defendant arose between the plaintiff in the attachment execution and the garnishee, and was held to be with the latter. The case is authority for nothing else. The service of the attachment was notice to the garnishee of the interest and equity of the plaintiff and fixed the rights of the parties as of that date, as the service of the summons did here, and the garnishee could defend on no cause of action at that time incomplete. The burden of showing that he had at impetration of the writ, an independent cause of action rested upon the garnishee in that case as it did upon the defendant in this.

The judgment is affirmed.

W. M. S., Jr.

Digitized by Google

Oct. '94, 107. October 24, 1894.

Armstrong v. Latimer et al.

Contracts—Monthly settlements—When credits must be claimed—Duress, fraud or mistake necessary to annul.

Where a contract provides for monthly settlements at the middle of the month for all coal delivered before the first of the month, it cannot be held, that, although these monthly settlements were actually made, and the amounts to be paid definitely ascertained and actually paid, preceding deliveries remained open, subject to any kind of controversy which either party might choose to set up subsequently.

Duress, mistake or fraud must be shown to annul or alter a contract.

Appeal of Robert Latimer and Albert Meyers, partners, trading as Latimer, Meyers & Co., defendants, from the judgment of the Common Pleas No. 1, of Allegheny County, in an action of assumpsit, wherein Frank Armstrong was plaintiff.

On the trial of this cause, before STOWE, P. J., the following facts appeared:

The plaintiff was an owner and operator of coal mines and agreed to sell to defendants, who were retail coal dealers, all the 1½ inch coal and all the nut coal needed to run their yards and to furnish it unless there was a strike at his mines. Settlements to be made on the 15th day of each month for all coal delivered before the first day of that month. This agreement was made April 1, 1890, and was to continue until April 1, 1895. All the coal delivered by Armstrong up to June, 1892, had been fully paid and settled for when this action was brought to recover for coal furnished in June and July, 1892. For the defence the following offer was made:

"Counsel for defendants propose to prove by the witness on the stand and by other witnesses, that under the contract offered in evidence, the firm of Latimer & Meyers received coal from the plaintiff in large quantities from Sept. 1, 1890, to the time of bringing the suit; that of the one and one-half inch coal, about 937 tons consisted of binders and other worthless material. That during the same period, a large quantity of nut coal was not nut-coal, but was really slack, having been run over a covered screen, and that complaint was made of this frequently to Armstrong. That payment for the coal already delivered having been demanded by Armstrong, it was refused by Latimer & Meyers. That Armstrong thereupon refused, unless payment was made of the whole amount claimed by him, to continue the shipment of coal according to the contract, in June, 1892. That at that time it was impossible to buy any coal in the market from other parties, and that by reason thereof, Latimer and Meyers paid to Armstrong, the plaintiff, all money claimed by him for coal delivered up to that time, stating they did so because of his refusal to furnish that coal, and that they would hold him responsible for the loss, and would take the same out of the coal he thereafter should deliver under the contract. We make the offer only to cover the deficiencies in the coal up to June." Objected to; objection sustained. The defendants also asked the following question: "From November 1st, 1890, to March 31st, 1891, was there any time that you ordered nut coal more than was furnished by the plaintiff during that time?" Objected to; objection sustained.

Verdict for plaintiff for $4,480 and judgment thereon.

The defendants appealed, assigning for error the rejection of the offer of evidence above mentioned and also the rejection of the question heretofore given.

John D. Shafer, (*Alexander Gilfillan* with him), for appellants.

The rejection of the offer set out in the first assignment of error, was based upon the assumption made by the Court that the statements contained in the offer showed a settlement of accounts between the parties up to that time. But the learned Court overlooked the fact that according to the terms of the contract mentioned in the offer and already in evidence the plaintiff was bound to sell to defendants all the coal of certain kinds needed to carry on two coal yards, and the defendants were bound to purchase all this coal from plaintiff for a long period of time, which has not yet elapsed. There was in the very nature of the contract to be a continuing account between them. They differed as to the state of the account at a particular period.

This is very different from a settlement of accounts, and furnishes no reason why the true state of accounts between the parties should not now be gone into.

The second assignment of error is to the rejection of defendant's offer to prove that the plaintiff neglected to furnish all the coal ordered by defendants of him. This was not in any way embraced in the first offer, nor was there anything from which it could be inferred that any settlement of such a matter had ever been had between the parties. Taking the offer contained in the first assignment in connection with it, the most that could be claimed by the plaintiff was that he had been paid for the coal he claimed to have delivered. How this also paid the defendants for their loss for coal he had not delivered we fail to see. The learned Judge must have been of opinion that the payment by defendants of the amount demanded by plaintiff was a settlement of all matters that might be in contro-

Digitized by Google

versy between them up to that date, whether mentioned in the transaction or not. Even if there had been no continuing contract between the parties, the payment could not have had any such effect.

J. S. Ferguson, (*E. G. Ferguson* with him), for appellee.

A voluntary payment of money under a claim of right cannot in general be recovered back. To warrant such a recovery there must be compulsion, actual, present and potential, and the demand must be illegal. In the absence of such compulsion a mere protest is not sufficient. The element of coercion is essential to the right. Where there is no mistake or fraud, a voluntary payment cannot be recovered back, on the mere ground that the one party was under no compulsion to pay and the other had no right to receive.

McCrickart *v.* Pittsburgh, 88 Pa. 133.

Where there is no element of compulsion, actual, present or potential in inducing payment, the protest of the payor and his purpose to preserve his credit are insufficient to render a payment involuntary and leave with the payor a right of recovery.

Harvey *v.* Girard National Bank, 119 Pa. 212.
Forbes *v.* Appleton, 59 Mass. 115.
Radich *v.* Hutchins, 95 U. S. 210.

January 7, 1895. GREEN, J. While it is true that the contract between the parties was a continuing contract during a period of five years, it is also true that one of the terms of the contract was that, "Settlements from said coal shall be made upon the fifteenth days of each month for all coal delivered before the first day of such month." On the trial, Robert Latimer, being one of the defendants and called as a witness on their behalf, was asked to tell about the quality of coal which the defendants received from the plaintiff from September 1, 1890 to 1891. To this offer plaintiff's counsel objected on the ground that none of that coal was involved in the suit, that the action was brought to recover only for coal delivered in June and July, 1892, all the coal previously delivered having been paid for. Thereupon the objection being sustained, counsel for defendants made an extended offer of proof, not denying the allegation of the plaintiff's counsel, the substance of the offer being that large quantities of coal had been received from the plaintiff from September 1, 1890, to the time of bringing this suit, that very much of the coal thus received was of inferior and worthless quality, that payment having been demanded by the plaintiff for the coal already delivered the defendants refused to pay; "that Armstrong thereupon refused, unless payment was made of the whole amount claimed by him, to continue the shipment of coal according to the contract, in June, 1892. That at that time it was impossible to buy any coal in the market from other parties, and that by reason thereof Latimer & Meyers paid to Armstrong all the money claimed by him for the coal delivered up to that time, stating to Armstrong at the time of making the payment that they did so because of his refusal to furnish them coal, and that they would hold him responsible for the loss and would take the same out of the coal he thereafter should deliver under the contract. We make the offer only to cover the deficiencies in the coal up to June." To this offer objection was made that it was incompetent and irrelevant and the objection was sustained and exception noted, and the rejection of this offer of proof constitutes the principal assignment of error.

It seems clear to us that the offer was properly rejected. Specifically all the coal previously delivered up to June, 1892, was paid for in full by the plaintiffs. Beyond all question this was a voluntary payment which could not be recovered back, under all the authorities, and this proposition is not controverted by the appellants. On the contrary, appellants' counsel admit that one who pays a bill cannot recover back the amount paid because it was paid with a protest that it was unjust, or declared to the creditor that he would set it off against the next transaction he had with him. But appellants argue that this is not such a case because the contract is a continuing one and the payment made did not close the transaction. We do not perceive the force of this contention. As we said before, the contract specifically provided that there should be settlements on the fifteenth of every month for all coal delivered up to the first of the month, so that it cannot be said that the contract left open, or intended to leave open, all the transactions under it until the end of the business done under its terms. There were to be settlements, and they were to occur every month and they were to include all coal delivered before the first of the month. We can only understand this to mean that the amounts owing by the defendants to the plaintiff were to be fixed, determined, adjusted, settled, at the middle of the month for *all* coal delivered before the first of the month. We cannot hold that these parties having used such language meant really its opposite, that is, that although these monthly settlements were actually made, and the amounts to be paid definitely ascertained and actually paid, those preceding deliveries still remained open, subject to any kind of controversy which either party might choose to set up subsequently, throwing open the whole subject of the deliveries, which would necessarily include the amount

Digitized by Google

and quality of the coal delivered, the prices to be paid and all matters affecting those questions. We could not possibly so hold without disregarding the plain meaning of the words of the contract and also its manifest spirit and purpose. The subject seems really too plain for argument. There was no element of duress about such payments, and there was no pretence of any mistake or fraud in the settlement. It seems unnecessary to pursue the subject farther. The assignments of error are dismissed.

Judgment affirmed.

W. C. S.

Oct. '94, 152. October 29, 1894.

The Farmers and Mechanics Bank, etc., v. The Third National Bank.

Banks—Agency—Clearing House—Pleading—Rules of Court—Practice—Negligence.

A bank acting as Clearing House agent for another is only bound to act in the matter of collecting checks through the Clearing House, and is not required to present them at the bank on which they are drawn.

Where a rule of Court provides that "such items of claim and material averments of fact as are not specifically traversed and denied by the answer shall be taken as admitted," an undenied allegation of negligence is not to be "taken as admitted," if the relations of defendant to plaintiff do not legally support the duty alleged to have been neglected.

The question of the extent of the power of a bank cashier to bind the bank by his action apparently within the scope of his duty is one of fact for the jury.

Appeal of The Third National Bank of Pittsburgh, defendant, from the judgment of the Common Pleas No. 1, of Allegheny County in an action of assumpsit, wherein The Farmers and Mechanics Bank of East Birmingham, for use of J. H. Sorg, H. J. Berg, Jr., and L. S. Cunningham, assignees of said bank, was plaintiff.

The facts of the case appear in the opinion of the Court.

At the trial the Court (STOWE, P. J.), charged the jury as follows:—

"Under the law and the facts in this case, as we understand them, the plaintiff is entitled to your verdict for the amount of this note with the proper interest. Therefore under our instructions it will be your duty to return a verdict for that amount."

Verdict for plaintiff and judgment thereon. The defendant appealed and assigned as error the charge of the Court.

James C. Doty, (*James R. Sterrett* with him), for appellant.

The cashier is the executive officer of a bank.

1 Morse on Banks and Banking, sec. 152, p. 308.
Bank *v.* Tyler, 3 W. & S. 373.
Bank *v.* Reed, 1 Id. 106.
Lloyd *v.* Bank, 15 Pa. 172.

His power may be derived not only from the by-laws of the bank, but from usage and custom.

1 Morse on Banks and Banking, sec. 165, p. 343.
Merchants' Bank *v.* State Bank, 10 Wall. 604.

Johns McCleave, (*D. T. Watson* with him), for appellee.

January 7, 1895. FELL, J. On May 23, 1884, the plaintiff received from one of its depositors a check on the Penn Bank, and on the same day delivered it to defendant for collection through the Clearing House. The Penn Bank had suspended payment, and was closed at the time of the receipt of the check by the defendant, but was open for an hour on the afternoon of May 23, which was Friday. It was open on Saturday the 24th, and a part of Monday the 26th. Checks on it were paid through the Clearing House on Saturday, but not on Monday. The check in question was not sent to the Clearing House on Saturday, as the Penn Bank had for some days been closed, and when it was sent on Monday it was returned dishonored. On the 27th the assistant cashier of the defendant returned the check with others to the assistant cashier of the plaintiff and explained to him that the officers of the Third National Bank had no knowledge that the Penn Bank cleared on Saturday, and that as it was the Clearing House agent only, the check was not presented at the bank. After this explanation and a full statement of all that had been done the check was handed back, and the plaintiff's check was received in adjustment of the accounts between the parties.

The business between the banks continued as before from this date, May 27, 1884, until February 28, 1888. During this time the defendant continued to act as the Clearing House agent of the plaintiff, and a pass-book was kept in which this and all other transactions were entered. This book was balanced monthly until it was finally closed February 28, 1888, at which time a full and final settlement was made between the banks. In 1884 suit was brought against the plaintiff by the depositor of the check for negligence in failing to collect it of the Penn Bank, and judgment obtained against it in 1885, which was paid October 15, 1888. The plaintiff suspended payment and made an assignment for the benefit of creditors. On May 20, 1890, this suit was brought by the assignees.

The rules of Court provide that " . . . such items of claim and material averments of fact as are not directly and specifically traversed and

Digitized by Google

denied by the answer shall be taken as admitted." The statement and the affidavit of defence are therefore to be taken in connection with the facts established by the testimony. The affidavit contains no specific denial of the averment that the defendant had an opportunity to collect the check on the 23d, the 24th and the 26th, but did not present it and negligently failed to collect it. The statement charges the defendant with no duty but that of a Clearing House agent, and avers no breach of that duty, but only that the check ought to have been collected by presentation at the counter of the Penn Bank. *Prima facie* no such duty was imposed by the agency, and there is nothing in the statement to show that there was anything in the facts and circumstances to give rise to it. The agency set out was to collect through the Clearing House, and no negligence in that regard was alleged. The only opportunity to collect through the Clearing House was on Saturday morning. The Penn Bank was closed on Friday, and the clearings were made on Saturday before it opened. Without knowledge or the means of knowledge that the bank would resume payment on Saturday there was no duty on the defendant to send checks on it to the Clearing House. The circumstances may have given rise to such a duty, and possibly to the duty of presentation at the bank, but they do not appear in the pleadings. The inquiry as to negligence was therefore not closed by admission for want of denial in the affidavit, but was open and for the jury.

The settlement of accounts, including the check in question, was made by the assistant cashier of the defendant in accordance with the practice and course of business between the banks. His authority to bind the plaintiff, if not inherent, might well be presumed from his position and the nature of the act, or become defined as to the defendant by its habitual exercise with knowledge and acquiescence. This settlement was made after a disclosure of all that had been done in relation to the check. It was entered on the pass-book of the plaintiff, and the business relation continued as before without interruption for nearly four years, when a full settlement of all their business was had. No objection was made at any time, although suit was brought against the plaintiff and recovery had for its neglect in relation to the check. This action was instituted by the assignee for the benefit of creditors within seven days of the period of the bar of the statute of limitations.

The defendant was entitled to go to the jury on the question of the authority of the assistant cashier and the subsequent ratification of his acts, and of the binding effect of a settlement made and acquiesced in for such a length of time.

The assignment of error is sustained and the judgment reversed, with a venire facias de novo.

W. D. N.

Jan. '95, 62. January 23, 1895.

Rhoads et al., v. Central Coal Dealers' Association et al.

Fitzpatrick's Appeal.

Affidavit of defence—Averment sufficient to require proof of plaintiffs' claim.

In an action to recover against defendants, who are charged in the statement as members of an association, for coal furnished to said association, an affidavit that appellant is not now and has not been connected in any way with the defendant association since December 13, 1892; that he is not indebted to plaintiffs in any sum whatever for coal sold and delivered, or for any other account whatsoever; that plaintiffs never dealt with said association while deponent was a member, and one of the plaintiffs knew that deponent was not a member of said association, is sufficient.

Appeal of Thomas Fitzpatrick, one of the defendants, from the judgment of the Common Pleas No. 3, of Philadelphia County, granted for want of a sufficient affidavit of defence, in an action by Samuel H. Rhoads and W. Durell Shuster, trading as Rhoads & Shuster, against W. H. Clowden, T. Fitzpatrick and others, trading as the Central Coal Dealers' Association.

This was an action brought against a large number of defendants, alleged to have traded as the Central Coal Dealers' Association, to recover for coal furnished to the said association.

The defendant, T. Fitzpatrick, filed the following affidavit of defence:—

"Thomas Fitzpatrick being duly sworn according to law deposes and says, that he has a full, just and complete defence to the plaintiffs' claim of the following nature and character, to wit: That no coal was sold and delivered to deponent as averred in the statement of plaintiff filed in the above case; that he is not now and has not been connected in any way with the Central Coal Dealers' Association since December 13, A. D. 1892; that he is not indebted to plaintiffs in any sum whatever for coal sold and delivered, or for any other account whatsoever, all of which deponent believes to be true and expects to be able to prove upon the trial of the above cause," and, after a rule for judgment, a supplemental affidavit setting out:—

"1. That there is no averment in the plaintiffs' statement that deponent was a member of said association at the time the coal was sold and delivered.

Digitized by Google

"2. That plaintiffs never dealt with said association while deponent was a member, and W. Durell Shuster, one of the above-named plaintiffs, knew that deponent was not a member of said association when the coal was sold and delivered.

"3. That deponent was treasurer of said association, and withdrew as a member December 13, A. D. 1892, and at said date the association was not indebted to any one.

"4. That W. Durell Shuster, plaintiff, knowing that deponent was not a member of said association, has several times stopped him since his retirement and endeavored to sell him coal.

"5. That deponent has not been connected with the association since his retirement as aforesaid and is not indebted to the plaintiff in any sum whatever."

The Court after consideration of both affidavits made the rule absolute.

The defendant took this appeal and assigned as error the entry of judgment for want of sufficient affidavit.

Charles J. Sharkey, (*John W. Martin* with him), for appellant.

Under the rules of the Courts of Common Pleas of Philadelphia County, Rule 1, Section 2, page 79, plaintiff must prove a partnership where defendant files an affidavit denying the existence of a partnership. In this case defendant denies the existence of a partnership and avers that plaintiffs knew that he was not a partner.

The dry allegation of a fact without detailing the evidence of it will suffice; the defendant need not state the evidence by which it will be established.

1 Chitty's Pleadings, 225 (Eighth Am. Ed.)
Kaufmann *v.* Cooper Iron Company, 105 Pa. 542.

Actual notice of cessation of defendant's membership in the association was not necessary, as the parties never had any previous dealings.

Robinson *v.* Floyd, *et al.*, 159 Pa. 165.

In this case, however, there is a distinct, clear and positive averment that one of the plaintiffs, W. Durell Shuster, knew that defendant was not a member at the time the coal was sold and delivered. This, if true, ends the case so far as appellant is concerned.

William H. Shoemaker, for appellees.

Rule 1, Sec. 2, of the Courts of Common Pleas of Philadelphia County, referred to by appellant, has no application; nor has the appellant complied with the rule, "stating, to the best of his or their knowledge and belief, whether there is any such partnership and who are parties to it." The rule has reference to procedure only, and the lower Courts are the best judges of the meaning of their rules of practice.

Rules of Court, Annotated by Hayes, page IX.
McLane *v.* Hoffman, 164 Pa. 491.

When an ostensible or known member of a co-partnership retires therefrom, and wishes to shield himself from liability for future debts of the firm, it is necessary that personal notice of his withdrawal be given to all who have had dealings with the firm, and that notice be given, by publication or otherwise, to all others.

Clark *v.* Fletcher, 96 Pa. 418.
Forepaugh *v.* Baker, 21 WEEKLY NOTES, 299.
Brown *v.* Clark, 14 Pa. 476.
3 Kent's Comm., 66 (11th Ed.)
Shamburg *v.* Ruggles, 83 Pa. 148.
Campbell *v.* Floyd, 153 Id. 93.
Selden *v.* Neemes, 43 Id. 423.
Bardsley *v.* Delp, 88 Id. 421.
Market Co. *v.* Brooks, 163 Id. 49.

No notice whatever is alleged to have been brought home to appellees. Notice of withdrawal of appellant from the association is not alleged to have been given in any form.

The citation from 1 Chitty's Pleadings, 225, made by appellant, refers to framing an issue in common law pleading, and has no bearing here.

February 4, 1895. STERRETT, C. J. This suit against the appellant, Thomas Fitzpatrick, and twenty-eight others, "now or late doing business as the Central Coal Dealers' Association," was brought by Samuel H. Rhoads and W. Durell Shuster, trading as Rhoads & Shuster, to recover $1,102.20, balance book account for coal alleged to have been sold and delivered by plaintiffs to the association defendant between the first of January and the sixth of May, 1894, with interest, etc.

Assuming for the present that plaintiffs' statement is sufficiently specific, the sole question is whether appellant's affidavits do not present a good defence. After averring "that he has a full, just and complete defence to the plaintiffs' claim," he further says, *inter alia*, that "he is not now and has not been connected in any way with the Central Coal Dealers' Association since December 13, 1892; that he is not indebted to plaintiffs in any sum whatever for coal sold and delivered, or for any other account whatsoever, ..." that plaintiffs never dealt with said association while deponent was a member, and W. Durell Shuster, one of the above-named plaintiffs, knew that deponent was not a member of said association; and, in substance, he further says that he withdrew from said association in December, 1892, and has not since been connected therewith.

Assuming, as we must, for the purposes of this appeal, that these and other averments, contained in the affidavits of defence, are true, it is

Digitized by Google

very evident that the plaintiffs were not entitled to judgment for want of a sufficient defence, and hence the Court erred in making the rule for judgment absolute. Appellant not only denies that he was a member of the defendant association during the period within which the coal was sold and delivered, but he positively avers that this fact was known to one of the plaintiffs. This was quite sufficient to put the plaintiffs to proof of the fact that appellant was a member of the defendant association to which the coal was sold and delivered, or of such other facts as would make him jointly liable with those who then composed said association.

Judgment reversed and a procedendo awarded.

W. C. S.

Oct. '94, 300 November 8, 1894.

Kennelty v. The Baltimore & Ohio R. R. Co.

Railroad companies — Running of trains — Schedules as to — Co-employes — Negligence of — Evidence.

Where it is clearly shown by the testimony, produced by the plaintiff, that the accident, upon which action is brought, was caused solely by a reckless disregard of clearly defined and well understood duties by co-employes of the person killed, there is no question for the jury.

An express train of a certain railroad came within one hundred miles of its terminus, P., two hours and eleven minutes late. There the engineer received a telegraph order to run to P. two hours late. By the rules of the road this meant that a track clear of all freight trains would be kept for it, but that the engineer must run with reference to the schedule time of all passenger trains. At the time an accommodation train was running on its schedule time to P. and to obey the telegraphic order the express train would have to pass it, or to run behind it in accordance with the general rule to which such orders was subject. The express train overtook and ran into the accommodation train, killing K., the brakeman and assistant baggage master on that train:

Held, that the accident was caused by the gross negligence of the engineer in running his train in violation of the rules of the road and that there can be no recovery against the company for K.'s death.

In a suit by K.'s wife against the railroad company the plaintiff asked a witness, the train dispatcher of the defendant company, whether some other method of running the trains would not have been "better railroading." Objected to, objection sustained, except on proof that the witness was qualified to speak as an expert:

Held, not to be error.

Appeal of Lida A. Kennelty, plaintiff, from the judgment of the Common Pleas No. 1, of Allegheny County, refusing to take off a non-suit entered in an action of trespass brought by her against the Baltimore and Ohio Railroad Company. Daniel J. Kennelty was an employé of the defendant company and was killed by a collision between an express train and the one upon which he was employed; his widow claimed to recover for his death. The other facts of the case are sufficiently set forth in the opinion of the Supreme Court, *infra*. During the trial the plaintiff asked the chief train dispatcher of the defendant company, the following question: "Now, wouldn't you consider it better railroading if an order had been sent out to No. 37 to look out for No. 5, and an order sent out to No. 5 to look out for No. 37, and also an order sent to the station agent at Glenwood to hold No. 5?" Objected to as incompetent and irrelevant. Objection sustained, unless ground was laid to show that witness was an expert. (First assignment of error.)

At the conclusion of the plaintiff's case the Court, STOWE, P. J., entered a compulsory non-suit, which the Court in banc refused to take off. Whereupon the plaintiff took this appeal, assigning for error the refusal to take off the non-suit, and the rejection of the evidence noted above.

James S. Young, (*S. U. Trent* with him), for appellant.

It is the duty of a railroad to frame and promulgate such schedules and rules for the moving of trains as will afford reasonable safety to the operatives engaged in moving them.

Lewis *v.* Seifert, 20 WEEKLY NOTES, 145.

It was therefore right to introduce evidence to show that the proper means for avoiding an accident were not employed.

Johns McClave, (*D. T. Watson* with him), for appellees.

January 7, 1895. FELL, J. The plaintiff's husband was employed by the defendant as a brakeman and assistant baggage master. He was killed by a collision of the train on which he was employed with another passenger train which ran into it from the rear. The accident was the result of gross negligence, and upon the trial the only question was whether the negligence was that of a co-employé in disregarding the rules for the movement of trains or of the defendant in not providing a safe schedule.

Both trains were running west on the same track towards Pittsburgh. Train No. 37, on which the deceased was riding, was running on its schedule time. Train No. 5, which ran into it, reached Rockwood, one hundred miles east of Pittsburgh, two hours and eleven minutes late, and the engineer there received a telegraphed order to run to Pittsburgh two hours late. The schedule time of the arrival of train No. 37 at Pittsburgh was 10.50 P. M., and that of No. 5

Digitized by Google

was 8.30 P. M. Running two hours late under the special order this train would reach Pittsburgh at 10.30 P. M. A literal compliance with the order would have required train No. 5 to pass train No. 37 and any other local trains which were in its way on the west bound track, and would have required additional orders to all such trains to get out of the way.

All the testimony shows that this special order was to be read in connection with the general rules of the company for the running of trains, and that it was so understood by everyone connected therewith. It meant that No. 5 should run two hours late and would have a track clear of all freight trains, but that it must run with reference to the schedule of all passenger trains. It imposed upon those charged with the running of the train the duty to observe the schedule time of all passenger trains and to run ten minutes behind the time of the train which it followed to Glenwood, and five minutes behind it from there to Pittsburgh. It appeared that this was distinctly understood by the trainmen who received the order, and that the collision resulted from their neglect. Within a few miles of the point where the accident occurred the conductor of train No. 5 was aware that they were running too fast, and signalled the engineer to reduce the speed, and when within a few hundred feet of the point he knew that they were close upon time of train No. 37. A moment before the collision, but when too late, he directed the baggage master to look out the side door for the train.

It was clearly shown by the testimony produced by the plaintiff that the collision was caused, not by an unsafe schedule or defective rules, but that it was due to the reckless disregard of clearly defined and well understood duties by those in charge of the train. As they were co-employés of the plaintiff's husband, there was nothing to leave to the jury, and the nonsuit was properly entered.

We find no error in the refusal of the offer of testimony which is the subject of the first assignment. It should be observed that this ruling was subsequently modified to admit the testimony on proof that the witness was qualified to speak as an expert. The offer did not raise a question as to the safety of the schedule and the rules adopted by the defendant for the operation of its road or of any orders given at the time. The witness was asked for an opinion as to whether it would have been "better railroading if an order had been sent out to No. 37 to look out for No. 5, and an order sent to No. 5 to look out for No. 37, and also an order sent to the agent at Glenwood to hold No. 5." It is not apparent that the trainmen of No. 37 could have done more under a special order than they did to give notice to No. 5, which followed them. They were in charge of a regular passenger train running on schedule time and having schedule rights, and had taken the usual precaution of fixing signal lights on the rear platform of the last car. It was a clearly defined duty of the trainmen of No. 5 to look out for No. 37, and no special order would have made it clearer. They knew this, and they knew the time of the train, and knew that they were encroaching upon it. Train No. 5 passed Glenwood station as it should have done, five minutes after train No. 37, and even with a special order, as each train was in its proper position on the road, there would have been no reason for holding it.

The judgment is affirmed.

S. H. T.

Oct. '94, 18. October 22, 1894.

Davis v. Koenig.

Acceptance of goods shipped—Right to refuse merchandise.

Payment of freight and receipt of goods are not necessarily an acceptance of the goods.

If goods are unmerchantable at time of shipment, or become so before arrival in consequence of the negligent manner of packing, it is the right of the vendee to refuse them, even after having taking physical possession of them.

Appeal of H. C. Koenig and Edward D. Gaertner, defendants, from the judgment of the Common Pleas No. 2, of Allegheny County, in an action of assumpsit, in which A. E. Davis was plaintiff.

The statement of claim set forth, that on June 30, 1893, the defendants agreed to buy from the plaintiff one car load of cabbage, to be delivered on board car at Lynchburg, Va., at the price of $1.25 per barrel; that, on July 1, 1893, the plaintiff shipped the car load consisting of 276 barrels in good condition, according to contract, which car load was received by the defendants at Pittsburgh and had not been paid for, whereby the defendants were indebted to the plaintiff in the sum of $345.

The affidavit of defence set up that about June 29, 1893, the defendants were informed by plaintiff that he would ship to them one car load of cabbage; that a few days later they received from him a letter and bill of lading of "the finest all just cut cabbage ever shipped;" that on July 6, 1893, they received notice from the railroad officials of the arrival of the carload of cabbage; that believing it to be as described by the plain-

Digitized by Google

tiff in his letter they took the cabbage and paid the freight; that on examination they found that the cabbage was of an inferior character, that much of it had decayed and was so negligently packed that it was bound to decay; that they at once, July 6, 1893, telegraphed to plaintiff that the car load was rotten in the middle, and on July 7th that they would sell the cabbage for account of plaintiff; that they did so and received $107.40, which, after deducting the freight and commissions made the sum due to the plaintiff $51.90, for which amount they tendered judgment.

The plaintiff took a rule for judgment for want of a sufficient affidavit of defence, which the Court made absolute. The defendant took this appeal.

T. L. Gaertner, for appellant.

If the buyer has been imposed upon by the fraud of the vendor, he has a right to refuse to accept the goods, even after delivery of them, if the discovery is not made until then.

1 Benjamin on Sales (4th Am. Ed.), sec. 674.

If plaintiff packed interior of car full with cabbage which was so far decayed as to destroy the merchantable character of the goods, and thereby converted it into an article substantially different in kind, defendants were not bound to accept it.

Fogel *v.* Brubaker, 122 Pa. 7, 15.

Receipt and acceptance under said circumstances are not identical. An acceptance includes the intention to retain. On arrival of goods at railroad yards, vendee has a reasonable time in which to examine and accept or reject them, and any formal notice is sufficient in refusing to accept the goods.

Tiedeman on Sales, sec. 114, 115.
2 Benj. on Sales (4th Am. Ed.), 1042.

William R. Blair, for appellee.

Under the contract in this case no particular kind or quality was ordered or contracted for, and the plaintiff fulfilled his contract when he shipped to defendants cabbage of merchantable quality and condition, as he swears in his affidavit of claim he did.

Wetherill *v.* Neilson, 20 Pa. 448.
Eagan *v.* Call, 34 Id. 236.
Warren *v.* Phil. Coal Co., 83 Id. 437.
Ryan *v.* Ulmer, 108 Id. 332.
Idem, 137 Id. 313.
Fogel v. Brubaker, 122 Id. 7.

It was not the plaintiff's duty, as alleged in said affidavit of defence, "under these circumstances to put none but the very best quality, sound and free from blemish, marketable, salable, and in every other respect good cabbage into the alleged car, so that on the arrival of the car in Pittsburgh the cabbage would still be in as good condition as when first placed in the car by plaintiff."

Ryan *v.* Ulmer, 108 Pa. 332.
Wharton's Law of Contract, sec. 223.
Fogel *v.* Brubaker, *supra*.
Borrekins *v.* Bevan, 3 Rawle, 23.
Selser *v.* Roberts, 105 Pa. 242.

The Court was right in entering judgment in the plaintiff's favor, because the affidavits filed were both of them argumentative, evasive and equivocal, and do not set forth facts constituting a defence to plaintiff's claim. If the affidavits had averred that plaintiff shipped to defendants cabbage that was unmerchantable, and known to be so by him at the time of shipment, this rule would never have been taken nor this judgment thereon entered; but that averment is precisely what the affidavits do not contain, though this was expressly urged upon appellant's counsel when the rule was first heard, and an opportunity was given to counsel to supplement his defence.

January 7, 1895. FELL, J. The affidavit in this case is lacking in the merit of clear and concise statement, but it appears to contain the elements of a good defence.

The payment of the freight and the receipt of the goods was not under the circumstances an acceptance of them. Until there was a delivery by the railroad company, and the car was being unloaded, there was no opportunity to make such an examination of the goods as would disclose the condition of those in the middle of the car. The purchaser might rely upon the goods being merchantable at the time of shipment, and upon their being packed in the manner and with the care usual to prevent their deterioration and decay while in transit. If the goods were unmerchantable at the time of shipment, or if they became so before arrival because of the unusual and negligent manner in which they were packed by the vendor, it was the right of the vendee to refuse them. These points are sufficiently covered by the affidavit of defence, and we are of opinion that it was sufficient to prevent judgment and to entitle the defendant to go to trial.

The judgment is reversed with a procedendo.

W. C. S.

Oct. '94, 112. October 24, 1894.

Vincent v. Woodland Oil Co.

Broker—Commissions—Contract.

An offer to sell land at a certain price without more is in the present only, and may be withdrawn at the next ensuing moment. There is given by the offer no time for considera-

Digitized by Google

tion which a jury may find reasonable or otherwise, unless by the agreement or concession of the party making the offer. A broker cannot claim commissions unless an actual sale has been made, *i. e.*, where the minds of the vendor and vendee concur on the subject of the sale or agreement.

Middleton *v.* Thompson, 163 Pa. 112, distinguished.

Appeal of the Woodland Oil Company, defendant, from the judgment of the Common Pleas No. 2, of Allegheny County, in action of assumpsit, wherein James W. Vincent was plaintiff.

On the trial of this cause before MAGEE, J., the facts appeared as follows: The defendants engaged the services of plaintiff to endeavor to sell certain oil leases at a price fixed at $150,000. The property was offered to the Eastern Oil Company of Buffalo, whose officers said "they would buy if the property was as represented." Before the property was proven to be as represented, a well was "struck" on a farm adjoining one of those on which defendant's leases were located, and, the day before the property was examined by the Eastern Oil Co., the defendant informed plaintiff that the price now was $175,000. The president of the Eastern Company was informed of the advance but nevertheless proceeded to examine the property and offered the defendants $150,000 for the same. This was declined and the sale was not consummated.

The plaintiff then brought suit to recover the commission of two and one-half per cent. he alleged defendant promised to pay him.

Defendant denied the employment of plaintiff, and averred that plaintiff did not conclude a bargain of sale for the properties, and that he knew of the possible advance in the price.

The Court charged the jury, *inter alia*, that:—"It cannot be well said that if the sale had been negotiated and agreed upon, subject to the examination of the property to be made by the purchaser as to the correctness of the representations made, accomplished within three or four days or a week under the circumstances of this case, that it would be open to the objection, that the operation lacked promptness in execution, or that it was not accomplished within a reasonable time to be allowed, for the exercise of the privilege conferred upon the plaintiff. The authority conferred, however, was subject to recall at any time before sale was made, but if delayed until the purchaser had been secured, the compensation for the services would then be earned." (First assignment of error.) . . . .

"If the authority to sell at the sum of $150,000 was withdrawn, with notice thereof given to the plaintiff—because he ought to have notice—before a sale had been made by him on the terms authorized, then his compensation for service based upon a sale would not be earned, but would depend upon other considerations for its ascertainment. Now Mr. Weil has stated in his argument that they do not ask anything except the whole amount claimed, but it is dependent upon what the jury find as to whether there was a commission of 2½ per cent. agreed upon, or no agreement as to 2½ per cent., or to any compensation, and that it depends on the circumstances what in your judgment the verdict should be; if you find evidence to warrant any other consideration as a reasonable and proper compensation for the services rendered, you disregard what the parties say as to that." (Tenth assignment of error.)

The defendant submitted the following points:—

"3. That as between the plaintiff and defendant the plaintiff had no authority under the evidence in the case to hold the offer open pending investigation of the property by O'Neil, on behalf of the Eastern Oil Company."

"4. That under the plaintiff's testimony to the effect that the Eastern Oil Company had agreed to purchase, provided it became satisfied by the investigation of O'Neil, of the truth of the representations as to the property, there was not such an acceptance of the defendant's offer as would entitle the plaintiff to recover."

"6. That under the defendant's testimony, to the effect that the Eastern Oil Company had agreed to purchase, provided it became satisfied by the investigation, of the truth of the representations as to the property, and under the undisputed evidence that the defendant telegraphed on Wednesday, before the time fixed for the investigation, requiring an answer that night, the defendant was entitled in reply to a definite, complete and final acceptance of their offer. That the reply of the plaintiff was not such an acceptance, and that as between the plaintiff and defendant, the defendant had the right to declare the offer no longer open; and if the jury believe that in connection with the foregoing the defendant did so declare to the plaintiff on Thursday, the plaintiff is not entitled to recover."

"7. That if O'Neil had notice, prior to leaving Pittsburgh, after his investigation of the property, and before reporting the result to the Eastern Oil Company, that the defendants were no longer willing to sell for $150,000, the plaintiff is not entitled to recover."

These points were refused. (Fourth, fifth, seventh and eighth assignments of error.)

The plaintiffs presented, *inter alia*, the following point:—

"3. If the jury believe from the evidence that J. W. Vincent, the plaintiff, was authorized by the Woodland Oil Company to offer their property to the Eastern Oil Company for the

Digitized by Google

present price of $150,000, said Eastern Oil Company were entitled to a reasonable time in which to accept or reject this proposition, and what was such reasonable time is a question of fact for the jury."

This was affirmed.

Verdict for plaintiff and judgment thereon.

The defendant appealed and assigned error, *inter alia*, as above indicated.

John F. Sanderson, (with him *Walter Lyon* and *Charles H. McKee*), for appellant.

The plaintiff not having found a purchaser ready and willing to purchase at the defendant's price is not entitled to a commission.

McDonald *v.* Simcox, 98 Pa. 619.
Railway Co. *v.* Rolling Mill Co., 119 U. S. 149.
McGavock *v.* Woodlief, 20 How. 221.

1. The offer required an immediate acceptance.

2. It was not immediately accepted.

3. It did not authorize a delay until Friday for examination.

4. The acceptance alleged did not bind the Eastern Oil Company to purchase.

5. It made O'Neil the judge of the truth of the representations.

6. It fixed no time for closing the transaction or payment of the price.

7. It was not understood by the Eastern Oil Company to be a binding acceptance as shown by the plaintiff's testimony, that after O'Neil's examination the Eastern Oil Company telegraphed the plaintiff that they would take the property.

The plaintiff had no power to postpone the actual purchase until after examination, nor for a reasonable time, nor for any time.

The business of agents for the purchase and sale of real estate is simply to bring the parties together. They have no implied authority from the nature of their business. They cannot bind their principals as to the terms of sale, or the damages which may arise from the breach of any contract for the purchase or sale of real estate.

In re Assignment of Fairmount Cab Co., 47 Leg. Int. 524.

Authority to sell at once at a certain price does not imply power to sell subsequently at same price.

Matthews *v.* Sowle, 12 Neb. 398.
Bliss *v.* Clark, 16 Gray, 60.

Defendant had the right to revoke the offer to sell at $150,000 at any time before final acceptance and did so revoke it. This is a defence to the claim for a commission.

Childs *v.* Gillespie, 147 Pa. 173.
Stitt *v.* Huidekoper, 17 Wall. 384.
Middleton *v.* Thompson, 35 WEEKLY NOTES, 1.
Heffner *v.* Chambers, 121 Pa. 84.

A. Leo. Weil, for appellee.

A real estate broker's commissions are earned whenever he has procured a buyer who will comply with the conditions fixed by his principal for the property to be sold.

Clendenon *v.* Pancoast, 75 Pa. 213.
Pratt *v.* Patterson's Exrs., 112 Id. 475.
Jaekel *v.* Caldwell, 156 Id. 266.
Hill *v.* Jones, 152 Id. 433.

A broker is held to be entitled to compensation in proportion to the service performed, where the order is countermanded by his principal.

Durkee *v.* Vt. Cent. R. R. Co., 29 Vt. 127.

January 7, 1895. MITCHELL, J. The learned Judge left to the jury whether any sale was made by the plaintiff before notification of the change of price, and in doing so he charged them by affirming plaintiff's third point, that the Eastern Oil Company as purchasers "were entitled to a reasonable time in which to accept or reject the proposition, and what was such reasonable time was a question of fact for the jury." The same principle runs through the charge as printed out in the assignments of error, and it is plain that the finding of the jury was based upon that view of the case. But the direction was erroneous, and the undisputed facts show that there was no such sale.

An offer without more is an offer in the present, to be accepted or refused when made. There is no time which a jury may consider reasonable or otherwise for the other party to consider it, except by the agreement or concession of the party making it. Until it is accepted it may be withdrawn, though that be at the next instant after it is made, and a subsequent acceptance will be of no avail. The circumstances here show conclusively that the defendant's offer was not an open or continuing one. Time was not only of the essence of it, but was intended to be urgent. The nature of the property as oil producing made it liable to fluctuations in value which raise a presumption that time was of the essence of transactions concerning it, and the facts in regard to the wells in the immediate vicinity then going down show that a new development at any hour might materially affect its value, and that this was understood by the parties. The written authority to the plaintiff was to offer it at a "present price," and this was shown to the intended purchasers and was notice to them that the price was likely at any moment to be changed. The plaintiff made the offer to the Eastern Company on Monday. On Wednesday plaintiff telegraphed defendant that the

Digitized by Google

purchaser would "go on the property on Friday," and the same day, Wednesday, defendant telegraphed back to plaintiff, "Must have an answer before to-night." On Thursday plaintiff returned to Pittsburgh and was told by defendant that in the meantime another well had come in, and the price of the property had been advanced. Was there any evidence on which the jury should have been allowed to find that there had been a sale made previous to this notice to plaintiff of the change in price? We do not find any. There had been no present acceptance of the offer by the Eastern Oil Company. Plaintiff testified, "they said if the property was as it was represented they would purchase," and Forman, the president of the Eastern Company, said, "We sent our superintendent to investigate the property and concluded to buy it at the price of $150,000 named." This is substantially all there is on the subject, and it shows that at no time previous to the examination of the property had the Eastern Company accepted the offer, or given anything but a conditional promise to accept thereafter, if in their judgment the property came up to the description. Before they had done so the defendant withdrew the offer. There never was the essential basis of a contract of sale, the concurrence of the two minds at the same time.

There is nothing in the case of Middleton *v.* Thompson, 163 Pa. 112, which conflicts with these views. It was there held that a broker has certain implied authority in regard to representations as to the title of his principal, and as to the examination of it by the intending purchaser. So it may be freely conceded here that plaintiff had authority to stipulate that the property should be as it was described, and if the Eastern Company had accepted the offer, subject to such condition, the contract would have been complete, although conditional, and no new conditions could have been added except by consent of both. But as already seen, there was no acceptance at all prior to the withdrawal of the offer. In Middleton *v.* Thompson there was no question of revocation of the agent's authority. Here the whole case turns on the effect of such revocation by the alteration of the terms on which he was authorized to sell.

There having been no performance of the plaintiff's undertaking to sell, nor what would for the purpose of this case be equivalent, the procuring of a purchaser on the stipulated terms while they were in force, the plaintiff cannot recover commissions as such, but so far as at present appears there was no agreement that his services were to be rendered on a mere contingency, and his authority having been revoked for no fault of his, he may be entitled to proper compensation for his time, labor and expenses, incurred in good faith in the defendant's interest before notice of the change in the terms of his agency. This matter was submitted by the learned Court below to the jury, but in connection with the question of the sale, and we are without means to determine on which basis the jury made up their verdict.

Judgment reversed and venire de novo awarded. W. D. N.

Executive Department of Pennsylvania.

In re South Side Water Company.

Charter—Water companies—Exclusive privilege—Purchase of franchise.

The Monongahela Water Company having purchased the franchise of the Manufacturers' Water Company, the latter company having been incorporated under the Act of 1874, with the exclusive privilege of supplying water in a certain district, may rightfully object to the incorporation of the South Side Water Co., for the purpose of supplying water in the same district.

The executive department will not decide disputed questions of fact, neither can questions of fraud be looked into, but only such matters as show whether an application is in due form, and whether or not on the face of the records and the law in the case, a charter should issue.

In re application for a charter of the South Side Water Company.

The facts sufficiently appear in the opinion, *infra.*

Lyon, McKee and *Sanderson,* for the applicant.

Watson, McCleave and *Thomas D. Carnahan,* for the protestant.

January 15, 1895. THE SECRETARY OF THE COMMONWEALTH (HON. WILLIAM F. HARRITY).

The "South Side Water Company" has made application for letters patent under the Act of April 29, 1874, and its supplements, for the purpose of the supply of water to the public in that portion of the City of Pittsburgh lying southwest of the Ohio and Monongahela rivers, and to such persons, partnerships and corporations residing therein or adjacent thereto, as may desire the same.

The "Monongahela Water Company" has filed a protest against this application, and the following facts relative thereto have been found:

The Monongahela Water Company was incorporated by Act of 21st of April, 1855, (P. L. 577), with power to supply water to the boroughs of Birmingham, East Birmingham and South Pittsburgh. By Act of March 1, 1871, (P. L. 135), it was authorized to extend its water supply to the Boroughs of Ormsby, St.

Digitized by Google

Clair, Allentown, Mt. Washington, West Pittsburgh, and Temperanceville, and the townships of Lower St. Clair, Union and Chartiers. This territory, with the exception of a portion of the townships, is now all embraced within the limits of the City of Pittsburgh, is on the south side of the Monongahela river and is known as the South Side of the City of Pittsburgh.

The "Manufacturers' Water Company of Pittsburgh" was chartered by the Governor on July 9, 1886, for the purpose "of supplying water to the public in that portion of the City of Pittsburgh lying south of the Monongahela river."

Under the Act of 1874 and its supplements, the "right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one, and no other company shall be incorporated for that purpose until the said corporation shall have from its earnings realized and divided among its stockholders, during five years, a dividend equal to eight per centum per annum upon its capital stock."

The Monongahela Water Company formally accepted the provisions of the Constitution and Act of 1874 and was granted letters patent bearing date August 18, 1888. It thereupon purchased from the Manufacturers' Water Company, all its rights and privileges.

It will be noted, that while the charter of the Manufacturers' Water Company and of the Monongahela Water Company cover territory south of the Monongahela river, the present application asks for the territory lying southwest of the Ohio and Monongahela rivers, but this variance was not made a point in this case, it being conceded, as we understand it, that it is to be decided on other grounds, and it being, we believe, admitted that the South Side Water Company now seeks to be chartered for the same territory. It is claimed that the Manufacturers' Water Company had under its charter the right to acquire or perfect its exclusive franchise in the district covered by its charter, but that it never did actually so acquire it, or has lost it by reason of the said sale of its franchises to the Monongahela Water Company.

We have very carefully examined the briefs which were prepared by counsel, and which exhaustively state the whole case, and while many of the facts which are alleged on the one side and denied on the other would probably be material in a suit of law, they are not to be decided here; neither can questions of fraud be here looked into; but such matters as would show whether the application was in form, and whether or not on the face of the records and the law in the case, that a charter should issue. We find that the application is in form; but the more vital point seems to be, a satisfactory answer to the question, whether or not an exclusive right was originally acquired by the Manufacturers' Water Company, so far as the requirements of this case are concerned, and did it pass by this sale to the Monongahela Water Company. It is contended that the exclusive privileges of the Manufacturers' Water Company never actually vested, and that consequently its successor, the Monongahela Water Company, could not acquire them. So far, however, as the records in this office show, the Manufacturers' Water Company was duly chartered, and acquired the exclusive right to have and enjoy the franchises and privileges of such incorporation, within the district or locality covered by its charter. We cannot decide whether it did or did not perfect its franchises, but there is no record here, which shows, nor has it been established, that its franchises ever lapsed or were forfeited; and hence we think that the making of this application would not be the way to determine that the Monongahela Water Company, had or had not purchased a valuable franchise. All that we can say as to this application, is, that on it being made, said corporation was duly chartered with certain exclusive privileges, and that they have not been shown to have been forfeited or destroyed.

These franchises were subsequently purchased under section 23 of the Act of April 17, 1876, which provides that "it shall be lawful for any corporation in the same manner to sell, assign, dispose of and convey to any corporation 'created under or accepting the provisions of this Act,' its franchises and all its property, real, personal and mixed, and thereafter such corporation shall cease to exist, and the said property and franchises, not inconsistent with this Act, shall thereafter be vested in the corporation so purchasing as aforesaid."

This section is plainly worded and certainly gave to the Monongahela Water Company the right to purchase the franchises of this company, and this was done, and they being of an exclusive charter, this sale did not extinguish them, and another company cannot be chartered for the same district, until it is affirmatively shown that this exclusive privilege no longer exists.

It was not contended that the Manufacturers' Water Company or the Monongahela Water Company had from their earnings realized and divided among their stockholders, during five years, a dividend equal to eight per centum per annum, upon their capital stock; and we have for these reasons and a careful consideration of the whole case, decided that the application for charter of the South Side Water Company should not be granted.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, MARCH 1, 1895.* [No. 3.

Supreme Court.

Oct. '94, 272. November 8, 1894.

Bayer v. Walsh.

Will—Privilege of purchasing under—Option—Statute of frauds—Lien of judgment.

Where a testator bequeaths land to several in shares, with the proviso that within a given time one of them may "purchase the shares of the others" at a price fixed in the will, and the devisee to whom the privilege is given elects to take, he takes not by purchase from or through the other devisees but under the provisions of the will.

P. left a piece of land to his daughter A. and his sons E. and J., "to be divided into shares, thus, A., $1200, E., $800, and J., $1,000, to hold to themselves, their heirs and assigns forever, provided that my daughter A. may, at her option, within five years of my death, purchase the shares of E. and J., named in this item, price not exceeding the amount bequeathed to each." At the time of her father's death, October 19, 1892, there was a judgment against E. On November 1, 1892, execution was issued, and levied on E.'s share in the devised lot. On October 31 A. had elected to take E.'s share and had paid him $800, but did not then receive a deed. The purchaser at sheriff's sale of E.'s interest brought ejectment against A. and J.:

Held, (1) that A. on the exercise of her election took title directly under the will and not through or by a purchase from E.; (2) that even if the transaction were considered a purchase from E., his title was on October 31, 1892, divested by the completion of the sale before the acquirement of any lien upon the land by the judgment creditor, whose execution did not issue until November 1, 1892.

Appeal of Charles F. Bayer, plaintiff, from the judgment of the Common Pleas No. 2, of Allegheny County, in an action of ejectment brought by him against Patrick Walsh and Alice Walsh, his wife, and Joseph McMullen. This was an action of ejectment to recover an undivided four-fifteenths part of a lot of ground fronting on Brownsville avenue, in the City of Pittsburgh.

On the trial, before MAGEE, J., the following facts appeared:—

Patrick Mullen died October 19, 1892, seized of the land described in the writ; by his will he provided as follows:—

"Item.—I give and bequeath my residence on Brownsville avenue, with lot 37 feet front by 120 feet deep, with privilege of the alley at the side, and valued at $3,000, to my daughter Alice Walsh, and my sons Edward McMullen and Joseph McMullen, to be divided in shares thus: Alice, $1,200, Edward $800, and Joseph $1,000—to hold to themselves, their heirs and assigns forever; provided, that my daughter, Alice Walsh, may, at her option, within five years of my death, purchase the shares of Edward and Joseph, named in this item; price not exceeding the amount bequeathed to each."

On October 31, 1892, Alice, who was living on the premises, having elected to take Edward's share of the lot, paid him the sum of $800, and some time afterwards received a deed for the said share.

As evidence of payment, *inter alia*, the following receipts were given in evidence.

"PITTSBURGH, PA., Oct. 31, 1892.

"Received of Alice Walsh, eight hundred dollars, in payment of share of Edward McMullen, as specified in will of Patrick McMullen, deceased. ANTHONY MCMULLEN, Executor."

"EXHIBIT C."

"Received of Anthony McMullen, executor of the estate of Patrick McMullen, eight hundred dollars, in payment of sum specified in will. EDWARD MCMULLEN."

At the time of the testator's death the plaintiff had a judgment against Edward McMullen in the Court of Common Pleas No. 1, of Allegheny County, at No. 216 September term, 1888, D. S. B., filed July 23, 1888, for $731.91, and on which a fi. fa. to No. 115, September term, 1888, had issued and been returned "*nulla bona.*"

On November 1, 1892, an alias fi. fa. was issued, and on the same day a levy was made by the sheriff on all the interest of Edward McMullen in the premises described in the writ, and on the same day the levy was entered on the judgment docket for the purpose of acquiring a lien under this fi. fa.

On March 10, 1893, all the interest of Edward McMullen in the lands devised him by his father, being the premises described in the writ of this ejectment, was sold by the sheriff, by virtue of the lien secured by levy made on November 1, 1892, and purchased by the plaintiff for $500, and for which he subsequently received a deed from the sheriff.

The defendant submitted, *inter alia*, the point: "That under the law and the evidence their [the jury's] verdict must be for the defendant." This point the Court affirmed and directed a verdict accordingly. (First, second and third assignments of error.) Verdict and judgment for defendant.

The plaintiff took this appeal, and filed assignments of error as above indicated.

S. A. Will, for appellant.

Digitized by Google

Under the will of Patrick McMullen his children took title in fee. It is sought to divert Edward's title by proof of a parol sale. The burden is upon the alleged purchaser to make out the sale by full and complete proof in order to take the same out of the statute of frauds. The receipts, the only matter of evidence of the alleged sale, are too indefinite and incomplete to be written evidence of the sale of land, neither of them specifies that it was given for purchase money of land; they might have reference to anything else coming from Patrick Walsh's estate and coming to Edward.

Mellon *v* Davison, 123 Pa. 298.
Reno *v.* Moss, 120 Id. 49.
Hammer *v.* McEldowney, 46 Id 334.
Ferguson *v.* Staver, 33 Id. 413
Ballou *et al. v.* March, 133 Id. 64.

A defendant setting up a parol contract to defeat an ejectment on the legal title comes under the same rule as if he were plaintiff seeking to enforce specific performance.

Moore *v.* Swall, 19 Pa. 461.
Rankin *v.* Simpson, Id. 471.

Specific performance of a contract will not be decreed unless the terms of the contract are clear and certain, and capable of ascertainment from the instrument itself.

Ballou *et al. v* March, 133 Pa. 64.

A contract for the sale of land is within the statute of frauds, "and therefore void and unenforceable, if parol testimony be required to establish any essential part of it."

Mellon *v.* Davison, 123 Pa. 298.
Hammer *v.* McEldowney, 46 Id. 334
Ferguson *v.* Staver, 33 Id. 413.

A written contract that requires verbal testimony to sustain it, by proving any essential part of it, is a verbal contract. This has been the uniform course of decisions.

Soles *v.* Hickman, 20 Pa. 180.
Smith & Fleek's Appeal, 69 Id. 474.
Troup *v.* Troup, 87 Id. 149.

To take a parol contract for sale of lands out of the operation of the statute of frauds the evidence must define the boundaries, indicate the quantity of the land, fix the amount of consideration, establish the facts that possession was taken in pursuance of the contract and immediately after time it was made, that the possession was notorious, and that it had been exclusive, continuous and maintained.

Hart *v.* Carroll, 85 Pa. 508.
Moyer s Appeal, 105 Id. 432.
Milliken *v.* Dravo, 67 Id. 230.
Woods *v.* Farmere, 10 Watts, 195.
Moore *v* Small, 19 Pa. 461.
Haslet *v.* Haslet, 6 Watts, 464.
Aitkens *v.* Young, 12 Pa. 15.
Frye *v.* Shepler, 7 Id. 91.
Miller *v.* Zufall, 113 Id. 317.
Anderson *v.* Brinser, 129 Id. 376.

A continuance of a prior possession is not enough.

Greenlee *v.* Greenlee, 22 Pa. 225.
Myers *v.* Byerly, 45 Id. 368.

The statute embraces a transfer by one tenant in common to another of his interest in land.

Galbreath *v.* Galbreath, 5 Watts, 146.

There cannot be a distinct transfer of possession as a tenant in common.

Hill *v.* Meyers, 43 Pa. 170.
Spencer's Appeal, 80 Id. 317.
Chadwick *v.* Felt, 35 Id. 305.

The parol contract of sale was not executed until the delivery of the deed, and the possession and other acts of ownership, after that time, are to be accounted for by the deed and cannot be called in aid of the parol contract.

Willey *et al. v.* Day, 51 Pa. 51.

The case was in any event for the jury.

Whether the evidence is sufficient to take the case out of the statute of frauds is for the Court. And then for the jury to say whether the testimony is true or not.

Troup *v.* Troup, 87 Pa. 149.
Bowers *v.* Bowers, 95 Id. 477.
Sidwell *v.* Evans, 1 P. & W. 383.

There was no conversion. The land itself was devised, and to work a conversion there must be either, 1st, a positive direction to sell; or 2d. an absolute necessity to sell in order to execute the will; or 3d, such a blending of real and personal estate so as to clearly show an intention to create a fund out of both, and bequeath the same as money.

Hunt & Lehman's Appeals, 105 Pa. 141.

And the directions to sell must be positive, irrespective of contingencies, and independent of discretion.

Peterson's Appeal, 88 Pa. 397.
Anewalt's Appeal, 42 Id. 416.

Conversion must come through the will, not through the act of the beneficiary.

Roland *v.* Miller, 100 Pa. 47.

John R. Harbison, (*Clarence Burleigh* with him), for appellee.

Under the will Alice had a right to take the land upon making a certain payment. When she exercised this right she derived title directly from the will and not through Edward.

As between Alice and Edward, Edward's title had passed before the lien of the appellant's execution had attached.

Under the will and the evidence, Edward

Digitized by Google

parted with personal property; and no deed of conveyance was necessary, however desirable it might be.

Mellon *et al v.* Reed *et al.*, 123 Pa. 1.
Johnson *et al. v.* Johnson *et al.*, 32 P. F. Sm. 257.

If the interest of Edward was real estate, and therefore within the statute of frauds as to the mode of transfer, how could the appellant, a mere creditor, compel Edward to disavow a sale with which he is entirely satisfied? Before the statute of frauds real estate might be sold by parol; that statute introduced a benefit, of which a party defendant might avail himself and refuse conveyance because the sale was not manifested by writing. But it is equally true that he need not avail himself of it. Indeed, if he would have its benefits he must plead the statute.

But, conceding that his interest was real estate, the case at bar was not within the statute of frauds. The option from the father to the daughter being in writing, her acceptance by parol and payments were all sufficient, for where an option is given in writing for the purchase of land, and accepted by parol within the time stipulated, it is not within the statute of frauds.

Smith & Fleek's Appeal, 69 Pa. 480.

There was no dispute as to the facts that Alice Walsh, the defendant, purchased whatever interest Edward McMullen acquired under the will of his father in the real estate in dispute prior to the lien of the judgment of the plaintiff.

That the purchase by Alice Walsh was *bona fide* was not denied. No fraud in the purchase was alleged or claimed. Nor do we see how it well could be, as Alice in doing what she did simply accepted the privilege bequeathed her by her father's will.

January 7, 1895. STERRETT, C. J. It is admitted that Patrick McMullen, whom both parties recognize as the common source of title, died seized of the lot in controversy October 19, 1892; and that, by his last will, dated October 1, 1890, and probated October 29, 1892, he devised said lot as follows: "I give and devise my residence on Brownsville avenue, with lot 37 feet front by 120 feet deep, ... valued at $3,000, to my daughter, Alice Walsh, and my sons, Edward McMullen and Joseph McMullen, to be divided in shares, thus: Alice, $1,200, Edward, $800, and Joseph, $1,000, to hold to themselves, their heirs and assigns forever; provided, that my daughter, Alice Walsh, may, at her option, within five years of my death, purchase the shares of Edward and Joseph named in this item, price not exceeding the amount bequeathed to each."

This action was brought to recover possession of the alleged four-fifteenths interest of Edward McMullen in the lot devised as aforesaid, which plaintiff claimed to have acquired by purchase at sheriff's sale on an execution issued November 1, 1892, on a judgment entered against Edward McMullen, in his father's lifetime, and levied same day on his interest in said lot. It is conceded that plaintiff had no lien on said interest prior to November 1, 1892, when he caused the execution to be issued and levy made. It therefore follows that if the interest of Edward McMullen under his father's will was legally divested before the date of said levy, the plaintiff acquired nothing by virtue of the said sale and sheriff's deed. In substance, that was the defence relied on by the defendants. Their contention was that, after her father's death, Mrs. Walsh determined to exercise the option, given to her by the will, to take her brother Edward's interest in the lot on the terms and conditions therein expressed; that her election to do so was fully consummated on October 31, 1892, by payment of the $800, acceptance of the same by Edward and giving the receipts put in evidence. There was no room for any doubt as to the facts of which this defence is predicated. They were clearly and conclusively proved by witnesses whose credibility was unquestioned, and whose testimony was not controverted or in any degree affected by any evidence in the cause. The controlling facts having been thus established, the learned trial Judge affirmed defendants' first point and directed a verdict in their favor. In this we are not prepared to say there was any error. Mrs. Walsh had an undoubted right to exercise the option given her by the will. That she did exercise it and fully comply with the terms thereof before the levy was made cannot be seriously doubted. Having done so, she was as completely invested with title to the four-fifteenths in question as she was with the six-fifteenths interest directly devised to her. As to both, she took under the provisions of her father's will; the one directly and the other by electing to take and paying the sum named in the will. The transaction was in no sense a purchase from Edward. That would imply consent on his part, which under the terms of the will was wholly unnecessary. It was for Mrs. Walsh, and for her alone, to determine whether she would exercise the option or not. But assuming for the sake of argument that the transaction was a purchase of Edward's interest in the lot, the plaintiff could not be permitted to recover as against a complete equitable title in Mrs. Walsh acquired by the purchase and payment of the consideration money before any lien attached by virtue of the levy or otherwise. Under our system of administering equity in common law actions, the defendants might well rely on an

Digitized by Google

outstanding equitable title in Mrs. Walsh to the four-fifteenths interest in controversy. No trial Judge should sustain a verdict in favor of the plaintiff in the face of such conclusive proof in support of the defence as was given in this case.

We find no error in the record that requires a reversal of the judgment.

Judgment affirmed. H. B.

July, '94, 203. January 30, 1895.

Ashhurst et al. trustees, v. The Eastern Pennsylvania Phonograph Company.

Landlord and tenant—Lease—Notice holding over.

Where a lease for a term certain, contains a clause to the following effect:

"It is hereby further agreed that if the lessee shall hold over after the expiration of the term hereby created, with the consent of the lessors, it shall be deemed and taken to be a renewal of this lease and all terms, conditions, covenants, and provisos herein contained, for the term of another year, and so on if the possession is still continued with like consent, after the expiration of this additional year, from year to year, unless either party shall give three months' previous notice to the other of an intention to determine the tenancy at the end of any year," the obligation to give notice before leaving does not arise until after the expiration of the additional year.

Appeal of Richard Ashhurst and others, trustees, plaintiffs, from the refusal of the Common Pleas No. 2, of Philadelphia County, to give judgment for want of sufficient affidavit of defence in an action of assumpsit upon a lease, brought against the Eastern Pennsylvania Phonograph Company. The plaintiffs filed a statement claiming to recover rent amounting to $637.47, alleged to have accrued from June 15, 1893, to February 15, 1894, upon a lease by plaintiffs to defendant dated May 12, 1891, for the term of one year from May 15, 1891, the said lease containing the following clause: "It is hereby further agreed, that if the lessee shall hold over after the expiration of the term hereby created, with the consent of the lessors, it shall be deemed and taken to be a renewal of this lease and of all terms, conditions, covenants and provisos herein contained, for the term of another year and so on if the possession is still continued, with like consent, after the expiration of this additional year from year to year unless either party shall give three months previous notice to the other of an intention to determine the tenancy at the end of any year."

The defendant filed an affidavit of defence setting up that pursuant to the clause above quoted "the defendant elected, to and with the consent of the plaintiffs, to hold over for the term of another additional year, but that before the expiration of said additional year, to wit, on the fourteenth day of May, 1893, the defendant company, having paid the rent in full for said additional year, surrendered possession and delivered the keys of the premises occupied by it to the plaintiffs, and the said defendant company has not since that day used, occupied, or enjoyed any part of the demised premises, and there is not, nor ever has been owing to the plaintiffs any sum or sums of money for rent of said premises, or upon any account whatsoever."

The plaintiffs took a rule for judgment which was discharged by the Court, whereupon this appeal was taken and the refusal of judgment assigned for error.

R. H. Bayard Bowie and *Rowland Evans*, for appellants.

The lease was a continuing contract from year to year. Either party had the option of bringing it to an end by giving to the other three months' notice of such desire previous to the end of any year.

The clause providing for three months' notice clearly applies to every year after the first. The operation of this clause is not limited by the words "after the expiration of this additional year" in the preceding clause, for that preceding clause is connected with the clause as to the three months' notice by the word "unless," not by the word "until." The contract is not to continue after the expiration of the additional year from year to year "until" notice be given, etc., but the entire holding-over contract is qualified by the clause introduced by the word "unless." The contract is to continue after the additional year unless notice be given. Such notice not having been given, the case comes exactly within the express terms of the last clause, that the failure of the lessee to give said notice of its desire to determine the tenancy shall "be deemed and taken to be such renewal." And defendant, therefore, became liable for the next year's rent.

The allegation of a surrender does not show a defence, it is not alleged that the surrender was accepted, and a lessee cannot rid himself of liability on his contract to pay rent by a surrender of the premises which is not accepted by the lessor.

Auer *v.* Penn, 99 Pa. 370.
Teller *v.* Boyle, 132 Id. 56.
DeMorat *v.* Falkenhagen, 148 Id. 393.

Henry C. Terry, for appellee.

Notice is required from a tenant of his intention to leave demised premises at the end of his term.

McCanna *v.* Johnston, 19 Pa. 434 (1852).
McGregor *v.* Rawle, 57 Id. 184 (1868).

Digitized by Google

The additional "year" was part of the original term at the option of the lessee, therefore, no notice was required.

Harding *v.* Seeley, 148 Pa. 20.

If by the terms of a lease its duration is left optional, without saying at whose option, the law favors the tenant and gives him the option of terminating it.

Dann *v.* Spurrier, 3 B. & P. 399.
Hersey *v.* Giblett, 18 Beav. 174; 23 L. J. Chan. 818.

February 18, 1895. McCollum, J. Does the affidavit contain a good defence to the action? The answer to this question depends entirely upon the construction of the lease, because the portion of the affidavit which relates to the surrender of the demised premises is clearly insufficient to prevent judgment. An averment of the surrender is unavailing without the further averment of an acceptance of it by the lessor: Teller *v.* Boyle, 132 Pa. 56. The real question, therefore, is whether the provision in the lease in regard to notice of an intention to determine the tenancy applies to each year of the lessee's occupancy of the demised premises, or is limited to his possession of them after the expiration of the additional year mentioned therein. This provision is somewhat obscure and confusing, but there is no room in it for a construction which dispenses with notice the first year and requires it to be given in order to terminate the tenancy at the end of the second or "additional year." If the lessors could have dispossessed the lessee at the end of the first year without having given three months previous notice of their intention to determine the tenancy at that time we see no good reason why they could not have done so at the end of the second year, and if the rights and obligations of the parties were mutual in this respect it follows that the lessor was at liberty to surrender the premises at the expiration of either year without having given such notice, or incurring further liability under the lease. It appears to be conceded by the appellants that notice was not necessary to determine the tenancy at the end of the first year, and so far we agree with them. The second term of one year was not founded upon a failure to give the three months' notice before the expiration of the preceding term, but upon a holding over by the lessee with the consent of the lessors. It seems to us that the rights and obligations of the parties were the same the second year as the first, and that the provision in respect to notice is applicable only to tenancies arising from a holding over after the expiration of the "additional year." It being conceded that the notice clause was not operative the first year the contention based on its concluding words "any year" loses its significance and becomes unimportant. This construction gives effect to the words "after the expiration of this additional year," while the construction which makes the notice clause applicable to that year ignores them.

Judgment affirmed.

H. B.

Jan. '94, 425. January 8, 1895.

Lang v. Finch.

Ejectment—Judgment—Capias ad Satisfaciendum—Costs.

The judgment obtained against a lessee by confession in an amicable action of ejectment for a breach of a covenant in a lease contains no element of damages in the nature of mesne profits; and so far as the costs of action may be regarded as a species of damages, they are merely a debt arising from a breach of contract. A *capias ad satisfaciendum* for costs will therefore not lie.

Appeal of Amelia C. Lang, from the judgment of the Common Pleas No. 3, of Philadelphia County, in discharging a rule for leave to issue an *alias ca. sa.*, for costs in an amicable action of ejectment, wherein judgment was confessed to appellant by George W. Finch, lessee of Jacob Lang, husband of appellant, and who was his devisee.

Amelia C. Lang, devisee and widow of Jacob Lang, lessor, in a lease of premises 1942 Columbia avenue, in the City of Philadelphia, entered judgment by virtue of a warrant of attorney in the lease against George W. Finch, the lessee, for a breach of covenant in sub-letting the premises to another without her consent obtained first thereto. The writ habere facias was executed so far as delivery of possession was concerned, but the fieri facias for costs was returned *nulla bona.*

A *capias ad satisfaciendum* was issued and the defendant was discharged by order of Court. A rule was then issued for an *alias* which was discharged by the Court. The plaintiff thereupon appealed.

James W. Laws, (*A. F. Daix, Jr.* with him), for appellant.

Although no damages be recovered in an action of ejectment, the judgment carries costs.

Bradley *v* O'Donnell, 40 Pa. 482.

The verdict will carry costs although they are not specified.

Harvey *v.* Snow, 1 Yeates, 156.
Ewing *v.* Alcorn, 40 Pa. 501.

But he can receive no more costs than damages.

Digitized by Google

Knappenberger *v.* Roth, 153 Pa. 615.

Joseph S. Goodbread, for appellee.

A judgment for costs is a debt, although it arose out of tort.

Meace *v.* Crump, 12 WEEKLY NOTES, 534.
Lane *v.* Baker, 2 Gr. 424.

The issuing of a *ca. sa.* for costs is not sanctioned by any authority in this State, or by the practice of the profession.

Wadlinger on Costs, p. 117 and 119.
Zeller's Petition, 51 Leg. Int. 265.

A judgment for costs is to be considered in the same light as a judgment for debt on contract, so far as the exemption law affects the rights of the parties. The fact that the costs accrued in action for a tort makes no difference.

Wadlinger on Costs, p. 117 and 119.

January 28, 1895. STERRETT, C. J. In this amicable action of ejectment, entered in pursuance of a clause in the lease between plaintiff's devisor and the defendant, judgment against the latter was confessed, and possession of the demised premises was delivered to plaintiff, but as to costs the return was "*nulla bona.*" A *capias ad satisfaciendum* for the costs was then issued and executed, and thereupon the Court quashed the writ and discharged defendant from custody. Plaintiff then entered a rule for leave to issue an *alias ca. sa.* for costs, and the same was promptly discharged by the Court; hence this appeal. The sole question is whether the defendant was liable to arrest and imprisonment for the costs in question. If he was not, the *alias ca. sa.* was rightly refused.

It clearly appears from the record that the amicable action is grounded solely upon an alleged breach of the lease, above referred to, in this, that the defendant as lessee, without the consent of his lessor, sublet the demised premises to a certain firm, and then removed therefrom, taking his goods with him. It is not even alleged that he committed any act of a tortious nature, either in obtaining or holding possession of the premises, or in surrendering the same to his sublessee, or otherwise. All that is charged against him is, in substance, that as lessee he failed to keep and perform all his covenants with his landlord; and that, by reason thereof, the latter, under the terms of the lease, had a right to terminate the same and repossess himself of the demised premises in the manner specified in the lease. In other words the plaintiff's right of action, as well as the speedy remedy of which he availed himself, sprang not from a tort but solely from a breach of contract, and hence the defendant is within the protection of the Act of July 12, 1842. The judgment contains no element of damages in the nature of mesne profits; and so far as the costs of suit may be regarded as a species of damages, they are in this case merely a debt arising not from tort, but from a breach of contract.

We are, therefore, of opinion that the Court was right in discharging plaintiff's rule.

Judgment affirmed. W. D. N.

Oct. '94, 116. November 6, 1894.

Higgins Carpet Co. v. Latimer.

Rules of Court—Rule 8, section 3 of Court of Common Pleas, of Allegheny County—Practice—Set-off—Affidavit of defence.

Where a rule of Court provides that where defendant has a "set-off" to plaintiff's claim defendant shall file a specification and statement of the same, verified by affidavit and within fifteen days after filing the same notify the plaintiff thereof, and the plaintiff fifteen days after notice thereof shall file his reply thereto; it is not sufficient to set forth the matter of "set off" in an affidavit of defence to plaintiff's claim, but the rule of Court should be strictly complied with.

Set-off in rule 8, section 3 of the rules of the Court of Common Pleas of Allegheny County embraces every species of counter-claim which may legally or equitably be interposed as a defence.

The Supreme Court will not reverse a lower Court for any construction of its own rules unless such construction is manifestly erroneous and injurious.

Appeal of Thomas M. Latimer, defendant, from the judgment of Common Pleas No. 1, of Allegheny County, in an action of assumpsit wherein the E. S. Higgins Company was plaintiff. The plaintiff claimed in his statement a balance of $137.65 due for goods sold and delivered to defendant.

The defendant in his affidavit of defence denied any indebtedness to plaintiff and continued as follows:

"The defendant says that instead of being indebted to the plaintiff that the plaintiff is indebted to him in the sum of $168.62, for which amount he asks a certificate in his favor, upon the trial of this case.

"The defendant says that he purchased 100 pieces of carpet from the plaintiff at a price agreed upon, but there being a rise in the market after the defendant purchased said 100 pieces of carpet, the plaintiff herein refused and neglected to ship more than 57 pieces, and the rise being more than five cents per yard, the defendant herein claims credit for five cents per yard loss on 43 pieces not shipped, which would amount to $129.00.

"The defendant claims credit on sprouted carpets in accordance with his contract made with the plaintiffs, which would amount to $61.36.

"Defendant also claims credit for the trade

Digitized by Google

discount of 5 per cent., which was specially agreed to be given him in the foregoing purchases, which would amount to $94.37.

"Defendant hereto attaches and refers to an itemized statement of the account between the plaintiff and defendant, showing that the plaintiff has been paid in full, and that there is a balance of $168.62 due to the defendant, for which amount he will ask for a certificate in his favor at the trial of the case."

On the trial before SLAGLE, J., defendant offered to prove his "set-off" as claimed in his affidavit of defence.

Objected to, as the claim should have been made in conformity to rule 8, section 3, of the Courts of Common Pleas of Allegheny County. The rule is as follows:

Sec. 1. In all actions on recognizances, judgments and other records, mortgages, mechanics' liens, policies of insurance, book accounts, bills, notes or other instruments of writing for the payment of money, and on all contracts for the payment of money, whether the same be in writing or not, and in all actions founded on contract, express or implied (whether in form *ex contractu* or *ex delicto*), the plaintiff shall file with or before his declaration a specification of the items of his claim, together with a statement of the facts necessary to support it, verified by affidavit, to which defendant shall, within the time hereinafter specified, file an answer verified by affidavit, and such items of the claim and material averments of fact as are not directly and specifically traversed and denied by the answer shall be taken as admitted.

Sec 2. If the specification and statement be filed with the praecipe, they shall be taken as an affidavit of claim, and defendant shall, without further notice, file his answer thereto, within the time required for filing affidavits of defence, which answer shall be taken as an affidavit of defence.

Sec. 3. This rule shall apply to a specification and statement of set-off filed by defendant, who shall, within fifteen days after filing the same, notify the plaintiff thereof, and the plaintiff shall, within fifteen days after notice thereof, file his reply thereto, verified by affidavit. If the plaintiff fails to comply with any of the requirements of this rule, judgment of *non pros.* shall be entered against him by the prothonotary; and if the defendant fails to comply with any of the requirements thereof, the plaintiff shall be entitled to judgment against him as for default of a plea and affidavit of defence.

Sec. 4. No evidence will be heard upon the trial of the cause as to any facts not substantially alleged or referred to as a ground of action or matter of defence in the statements then on file in the case. Either party may at any time before the cause is placed on the trial-list, supplement his affidavit, as of course, giving notice thereof in writing to the opposing counsel, within fifteen days of the filing of such supplemental-affidavit; but after the cause has been placed on the trial-list, such supplemental-affidavit shall be filed only by special allowance of the Court, and upon such terms as to notice, costs and continuance, as may be deemed just and proper under all the circumstances of the case.

The Court struck out all the evidence offered by the defendant because no notice had been given to plaintiff of the "set-off" as required by the rule, and directed a verdict for plaintiff.

Verdict for plaintiff for $145.32 and judgment thereon.

The defendant took this appeal and assigned as error, (1), the Court's action in striking out the defendant's testimony; (2), the instruction to find for the plaintiff.

Thomas M. Marshall, Jr., *John D. Brown* and *Frank P. Sproul*, for appellant,

Submitted a paper book and cited in it:

Bair & Gazzam, Limited *v.* Hubartt, 139 Pa. 96.
Gannon *v.* Fritz, 79 Id. 303.

George D. Riddle, for appellee, cited:

Rentzheimer *v.* Bush, 2 Pa 88.
Bair *v.* Hubartt, 139 Id. 97.
Finlay *v.* Stewart, 56 Id. 193, and
Gannon *v.* Fritz, 79 Id. 303.

January 7, 1895. STERRETT, C. J. Inasmuch as both specifications of error, in effect, challenge the correctness of the Court's construction of its eighth rule, they may be considered together. If the rule was rightly construed there was no error in striking out defendants testimony and directing a verdict for plaintiff. This is the only question in the case.

The first section of the rule requires that in certain actions therein specified, "the plaintiff shall file with or before his declaration a specification of the items of his claim, together with a statement of the facts necessary to support it, verified by affidavit, to which defendant shall, within the time hereinafter specified, file an answer verified by affidavit; and such items of the claim and material averments of fact as are not directly and specifically traversed and denied by the answer shall be taken as admitted."

The next section declares: "If the specification and statement be filed with the praecipe, they shall be taken as an affidavit of claim, and defendant shall, without further notice, file his answer thereto within the time required for filing affidavits of defence, which answer shall be taken as an affidavit of defence. If the specification and statement be not filed with the praecipe, the plaintiff shall within fifteen days after filing the same, notify the defendant thereof, and defendant shall within fifteen days thereafter file an answer thereto."

The third section declares: "This rule shall apply to a specification and statement of set-off filed by defendant, who shall, within fifteen days after filing the same, notify the plaintiff thereof, and the plaintiff shall, within fifteen days after notice thereof, file his reply thereto, verified by affidavit."

The fourth section of the rule, after declaring that, "no evidence will be heard upon the trial of the cause as to any facts not substantially alleged or referred to as ground of action or mat-

Digitized by Google

ter of defence in the statements then on file in the case," provides for supplementary amendments of said statements, affidavits, etc.

The company plaintiff, strictly complying with the first section of the rule, filed with its praecipe a duly verified specification of the items of its claim, and averments of fact necessary to support the same, in connection with which it gave defendant credit for $2,481.67 on account, and claimed the balance as due and payable.

Without directly or specifically traversing or denying a single item or averment of fact in plaintiff's statement, the defendant in his answer, denies in the most general terms that he is indebted to plaintiff in the balance alleged, "or in any part thereof," and then avers "that instead of being indebted to the plaintiff, the plaintiff is indebted to him in the sum of $168.62, for which amount he seeks a certificate in his favor upon the trial of this case. This is supported by averments of three items, in the nature of set-off, or counter-claims against plaintiff, one of which is damages for refusal to deliver forty-three pieces of carpet purchased by him from plaintiff at an agreed price, etc. After setting forth in a general way, but not as clearly as should have been done, the nature and amounts of the other two items, the answer contains the following averment: "Defendant hereto attaches and refers to an itemized statement of the account between plaintiff and defendant showing that plaintiff has been paid in full and that there is a balance of $168.62 due to defendant," etc. Presumably, the "itemized statement" thus referred to was regarded by the defendant as a necessary part of his affidavit of defence and, whether he so considered it or not, we should have been furnished with a copy thereof, so that the entire defence, as presented to the Court below, might be considered by us; but waiving this omission, we think the learned trial Judge was clearly right in holding that the defence interposed was such as to bring it within the true intent and meaning of the third section of the rule. As already observed, not a single item of plaintiff's claim nor a single averment of fact in support thereof, was specifically traversed and denied, and hence, as was his right under the rule, the plaintiff introduced them as admitted, and then rested. The defendant thereupon, assuming the burden, undertook to prove his counter-claim, when he was met by the objection that he had not complied with the rule as to notice. It is not a sufficient answer to say that the defence was not set-off and therefore the rule was not applicable. The first item of defence, as we have seen, is clearly a counter-claim for damages resulting from refusal to deliver certain pieces of carpet, etc. It may be that in the technical sense of the word the other items are not strictly "set-off," but the rule was never intended to have any such restricted meaning. It was meant to embrace every species of counter-claim that under our more liberal practice may be legally or equitably interposed as a defence: Bair *v.* Hubartt, 139 Pa. 96, and 27 WEEKLY NOTES, 272. As was well said by our brother MITCHELL in that case: "The object of the rule . . . is manifestly to reduce the contest at the trial to the points actually in dispute, and whenever any matter sought to be introduced at the trial, called by whatever name it may be, is such as to require notice to the other side, the object of the rule would seem to demand its application." With the view of eliminating every uncontroverted fact, and thus narrowing the controversy to the points actually in dispute, it is just as important that the plaintiff should be required to answer the counter-claim interposed by the defendant as it is that the latter should be called upon to specifically traverse and deny the items, etc., of the plaintiff's claim. If the defendant had given the required notice in this case, *non constat* that the plaintiff could have denied the items of his counter-claim. In that event, it would have been unnecessary to take up the time of the Court in calling witnesses and attempting to make the necessary proof.

As a means of promoting justice and expediting the trial of causes, the rule under consideration has proved to be most valuable; and its usefulness and efficacy should not be impaired by neglecting to enforce its provisions on all proper occasions.

We have no doubt as to the correctness of the learned Judge's construction of the rule in this case; but if we had, it would require much more than that to justify our interference. As has been frequently said, every Court is the best judge of its own rules, and this Court will not reverse for any construction unless it is manifestly erroneous and injurious: Coleman *v.* Nantz, 63 Pa. 178; Wickersham *v.* Russell, 51 Pa. 71; Gannon *v.* Fritz, 79 Pa. 303; Barr *v.* Hubartt, *supra*.

Judgment affirmed.

W. D. N.

Jan. '95, 408. January 8, 1895.

Restein v. McCadden.

Commissions—Liability for—When payable—The procuring of customer and acceptance sufficient.

When a person engaged to sell goods on commission has procured a customer who has been accepted as a pur-

Digitized by Google

chaser by the employer, who receives his customer's order and undertakes to execute it, the commission has been earned.

One who has engaged another to sell for him on commission cannot relieve himself from liability for the commission by setting up that it was not to be paid until the goods were delivered and paid for, when the controversy between himself and the purchaser which led to the withholding of the price was only upon the question of a defective execution of the order.

Appeal of James McCadden, trading as McCadden & Bro., defendant, from the judgment of Common Pleas No. 3, of Philadelphia County, in an action against them by E. P. Restein to recover commissions.

The facts of this case are stated in the opinion of the Supreme Court, *infra*.

The appellants assigned for error that "The learned Court erred in charging the jury that the defendant, McCadden & Bro., had no defence to the cause; that suit ought to have been brought against Kolb, from whom he could recover, unless Kolb defended successfully upon the ground that the kites were not made according to the terms of the contract.

M. J. O' Callaghan, for appellant.

It certainly was a question for the jury to determine what the contract between these parties was, and not for the Court to say, because the contract was not in writing. The plaintiff was not an agent of the defendant engaged in selling goods for which he was to have been paid certain compensation, but was an independent factor selling on his own account and making what he could over and above the price at which he was able to obtain the goods. It did not make any difference whether the parties from whom the goods were purchased had the bills made out and delivered directly to the parties to whom he sold. Under the law it is plain that the questions of fact in this case should have been submitted to the jury.

Shaver *v.* McCarthy, 110 Pa. 339.
Reber *v.* Herring, 115 Id. 599.
Spear *v.* R. R. Co., 119 Id. 61.
Branson *v.* Kitchenman, 148 Id. 541.
Webb *v.* Lees *et al.*, 149 Id. 13.

A. E. Stockwell, for appellee.

The defendant failed in his contract to deliver the proper goods, and Mr. Kolb refused to take them for that reason; in other words, the contract failed because of the negligence of the defendant. It is therefore submitted that under the law the plaintiff is entitled to his commission no matter if payment was originally conditioned upon the delivery to and payment for the goods by Mr. Kolb.

Mechem on Agency, sec. 967.
Love *v.* Miller, 53 Ind. 294.
Parker *v.* Walker, 8 S. W. Rep. 391.
Cook *v.* Fiske, 12 Gray, 491.
Sweeney *v.* Oil Co., 130 Pa. 193.
Edwards *v* Goldsmith, 16 Id. 43.
Reed's Executors *v.* Reed, 82 Id. 420.
Adams Express Co. *v.* Egbert, 36 Id. 360.
Keys *v.* Johnson, 68 Id. 42.
Johnson *v.* Drill Co., 39 Leg. Int. 403.

February 18, 1895. GREEN, J. The learned Court below was not mistaken in speaking of the contract as a matter that was not in dispute. It was proved by the plaintiff, and also by Mr. Kolb, who gave the order written by himself, at the instance of the plaintiff, and it was admitted by the defendants in their affidavit of defence, and further proved on the trial by their agent Leslie, who made the contract with the plaintiff. According to all of this testimony the plaintiff obtained for the defendants, from Kolb, an order in writing for 150 gross of kites at $2.25 per gross, and delivered it to the defendants who accepted it. Leslie, on cross-examination, was asked. "Q. You accepted the order in which Mr. Kolb agreed to pay you $2.25? A. Yes, sir. Q. And you were to pay him fifty cents? A. Yes, sir: when the goods were delivered and paid for."

The defendants then undertook to fill the order, and they made and delivered 54 gross of the kites. The purchaser, Kolb, and his bookkeeper Connor, testified that they would not receive them because they were not properly made, they would not fly after repeated efforts. Kolb also testified that he was anxious to have them and would still take them at the time of the trial if they were so made that they would fly. Of course this testimony raised a question whether the kites were properly made so that Kolb ought to have received them. But with that question this plaintiff had nothing to do. He procured the customer and defendants accepted him as a purchaser, received his order and undertook to execute it, and upon all the authorities the plaintiff had then earned his commission: Keys *v.* Johnson, 68 Pa. 42; Reed's Ecrs. *v.* Reed, 82 Id. 420; Sweeney *v.* Oil Co., 130 Id. 193; Mechem on Agency, sec. 967.

Nor does it matter whether there was a controversy in the testimony as to when the commission was to be paid. That question was left to the jury by the learned Court below, but it is perfectly apparent that the defendants could not relieve themselves of their liability for the commission by saying that the commission was not to be paid until the goods were delivered and paid for, when the very controversy between them and the purchaser was only upon the question of a defective execution of the order. If the goods were properly made, they could compel the purchaser to pay for them or pay them compensatory damages. If they were not properly made they could recover nothing from the

Digitized by Google

purchaser, but that result would flow from their own negligence. But the plaintiff has no concern with either of these questions.

Judgment affirmed. W. C. S.

Oct. '94, 304. October 23, 1894.

Huckestein v. City of Allegheny.

Highways — Change of grade — Ordinance — Blunders of—Jurisdiction of city and Court.

On the trial of an action to recover from a city for the change of grade of a street, plaintiff insisted that the street had never been accepted or opened by the city, and the case went to the jury on the question whether there was any street on the ground covered by the ordinance authorizing the change of grade. The jury gave a verdict for $8,000, in effect finding that when the ordinance was passed there was no street on the ground, and at the same time found that an attempt to change the grade of a street that had no existence had injured the plaintiff's property:

Held, that this finding was absurd and that the jury should have been instructed, that in case it found for the plaintiff upon the question of the non existence of a public street, damages could not be recovered for an attempt to change that which had no existence. An effort to do an impossible thing could inflict no greater injury on the plaintiff than the costs and expenses to which the effort might subject him.

Appeal of the City of Allegheny, from the judgment of the Common Pleas No. 1, of Allegheny County, in a suit, wherein John Huckestein was plaintiff, to recover damages for injury done to his property by changing the grade of a street.

The facts as they appeared on the trial, before STOWE, P. J., are set forth in the opinion of the Supreme Court, *infra*.

Verdict for plaintiff for $8,000 and judgment thereon. The defendant took this appeal and filed assignments of error as follows:

1. The Court erred in its answer to plaintiff's second point which was as follows: "If the jury find that the street in controversy was not accepted by the city or public user prior to the grade ordinance of 1890, then the city cannot complain in this case that Mr. Huckestein made changes in the surface of the street prior to the acceptance by that ordinance, but the city took it as it was then." *Answer*. "Affirmed. If the public has obtained no right to this street—no fixed, vested right prior to this ordinance, then Mr. Huckestein had a right to do with this street just as you and I have a right to do with any property that we may have with no street on it—right to use it, dig it up, build upon it, excavate it, and do just as we see fit to do, and the fact that a street was afterwards laid out through it after that would not affect our right to damages as affected from anything that we had done when owners of it free from any right in the property."

2. The Court erred in submitting the case to the jury, the plaintiff's right of action not having accrued.

Exceptions for both sides.

George Elphinstone, for appellant.

W. B. Rodgers, (*Thomas M. Marshall, Jr.* with him), for appellee.

January 7, 1895. WILLIAMS, J. This case grew out of a proceeding to assess the damages to result from a proposed change of grade of Sandusky street in the City of Allegheny.

Viewers had been appointed who went upon the ground and after examination made report that little damages would be done by the proposed change. The plaintiff appealed, and the appeal was certified by the Court of Quarter Sessions into the Common Pleas for trial before a jury. It was tried in October, 1892, and resulted in a very large verdict in favor of the plaintiff. The city then appealed to this Court and the record is now before us. It presents a series of blunders on the part of the city that extends from one end of the proceeding to the other, and from the consequences of which it is not easy to extricate her upon the assignments of error appearing on the record.

The proceeding seems to be taken under a statute that is in many respects like that considered in Wyoming Street, 137 Pa. 494. It interferes with the jurisdiction of the Quarter Sessions and confers on the city powers that belong to that Court. Under its provisions when the city enters upon the land of a citizen under the right of eminent domain it ascertains the damages it has done him by viewers of its own selection and appointment who report to the city. The city then sits as a judicial tribunal to try its own cause, and confirms or sets aside the report against it. The judgment so entered is conclusive on the adverse party unless he flees to a Court of law with sufficient speed to reach its portals before the time graciously allowed him for such flight has expired. How much of this law is valid it is not important now to consider, for no assignment of error raises the question, and the city having proceeded under it is in no position to question its validity. If she has been caught in the absurd machinery she has set in motion in this case she is entitled to no sympathy; and we should feel disposed to let this verdict stand if it was not apparent that it had been rendered by the jury and sustained by the Court below upon an erroneous theory.

The city councils passed an ordinance in 1890 for the purpose of "changing the grade on Sandusky street from Henderson street to Bell avenue." This was done upon the assumption

Digitized by Google

that Sandusky street at the point mentioned was a city street and had an established grade under proceedings begun some twenty years before. The viewers were appointed by the city councils in the same ordinance, and their business was to estimate the damages to accrue from the contemplated change of grade. They were not to lay out or open a street, but to examine an existing street in order to change an existing grade. The ordinance was itself a blunder. If the street had been adopted and opened as the ordinance assumed, its grade was that of the surface as it existed when the owner laid it out on his plan of lots, long before the plaintiff acquired his title or began his excavations; and as what was proposed was to restore substantially the grade of the surface across the plaintiff's excavation the ordinance was a work of supererogation. The excavation was in that case a trespass, a nuisance for which the plaintiff was liable.

But the plaintiff insisted on the trial that the street had never been accepted or opened by the city, and the defendant was unable to show that it had been. In this view of the case the ordinance was no less a blunder, for if there was no street on the ground there was no grade to change.

The case went to the jury on the question whether there was any street on the ground covered by the ordinance. The learned Judge instructed the jury upon what was necessary to convert a way laid down by a land owner on his plan of lots into a public street over which the city would have control. He then submitted the question whether the way laid out across the plaintiff's land had been adopted by usage or opened by legal proceedings so as to become a city street, telling them if it had not been so adopted or opened then whatever rights lot owners might have in this way or private road the municipality had none, and the plaintiff so far as the city was concerned was at liberty to exercise all the rights of ownership over it. He said: "Previously to this ordinance of 1890 if this property was not subject to this highway as a public street at that time he had the right to take it away, and if that is so then that property was free as far as he was concerned of the incumbrance of this street as a highway which the public had accepted; then it was his property as much as if the street had never been there, and he had the right to dig it down or fill it up, just as he pleased."

Upon the question so submitted the jury found that when the ordinance of 1890 was passed by councils there was no street on the ground, and at the same time they found that an attempt to change the grade of a street that had no existence would injure the plaintiff's property to the extent of eight thousand dollars. The absurdity of such a finding requires no comment to make it apparent. It will not do to say that the ordinance of 1890 was an acceptance of the street. It had no such purpose. It rested as we have seen upon a mistaken assumption that acceptance had taken place, that the street had been legally opened, and was therefore a city street under the care of the municipality. If this was so then the further excavation of the hillside was making the work of restoring the surface grade more difficult and expensive day by day, and the object of the councils was probably to stop the excavation and restore the grade of the original surface. The jury have found that the assumed facts did not exist. There was no street on the ground, no grade to change. The purpose of the ordinance becomes impossible of performance and it falls. The city is on the horns of a dilemma. Let it take whichever it will its ordinance was a blunder. If the street had been adopted and opened as was assumed its grade was upon the surface, as it was at the time of such adoption and opening, and this proceeding was unnecessary. If it had never been adopted or opened there was no street there and no grade to change and the proceeding was absurd. The plaintiff was in the same dilemma. If the city was right in its contention he had committed a nuisance in the public highway and was entitled to no damages for the effect which its removal might have upon his property. If he was right it was impossible to change a grade upon a street that had no existence, and the folly of the city in attempting to do so could give him no right of action. It might compel him, as it did, to show the facts and to incur expenses therein. These he had a right to recover.

The first assignment of error is not sustained. The portion of the charge embodied therein is free from error. The second assignment may afford room to correct the one mistake made at the trial. The case had to go to the jury upon the question raised by the plaintiff over the existence of a public street on the ground, but the jury should have been instructed, in case they found with the plaintiff upon this question, that damages could not be recovered for an attempt to change that which had no existence. An effort to do an impossible thing could inflict no greater injury on the plaintiff than the costs and expenses to which the effort might subject him.

The judgment appealed from is reversed and the record remitted that the Court may fix an allowance for counsel fees for the plaintiff and tax the costs. If these are paid no venire facias de novo will be awarded. If not paid, application can be made to us for such writ.

W. C. S.

Digitized by Google

Oct. '94, 49. October 23, 1894.

In Re Sandusky Street.

Highways—Change of grade—Opening of—Costs and expenses.

Where a city has made a mistake in attempting to open and grade a street that has no existence, it may be relieved from the consequences thereof upon the payment of the costs and expenses which the property owner has been compelled to incur thereby.

Appeal of the City of Allegheny, from the decree of the Quarter Sessions of Allegheny County.

The City of Allegheny, by an ordinance established the grade of Sandusky, also known as Fleming, street, and appointed viewers to ascertain the damages and benefits. The proceedings were under the special local Act of 1870, P. L. 751, by the twenty-second section of which councils are empowered to appoint viewers to ascertain the probable cost of a change of grade before actually making the same. John Huckestein, owning property abutting on the line of the street, appealed from the action of the board of viewers, which found neither damages nor benefits, to the Court of Quarter Sessions. The cause was certified to the Common Pleas for jury trial, and a verdict for $8,000 was found in his favor. The record being certified back to the Quarter Sessions, motions were made on behalf of the city and a property owner to quash the proceeding, councils having repealed the ordinance. These motions were refused and the Court made an order directing a change to be made in the viewers' report, and ordering the city to pay to John Huckestein the sum of eight thousand dollars. The city excepted to this order and took this appeal.

The assignments of error were that the Court erred in overruling the motion to quash, and in making the following order or decree:—

"And now, December 16, 1893, it is ordered that the record be changed by awarding John Huckestein damages in the sum of eight thousand dollars, with interest from October 20, 1892, and no cause being shown to the contrary, it is ordered that the record as changed be certified to the city controller of the City of Allegheny, and that the proper officials of said city be directed to pay said damages, and that the city pay all the costs; and it is further ordered that the application to quash be refused."

George Elphinstone, for appellant.

The ordinance involved in this case establishes the grade of Sandusky street and appointed viewers to assess damages and benefits. It was passed under authority of section 22 of the Act of 1870, relating to streets in the City of Allegheny. The part of said Act pertinent to this case is as follows:—

"That when councils shall propose to change a grade, they may before taking action appoint the said appraisers, to whom all claims for damages shall be submitted, and no other claims thereafter shall be received, or entertained, or allowed; and, upon return of the report of said appraisers, councils may or may not, at their discretion, make the proposed change of grade." Prior to the adoption of the new Constitution the city found no difficulty in proceeding under the said section of the Act of 1870.

While it gave a right to damages for change of grade that did not exist without such special statutory provision, the method of ascertaining such damages provided by the Act was exclusive, and the barring of all claims not presented within the prescribed time was effective until the new Constitution abrogated all such provisions in favor of corporations.

In re Grape Street, 103 Pa. 121.

The purpose of the law was to give councils an opportunity, before damaging private property, of ascertaining the extent of such damages, and after the final confirmation of the viewers' report by councils or the Court, of making or not making, at their discretion, the proposed change of grade.

Section 22, Act of 1870, P. L. 751.

Moravian Seminary *v.* Bethlehem Borough, 153 Pa. 583, and other cases relied upon to sustain the decree of the Court below are not in point. They are all cases of opening of streets. The exercise of the power of eminent domain was consummated when the ordinance was passed. The damages are to be estimated as of that time; the statute of limitations only runs from that time. "It is the physical, not the paper change of grade that entitles to damages."

Jones *v.* Bangor Borough, 144 Pa. 638.
O'Brien *v.* Phila., 150 Id 589.
Easton Borough *v.* Rinek, 116 Id. 7.
Negley Ave, 146 Id. 456.

The proceedings are analogous to the locating of streets. No right of action vests until the street is opened, or at least, ordered to be opened.

Forbes Street, 70 Pa. 125.
Hannum *v* West Chester, 63 Id. 475.
Whitaker *v.* Phœnixville, 141 Id. 332.

The Court should have sustained the motion to quash for the reasons above given.

Section 4, Act of 1870, P. L. 751.
Pittsburgh *v.* Irwin s Exrs., 85 Pa. 420

We think the Court erred in certifying this cause into the Common Pleas for jury trial.

Digitized by Google

While the Constitution and the Act of 1874 give the right of trial by jury for injuries to private property by municipalities, they have no application in a case where the property owner has at best an inchoate right of action. The right to damages by establishment of a grade is not perfect until the grading is either done or ordered done.

W. B. Rodgers, (*Thomas M. Marshall, Jr.*, with him), for appellee.

The authority of councils on the subject of this legislation will be found in the 22d section of Act of 1870. Proceedings under this section may be considered as preliminary thus far:—

1. When the councils under the second and last proviso merely propose to change the grade; and (2), even when they change the grade, as they did here, they may quash the proceedings when the report is presented. If this was merely a preliminary inquiry, why did the city confirm the report? Why did the clerk give notice of the action as provided in 3d section of Act of 1870, and why did the city certify the papers and proceedings to Court on the appeal as provided in 4th section of Act of 1870; and why did the city solicitor plead to the issue framed in the Court of Common Pleas and try the case there? It is, in the second place, contended by the appellant that it is the physical change of grade alone which entitles an owner of property to damages. This defence means this, if anything: that the councils were all wrong in passing the ordinance and in all their action, and that the Court was equally wrong in trying the case. This defence was not suggested at the time, and comes with bad grace now, and, if true, looks like a trap to catch the unwary property owner. This defence is bad under the statute. The Court was not in error in refusing to quash the proceedings. The motions came too late. The councils had the power on the return of the report of viewers to quash the proceedings. See Section 4, Act of 1870. When judgment was entered their control was gone.

Myers *et al.* Exrs., *v* Bethlehem, 149 Pa. 85.

January 7, 1895. WILLIAMS, J. The case of Huckestein *v.* The City of Allegheny, in which an opinion has just been filed, practically disposes of this case. The judgment rendered in the Court of Common Pleas in favor of Huckestein has been reversed for reasons that are fatal to the plaintiff's claim, and there is now no good reason why the city should not be allowed to correct its mistakes and be relieved from their consequences so far as Sandusky street is concerned, upon the payment of the costs and expenses they have compelled the plaintiff to incur. These it should pay. Upon their payment, the city having repealed the ordinance of 1890, should be allowed to discontinue its proceedings taken under it to assess the damages done by the proposed change of grade.

The order appealed from is now reversed and the record remitted, that the Court below may make a proper allowance to Huckestein for costs and expenses, and upon payment of the same by the city, permit the proceedings for the assessment of damages to be withdrawn.

W. C. S.

Oct. '94, 302. October 18, 1894.

Birch et al., Executors, v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.

Negligence—Damages for personal injuries resulting in death—Who entitled to bring action—Acts of April 15, 1851, P. L. 674, and April 26, 1855, P. L. 309.

By section 18 of the Act of April 15, 1851, P. L. 674, an action begun for injuries to the person does not abate by reason of plaintiff's death, but survives by substitution of his personal representatives, and by section 19 of the same Act, if an injured person's death was caused by negligence or violence and no action for damages was brought by him, his widow, or, in case there is no widow, his personal representatives, are given a right of action. The first was intended to regulate a common law right of action by securing to it survivorship, and the second gave a new cause of action in cases where the injured person had not begun suit.

The first section of the Act of April 26, 1855, P. L. 309, instead of confining the right of action to the widow or personal representatives, designates four separate parties, to one of whom, according to the circumstances of each case, the right of action is given.

Held, That this later Act does not affect section 18 of the Act of 1851, but an action brought will still survive and may be prosecuted by the personal representatives, although it appear in the pleadings that the death of the plaintiff, occurring after action brought, was due to the negligent or violent act of the defendant, to recover the damages occasioned by which the action was brought.

Appeal of T. F. Birch and J. W. Rowland, executors of the estate of Mary V. Taylor, deceased, plaintiffs, from the judgment of the Common Pleas of Washington County, sustaining a demurrer to a statement of claim filed by them in an action against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. The facts are fully set out in the opinion of the Supreme Court, *infra*.

The assignments of error specified the action of the lower Court in sustaining the demurrer.

S. D. Mitchell, (with him *J. W. Donnan* and *T. F. Birch*), for appellants.

At common law actions for personal injuries died with the person.

Digitized by Google

R. R. Co. *v.* McCloskey, 23 Pa. 530.

This was changed by Act of Assembly providing for substitution of the personal representatives, where suit had been actually begun by the injured person.

Sec. 18, Act April 15, 1851.
Coakley *v.* R. R Co., 5 Clark, 444.

By section 19 of the same Act, if no suit had been begun in the lifetime of the injured person, the widow, or, if no widow, the personal representatives could maintain an action and recover damages for the death.

By section 1, Act of April 26, 1855, the right of action was conferred upon parents for loss of children, children for loss of parents, and reciprocally upon husband and wife.

Books *v.* Borough of Danville, 95 Pa. 165.

The Act of 1855 has reference merely to section 19 of the Act of 1851, and has nothing to do with section 18.

Fink *v.* Garman, 40 Pa 103.
R. R. Co. *v.* Zebe, 33 Id. 329.
R. R. Co. *v.* Robinson, 44 Id. 178.
R. R. Co. *v.* Adams, 55 Id 501.

Repeals by implication are not favored in the law.

Street *v.* Commonwealth, 6 W. & S. 209.
Erie *v.* Bootz, 72 Pa. 199.

A. M. Todd, (*James A. Wiley* with him), for appellee.

The Act of 1851 is repealed by the Act of 1855 in so far as it allows personal representatives to be substituted as plaintiffs in an action brought by the deceased.

Under the Act of 1851 there is one method of ascertainment of damages, see R. R. *v.* McCloskey, 23 Pa. 526, while a different measure of damages is applied when the action is brought under the Act of 1855, see R. R. Co. *v.* Butler, 57 Pa. 338. Defendant is willing to stand trial and not rely upon technicalities, but it submits that these Acts of Assembly should be construed so as not to make the defendant liable to two actions for the same alleged offence.

January 7, 1895. STERRETT, C. J. This action of trespass was brought by Mrs. Mary V. Taylor in August, 1892, to recover damages for personal injuries suffered by reason of the negligence of defendant company's employés while she was a passenger on one of its trains.

On March 28, 1893, after the cause was at issue, but before trial, she died, and on August 30, following, her executors above named were substituted as plaintiffs. By leave of Court they filed an amended statement, to which defendant company demurred, "for the reason that said statement discloses the fact that the said Mary V. Taylor died as a result of the injuries averred or alleged to have been sustained at or on the 29th of June, 1892, and avers the said death to have been caused by, and the result of, the alleged negligence of the defendant, and that under the facts so stated, and there being no allegation that there are no minor children, the right of action did not survive to the plaintiffs, executors of the said Mary V. Taylor, but that damages for any injury causing death shall belong to the husband, widow, children, or parent of the deceased and to no other relative." The Court, holding "that the admission of the plaintiffs, that the negligence of the defendant company was the cause of Mrs. Taylor's death, is fatal to their claim and that the children and not the executors of deceased can alone maintain an action against the defendant company for the injury complained of,"—gave judgment on the demurrer for the defendant, and hence this appeal.

While the precise question thus presented by the record does not appear to have been expressly decided by this Court, its solution must, of course, be found in a proper construction of our Acts of April 15, 1851, P. L. 674, and April 26, 1855, P. L. 309, changing the common law in actions for injuries to the person by negligence or default, etc.

Section 18 of the former Act declares: "No action hereafter brought to recover damages for injuries to the person by negligence or default shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiffs and prosecute the suit to final judgment and satisfaction." This is predicated not only of a previously existing right of action in the injured party, but also of the fact that he availed himself of that right by bringing suit in his lifetime, as did the plaintiff in this case; and its purpose was to obviate the effect of the general maxim, *actio personalis moritur cum persona*, by authorizing the substitution of the deceased plaintiff's personal representatives, and prosecution of the action by them in same manner as he himself could have done if living.

The next section provides: "Whenever death shall be occasioned by unlawful violence or negligence and no suit for damages be brought by the party injured, during his or her life, the widow of any such deceased, or if there be no widow the personal representatives, may maintain an action for and recover damages for the death thus occasioned." Recognizing the living injured party's common law right of action for damages, etc., this section—in the circumstances therein specified—gives a new right of action for the same unlawful violence or negligence and declares by whom it shall be exercised. It

Digitized by Google

is given only in cases where the injured party's death has been "occasioned by unlawful violence or negligence and no suit for damages" has been brought by him in his lifetime, and is to be exercised first by his widow, and if there be no widow then by his personal representatives. As was well said by Mr. Justice WOODWARD in Fink *v.* Garman, 40 Pa. 103, "The 18th section was apparently intended to regulate a common law right of action by securing to it survivorship; but the 19th section was creative of a new cause of action, wholly unknown to the common law. And the right of action was not given to the person suffering the injury, since no man could sue for his own death, but to his widow or personal representative. It was quite competent for the Legislature to alter the common law in this regard. They did so by giving parties a right of action who had none before."

While grounded on the same "unlawful violence or negligence" for which the injured party had a common law right of action in his lifetime, the statutory right, given by the 19th section, is conditioned upon the concurring facts, that the injured party's death was occasioned by said violence or negligence, and that no suit for damages was brought by him. The first section of the Act of 1855, was not intended to dispense with either of said conditions. It merely designates the persons, who in connection with the widow, and in lieu of "the personal representatives," shall thereafter be entitled to exercise the statutory right of action, and recover damages for the death, etc. In other respects, there does not appear to be any express or implied repeal or modification of the 18th and 19th sections of the Act of 1851. In Railroad Co. *v.* Decker, 84 Pa. 419-425, referring to the provisions of the Act of 1855, it was said: "Instead of confining the right of action to the widow and personal representatives, it designates four separate parties, to one of whom, according to the circumstances of each case, the right of action is given. If the deceased leaves a husband, he alone is clothed with the right of action; if the wife is the survivor she is entitled to bring suit. If there be neither surviving husband or widow, the right of action is given to the children, and if there be neither husband, nor widow nor children surviving, it is given to the parents of the deceased. But, while the right of action is given, according to the circumstances of each case, to one of the four designated parties, it is clear from the wording of the Act, that the entire sum recovered is not always to be retained by the plaintiff in his or her own right. It is to be distributed among the relatives named in the proportion they would be entitled to take the personal property of the deceased in case of intestacy; and to the end that it may appear who are entitled to participate in the damages recovered, it is required that the declaration shall state who they are."

The Acts above referred to were followed by the constitutional provision declaring: "No Act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property; and, in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such action shall be prosecuted." Article III., section 21. As we have seen, some of these matters had already been provided for long before the adoption of the Constitution in 1874, and remain unchanged.

It follows from what has been said, that the substitution of Mrs. Taylor's executors as plaintiffs, in the action commenced by her, was fully authorized, and they should be permitted to prosecute the same to final judgment and satisfaction, notwithstanding the fact, averred in their amended statement, that her death was occasioned by the defendant company's negligence. In the circumstances, their substitution was clearly warranted by 18th section of the Act of 1851.

Judgment reversed and a procedendo awarded.

W. M. S., Jr.

Orphans' Court.

January, 1894, 58.

Coffin's Estate.

Legacies to a class—Lapse—Act of May 6, 1844—Construction of wills.

In the absence of words of substitution or of statutory provision, the death of a legatee in the lifetime of the testator occasions a lapse of the legacy, which will go to the residuary legatee or to the next of kin, unless the legatee is one of a class taking as tenants in common, in which case the survivors of the class will take the entire fund.

The Act of May 6, 1844, makes no provision for gifts under a general power of appointment conferred by will to a brother or sister who survives testator but who dies in the lifetime of the donee of the power.

In the exercise of the power of appointment under the husband's will testatrix gave her residuary estate to her daughter, N., for life; after N.'s death without issue to A., B., C., D. and E., brothers and sisters of husband of testatrix; N. died before testatrix, without issue; B. died after N., but in the lifetime of testatrix; held, notwithstanding, that the gift to A., C., D. and E. was to them as a class, and that the executor of B. must be excluded in the distribution of the estate.

Exceptions to adjudication.

William Coffin, the testator, directed in the

Digitized by Google

third paragraph of his will, dated 13th February, 1872, as follows: "The residue of my estate shall go to such persons or objects as my wife aforesaid shall direct by her last will and testament."

Ann D. Coffin, his wife, on page eight of her will, dated seventh day of February, 1881, directed as follows: "All the rest, residue and remainder of the estate of my said husband over which I have power of appointment remaining after the above are satisfied, I give, devise, bequeath and appoint to and among the brothers and sisters of my said husband to be equally divided among them share and share alike to take effect and be paid after the death of Amanda without children or the descendants of such surviving her."

Amanda Coffin, the daughter of William and Ann D. Coffin, died on or about October 4, 1889, unmarried, "without children or the descendants of such surviving her."

The brothers and sisters of William Coffin, the husband of Ann D. Coffin, were Bodine Coffin, Edward W. Coffin, John H. Coffin, Mary C. Raybold and Abigail C. Shinn. All of whom are now living with the exception of Mary C. Raybold, who died in February, 1891, testate.

The auditing Judge was of opinion that the executor of Mary C. Raybold was entitled to her share in the fund.

To which finding the surviving four filed exceptions.

George G. Mercer, for the exceptions.

A. H. Wintersteen, contra.

February 2, 1895. PENROSE, J. The death of a legatee in the lifetime of the testator, except where the will contains a substitutional limitation or where the contingency is provided for by statute, occasions a lapse of the legacy, which will go to the residuary legatee or to the next of kin, unless the legatee is one of a class taking as tenants in common, in which case the survivors of the class will take the entire fund.

Hence it follows where the gift is to a class, that if the class is to be fixed not at the time of distribution, but by some event happening in the testator's lifetime which individuates its members—as, for example, if instead of a gift to "the brothers and sisters of A.," it is to "the brothers and sisters of A., living at the death of B.," and B. dies before the testator, the class being thus ascertained to consist of C., D., E. and F.,—the death of one of them will cause a lapse enuring to the benefit of the residuary legatee, etc., and the surviving brothers and sisters will take no more than their original shares. In neither case, however, will the share of the one so dying—in the absence of words of substitution or of statutory provision—go to his children, etc., or personal representatives.

Here the will contains no words of substitution, and the Act of May 6, 1844, cannot apply for the reason that it provides against lapse of gifts to brothers and sisters of the testator dying in his lifetime, and makes no provision for gifts, under a general power of appointment conferred by his will, whether to his wife or other person—to a brother or sister who survived him but died in the lifetime of the donee of the power, and therefore, necessarily, before any interest could have vested in the person so dying. An appointment of this kind is ambulatory until the death of the appointer, just as any other testamentary disposition is.

It need only be added that if the gift to the brothers and sisters of the husband ceased to be to them as a class by reason of the death in the lifetime of the donee of the power of one to whom she had given a prior life estate, and thus became as if to them *nominatim*, the death of one while she lived occasioned an intestacy, since the subject of the gift was residuary estate. The presumption is against a construction which leads to such a result; especially where, as here, after the event which would occasion it the will is republished, without change of phraseology, by a codicil.

The exceptions are sustained, and distribution awarded to the brothers and sisters who survived the testatrix, to the exclusion of the executor of the deceased sister. F. B. N.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, MARCH 8, 1895.* [No. 4.

Supreme Court.

July, '94, 191. January 30, 1895.

Kennedy v. Borie et al.

Equity—Combination—Purchase of land subject to liens—Sheriff's sale—Purchase at sheriff's sale under senior liens by owner of land who has taken subject to two liens.

Where one has bought land and takes it expressly subject to two mortgages, he cannot by making default in the payment of interest upon the earlier mortgage bring about a sheriff's sale and buy in the land so as to hold it discharged from the lien of the second mortgage, and a bill by the second mortgagee charging combination to bring about such a result and concealment of the fact that proceedings were pending upon the earlier mortgage, and praying a declaration that the rights of the second mortgagee are unaffected by said sale should not be dismissed upon a demurrer.

Taylor *v.* Smith, 2 Whart. 432; Woodburn *v.* The Bank, 5 W. & S. 447, followed; Rauch *v.* Dech, 116 Pa. 157; Rushton *v.* Lippincott, 119 Id. 12, distinguished.

Appeal of Clarence Kennedy, assignee for the benefit of creditors of the Order of Vesta, from the decree of the Common Pleas No. 4, of Philadelphia County, dismissing his bill in equity filed against Beauveau Borie, James M. Rhodes and John T. Lewis, Jr., trading as C. & H. Borie; John S. Martin, Samuel W. Groome and Nannie A. Groome, his wife.

The bill set forth as follows:—

(1) That the Order of Vesta, a corporation under the laws of the State of Pennsylvania, made an assignment for benefit of creditors to plaintiff, duly executed, which assignment was recorded on October 7, 1892; (2), that among the assets assigned was a mortgage of Samuel W. Groome and Nannie A. Groome, his wife, for the sum of five thousand dollars, on lands standing in the name of said Nannie A. Groome, situate in Radnor Township, Delaware County; that plaintiff had as additional security for said debt the note of Samuel W. Groome, given to said Order for said sum of five thousand dollars, dated August 17, 1892, and payable two years after date, accompanied by certificates for three hundred shares of capital stock of the Commercial Cooperage Company of Chicago, which had no market value; that the debt of $5,000 with interest was still wholly due and unpaid; that this mortgage was subject to the lien of a prior mortgage given by the said Groome and wife, to Fairmount Park Art Association, to secure the sum of $8,000 with interest on the same premises; (3), that after the assignment for creditors, Samuel W. and Nannie A. Groome, conveyed said mortgaged lands and premises to defendant, John S. Martin, by deed dated October 31, 1892, the conveyance being, in express terms, subject to both of said mortgages; that Martin was a clerk in the office of defendants, C. & H. Borie, and took title merely for them, they furnishing the consideration; (4), that on Friday, February 10, 1893, a writ of scire facias issued on the Park Art Association mortgage from the Court of Common Pleas of Delaware County, returnable the second Monday of February, which was February 13, but three days after the issuing of the writ, which was returned *nihil habet*, and two days after the return day thereof, on Wednesday, February 15, an alias writ of scire facias issued, returnable to the third Monday of that same month of February, which writ was also returned *nihil habet*, whereupon, on the earliest possible day, viz, on Tuesday, March 7, judgment was entered by default for want of an appearance on two returns of *nihil*, and damages were assessed at $8,733.38, and on the same day a writ of levari facias was issued and on Saturday, April 1, the sheriff sold said premises, and the same were bought by respondent, John S. Martin, for the sum of $9,005, and on the next secular day, Monday, April 3, a sheriff's deed for said premises, by virtue of said sale, was made to respondent, John S. Martin, and was duly acknowledged and recorded; that Martin also took title for his employers, C. & H. Borie, who furnished the purchase money; (5), that shortly before said sheriff's sale, and during the advertisement thereof, and at times when respondents, Martin and C. & H. Borie and their counsel, were aware of the proposed sale, the plaintiff had divers conversations and conferences with the counsel for C. & H. Borie and said Martin respecting the stock of the Commercial Cooperage Company so held by him, which said C. & H. Borie desired to secure; that plaintiff stated that he had no right to dispose of the same at that time, apart from his mortgage, and proposed to sell his mortgage debt and all securities connected with it; that although those respondents and their said counsel were then well aware of the proposed sheriff's sale, they made no mention or reference thereto; but all reference to said sale was "studiously avoided" by them; that plaintiff had previously been informed by respondent Samuel W. Groome that there was an arrangement of some kind between him and

Digitized by Google

respondents C. & H. Borie, and had been told that they, said C. & H. Borie, were to see that the incumbrances were protected; relying on this and on the fact that he was in communication and conference with their counsel and understood that they would purchase the said mortgage held by your orator as soon as he was prepared to bring suit thereon, he failed to examine the records of Delaware County for the short space of seven or eight weeks between the issuing of the first writ of scire facias and the completion of the sale by the acknowledgment and record of the sheriff's deed, and he knew nothing of the sale until after the acknowledgment and record of the sheriff's deed. (6), that respondents Martin and C. & H. Borie, claimed the right to hold said mortgaged premises free and clear of all right of redemption or trust, and free and clear of the mortgage of plaintiff. On the other hand, that plaintiff claimed that said respondents ought to have disclosed the fact of the proposed sale; that they not only did not do this, but the fact that they "studiously avoided" mention of it, in connection with the nature of the conversation and the other circumstances of the case, was a positive concealment thereof; that said respondents, as owner or owners of said mortgaged property, could not in law buy the same at sheriff's sale without notice to or knowledge by him, so as to deprive him of the advantage of his said incumbrance, it being the duty of the respondents to make all necessary payments on said prior incumbrances; that at the time of and before said sale, the plaintiff was possessed of sufficient cash assets of said assigned estate to enable him to protect his interest either by the purchase of the prior incumbrance or by bidding the property at the sale to a sum sufficient to pay his incumbrance in full, and would have thus protected himself if he had known of the proposed sale.

The bill prayed: (1), a decree "that the title of the respondents, John S. Martin and C. & H. Borie, was not affected or changed by the said sheriff's sale and the deed thereunder; that the said mortgage debt of your orator and the lien thereof were not affected or discharged by the said sale; and that the said mortgage is still a valid and subsisting lien on said premises; (2), that respondents be required to pay to plaintiff, your orator, out of said mortgaged premises, the mortgage debt, with its interest and costs; (3), an injunction restraining the said respondents from selling, conveying or in any way disposing of said mortgaged premises or any part thereof, without paying said debt to your orator, with its interest and costs; (4), further relief.

Beauveau Borie, James M. Rhodes and John T. Lewis, Jr., trading as C. & H. Borie, and John S. Martin, four of the respondents, demurred to the bill.

The Court sustained the demurrer and dismissed the bill at the costs of the plaintiff. The plaintiff took this appeal and assigned as error the dismissal of his bill.

J. Howard Gendell and *John G. Johnson*, for appellant.

Where the owner of land subject to two mortgages, who has directly agreed with the former owner to see that these incumbrances shall be protected, actually procures a sale to be made on the first incumbrance with a view of cutting out the second, for that purpose positively concealing the proceedings from the holder of the second mortgage, and he himself purchases at the second sale, his title has not changed. He has simply paid, through the sheriff, a debt which he ought to have paid directly to the creditor; and he cannot avoid his obligation to the second mortgagee by any such scheme.

The bill sets up circumstances from which these facts are naturally to be inferred and which require explanation from appellees.

Where the defendant in an execution, or the owner of land whose duty it is to pay a prior incumbrance, fails to perform that duty, by reason of which the land is sold and he himself buys it, he takes in accordance with his former title, and the second incumbrance, especially if it be a mortgage, is not discharged.

There are two distinct grounds upon which this can be sustained. One is that where the owner whose duty it is to pay an incumbrance allows the property to be sold and buys it himself, he does this only for the purpose of discharging the later incumbrance, and this is a fraud on the incumbrancer.

The other ground is that the title of the owner of the land is really never divested. He owned it before the sale—he continues to own it afterward. The incumbrance also is therefore not divested.

Taylor *v.* Smith, 2 Whart. 432.
Woodburn *v.* F. & M. Bank, 5 W. & S. 447.
Good *v.* Schoener, 10 Leg. Int. 151.

The owner of the property cannot gain any advantage by his own act in substituting another title for that which was bound by the mortgage.

Coote on Mortgages, 244.
Taylor *v.* Wheeler, 2 Salk. 449.
Smith *v.* Chichester, 4 Ir. Eq. R. 580.
Collett *v.* Hooper, 13 Ves. 255.
Jones *v.* Kearney, 4 Ir. Eq. R. 74.
Hughes *v.* Howard, 25 Beav. 575.

G. Heide Norris and *George Tucker Bispham*, for appellees.

The appellees are not trustees *ex maleficio*.

Digitized by Google

Kraft *v.* Smith, 117 Pa. 183.
Salsbury *v.* Black, 119 Id. 200.

No fraud being alleged, the appellees, as previous holders of the title, could purchase the property at sheriff's sale, freed and discharged of all incumbrances.

Rauch *v.* Dech, 116 Pa. 157.
Rushton *v.* Lippincott, 119 Id. 12.

February 19, 1895. GREEN, J. We do not think that the rulings in Rauch *v.* Dech, 116 Pa. 157, and Rushton *v.* Lippincott, 119 Pa. 12, control the decision of this case. In both of those cases the purchaser at the judicial sale was a total stranger to the title and under no obligation to protect the title against any incumbrances. He, therefore, took the lands divested of the liens which were sought to be enforced, and when he subsequently conveyed to the former owner the purchaser took the same title which he held. In this case the allegation of the bill is that Martin bought the property from Groome and wife, subject, in express terms, to both the mortgages described in the bill, one of which is the mortgage of the plaintiff's assignor. It is true that Martin was not the original mortgagor, but he was the grantee of the title of that person, and it must be assumed that the purchase money which he agreed to pay and in consideration of which he obtained the title, was, in part at least, secured by the very mortgage which he now claims to be discharged because there was a sale under the prior mortgage, which also he agreed to pay. The case looks now more like the line of cases of which Taylor *v.* Smith, 2 Wharton, 432, and Woodburn *v.* The Bank, 5 W. & S. 447, are examples, in both of which the purchaser's title was held to be subject to the prior liens.

Nor are we willing to say conclusively, at this stage of the pleadings, that no force is to be given to the other facts stated in the bill, as *indicia* of an improper purpose to use the sale under the first mortgage, as a means of divesting the lien of the second mortgage, which the purchaser Martin had, according to the bill, expressly agreed to pay. While we will not now review these facts, as we do not wish to prejudge the case, we are of opinion that they would be admissible in evidence, and be entitled to consideration, in support of the charge of a combination between Martin and the other defendants to destroy the lien of the plaintiff's mortgage.

The case comes before us only upon a demurrer to the bill, which necessarily admits the truth of the facts stated in the bill. We think the case should be heard upon its merits and that there is a sufficient averment of facts in the bill to entitle it to be heard. We will therefore overrule the demurrer and direct the defendants to answer over.

The judgment of the Court below is reversed, the demurrer of the defendants is overruled, the bill is reinstated and the defendants are directed to answer over, and the record is remitted; the costs of this appeal to be paid by the defendants.

H. B.

Oct. '94, 214. November 1, 1894.

Freyer v. McCord.

Deceit—Principal and agent—Liability of principal for misrepresentations of agent—Depends upon principal's knowledge and consent—Proof of.

An action of deceit being founded on fraud or moral wrong, to sustain it against a principal on misrepresentations of his agent, the fraud should be clear, and there should be in addition some evidence of participation or knowledge on the part of the principal, or circumstances which should have put him on inquiry.

M. authorized her agent O. to sell a piece of property The land was divided by a public road, and O. advertised it by putting up a sign board on the portion above the road. F. agreed to buy, and a deed was prepared by G. which called only for the portion above the road. The deed was executed and delivered to F., who raised a part of the purchase money by a mortgage, prepared by a building association, which followed the lines of the deed. F. brought an action of deceit against M., and testified that he could not read English, and that he asked O. whether the deed was all right. He did not, however, ask to have the deed read to him. O. testified that he had told F. that the deed included the whole property, but it appeared that G. had called to O's attention, that the deed only covered a portion of the tract. M. testified that she had never authorized O. to sell anything but the upper portion of the property above the road:

Held, that there was not sufficient evidence to maintain the action.

Griswold *v.* Gebbie, 126 Pa. 353, distinguished.

Appeal of Zelas K. McCord, defendant, from the judgment of the Common Pleas No. 3, of Allegheny County, in an action of trespass (in deceit) brought by Ernest Freyer against Zelas K. McCord, to recover damages for misrepresentations in regard to certain land bought by said plaintiff from said defendant.

Upon the trial, before McCLUNG, J., the following facts appeared: Zelas K. McCord, the defendant, was the owner of a small tract of land in the borough of Etna, described as one piece in the deed from E. E. Graham *et al.*, dated March 16, 1878, under which she acquired title, and containing one acre and one hundred and forty-four perches. A public road, known as Washington street, ran through this tract, part

Digitized by Google

of which lay above and part below the road. Ernest Freyer, the plaintiff, was a tenant upon this property under Mrs. McCord, from 1884 to 1888, during which time he used the part lying on the lower side of the road as part of the leased premises. This lower part was, however, not fenced, and there was nothing to show that it belonged to the rest of the property. In 1892 Mrs. McCord, who was living in Denver, Colorado, authorized Henry Ochse to sell this land with the improvements thereon. There was no written authority to sell given, nor any writing of any kind describing the land to be sold. Ochse put a "For Sale" notice on the land above the road, and shortly afterwards Ernest Freyer purchased the land for $1,500. The deed, which was written by R. I. Graham, a justice of the peace, and father of Mrs. McCord, called only for part of the land above the road. It was sent to Mrs. McCord, who executed it, and shortly afterwards it was delivered to Freyer, in Ochse's office, at which time the purchase money was paid in full. Part of the purchase money was raised from a building association by a mortgage on the premises, in which the description was the same as in the deed. Subsequently Freyer, alleging that the deed did not embrace all of the land sold to him, had a new deed prepared and forwarded to Mrs. McCord, but she refused to execute, saying that the deed already executed and delivered embraced all the land she had agreed to sell. Freyer then brought this suit. It was in evidence that the plaintiff was a German who spoke and understood English very little, and could not read it. He testified that when the deed was delivered, he asked Ochse "Is the deed all right? I can't read English." He further said, "I guess he said that it was all right." Ochse denied this, but testified that he told the plaintiff that the deed included the whole property. He admitted, however, on cross-examination, that Graham, who drew the deed, had just before told him that the lines ran only to the road.

The defendant requested the Court to charge as follows: "That under the pleadings and evidence in this case the plaintiff cannot recover." *Answer.* Refused. (First assignment of error.) The Court charged the jury, *inter alia*, as follows:—

"This action, which is presented to you for determination, is one called an action of deceit, or at least was so called when lawyers were required to study their profession as far as pleading was concerned, and to understand the distinction between actions. It is, in its essence, an action of deceit.

"The plaintiff alleges that he purchased from Mrs. McCord, the defendant, through her agent, a certain lot or tract of land in Etna, and that whilst he paid the full price that he agreed to pay, that he only obtained a part of the land. This is only a part of the case.

"[For the purpose of recovery in this case, it is not sufficient that he should show you simply that he purchased a tract of land, and only got a portion of it. He must, in addition, convince you by the weight of the evidence, that he was tricked into paying this full price for that portion of the land. There must have been a deceit, a fraud, or a trick on the part of the defendant, either by herself or through her agent. If you find all the other facts and fail to find that fraud, that deceit—fail to find that the defendant, or her agent, obtained the money for the whole tract, the full price, by a trick, whilst they only conveyed a portion of the land, then you cannot find for the plaintiff. You must find that they conveyed simply a portion of what they knew he had bought, and that they, by deceiving him into the belief that he was getting his whole purchase, obtained from him the purchase money for that whole purchase.]

"If he knew that he was only getting a part of the land, although he had bought the whole, then he cannot recover here because that was not deceit. That is simply a mistake; if there was no actual, moral wrong done, no trick played, then he could not recover, although he might have a remedy in another form of action. I have said that this fraud must have been perpetrated either by the defendant or by the agent.

"[She did not personally conduct this sale; she conducted it through her agent. Mr. Ochse was perhaps her agent as to part of it, and Mr. Graham, her father, as to the balance. Mr. Ochse had to do with the sale, and Mr. Graham specially with the preparation and delivery of the deed. What they did even in the way of a fraud or a trick, within the scope of their authority, would be binding upon her; and if they did anything outside of the scope of the authority which she had given them, and she afterwards ratified that, then she would be bound by it, and would be liable for their acts. If she took advantage of a trick that they had played, obtained the benefit of it and held to it, then that would be a ratification of their act. Although she only intended to sell a part of this land, if the agent, by selling the whole, obtained an offer and then by a trick got the purchaser to accept a part for the whole, and thus got that whole price, and she ratified it by accepting the benefit, and refusing to right the wrong, then she would be liable for the act of the agent, and there could be a recovery against her as if it were against the agent.]

"This, I think, gentlemen, explains all the legal principles which govern this case.

"[I repeat that you must find that element of

Digitized by Google

moral wrong in the case in order for the plaintiff to recover here. You must find that there was a fraud perpetrated upon this plaintiff, that he was deceived into paying this money for a part of the land that he had bought, and you must find that he did actually buy the larger tract of land and only got the smaller. It is admitted that the latter is the fact. He could not be deceived, of course, if he only bought the portion above the road, and he could not be deceived if he bought the whole of it, if, before he accepted and paid the money he was informed that the deed only conveyed that which was above the road. It is said that that statement was made in his hearing. He alleges that he did not hear any such statement, and did not understand that that was the fact, but supposed he was receiving the whole tract. The plaintiff is a German, and while he speaks English, he does not speak it very fluently, perhaps, and that may account for his failure to understand, at least it is an element to be regarded by you in weighing the testimony. If you determine, however, that he did understand that, you should at once find for the defendant. If not, and you find the other element of the case, and find that they took advantage of his ignorance, and of the supposition upon his part that he was getting the whole, to trick out of him the purchase money for the whole, then the action would be made out and he would be entitled to recover the damages which he suffered.]

"[Now the damages which he suffers are simply the lessened value of this property by reason of cutting off what was below the road. How much less in value of property has he than if he had gotten what he bought? You have the testimony of the witnesses. The testimony of the plaintiff's witnesses varies from $200 to $500; perhaps the testimony of the defendant's witnesses varies from $50 to $150. Perhaps you find generally in these matters of opinion that people are honestly likely to be more influenced by their leaning towards one side or the other, than in other cases. A matter of opinion is very flexible, and a party can go up and down, but you probably find the true point at which you should arrive between the extremes.]"

Verdict for plaintiff in the sum of $325. Whereupon the defendant took this appeal, assigning for error the answer to her point, and the portions of the charge as given above in brackets.

J. McF. Carpenter, for appellant.

The plaintiff cannot recover in this action unless equity would have afforded him relief in reforming the deed, which cannot be done upon the testimony of only one witness, Ochse, especially when such testimony is flatly contradicted, and further weakened by the circumstances of the case.

Rowand *v.* Finney, 96 Pa. 196.
Cullmans *v.* Lindsay, 18 WEEKLY NOTES, 509.
Stafford *v.* Giles, 135 Pa. 411.

The plaintiff must offer to reconvey the land, on repayment of the purchase money, before he can recover in this suit.

Pearsoll *v.* Chapin, 44 Pa. 9.
Babcock *v.* Day, 104 Id. 4.

The defendant executed and delivered her deed in perfect good faith, and cannot be answerable, in an action of deceit, for the alleged fraud of her agent, on the ground that she profited by it.

Titus & Scudder *v.* C. & F. R. R. Co., 46 N. J. L. 393
Kennedy *v.* McKay, 14 Vroom, 288.

J. M. Swearingen, (*Samuel McClay* with him), for appellee.

A principal is responsible for the misrepresentations of his agent within his authority; and Ochse testified that he was authorized by the defendant to sell the entire lot, and did so sell it to the plaintiff.

Griswold *v.* Gebbie, 126 Pa. 365.
Lee *v.* Dean, 3 Wharton, 315.

The plaintiff is at liberty to affirm the contract, so far as executed, and sue for the value of the balance.

Wharton on Contracts, sec. 232.
Wiswall *v.* Hall, 3 Paige, 313.

January 7, 1895. MITCHELL, J. While the general rule that the principal is liable for his agent's misrepresentations is unquestionable, as was held in Griswold *v.* Gebbie, 126 Pa. 353, yet the action of deceit being founded on fraud or moral wrong, to sustain it against the principal on such representations, the fraud should be clear, and there should in addition be some evidence of participation, or knowledge on the part of the principal, or circumstances which should have put him upon inquiry. In other words, as said in Griswold *v* Gebbie, "the scienter must not only be alleged but proved." A man may be liable to make good the value of another's property which he has used, though he may have used it innocently and unwittingly, but he could not be convicted of larceny unless he took it *animo furandi*, nor can he be punished by damages in deceit for a fraud without evidence that he participated or knew, or ought to have known it. Griswold *v.* Gebbie was said to be a very close case, but attention was called in the opinion to the fact that the defendant not only knew of the preparation of the deceptive circular by her agent, but had herself given it to some parties who inquired about the property.

That element is entirely wanting in the present case. There is no evidence that either the

Digitized by Google

defendant, or Graham, her agent to prepare the deed, knew of any fraud, if in fact any fraud was committed. The property was advertised by a sign board put up on the portion above the road; the part below the road was not fenced and had nothing to indicate that it was part of the same ownership; the deed plainly described the land as above the road, so that the identity or variance between the thing conveyed and the thing bought was evident to the slightest examination; the plaintiff was a German but he spoke English, and was bound to know what his deed contained, unless it was misread to him, which is not alleged; he took it to the attorney of his building association who examined it and prepared a mortgage, following the same description, plaintiff executed it with that description, took charge of the land, rented it for a time and then moved on it himself and made no complaint for some months, how many not exactly shown. The defendant denied positively that she authorized or intended to sell anything more than the upper lot properly described in the deed, and it was admitted that she never gave Ochse any written authority, or had any personal communication at all with the plaintiff. Against the sale with these surroundings the only evidence of fraud or deceit is the allegation that Ochse told plaintiff that the deed was "all right," and as to this the testimony of plaintiff and his witness is at variance. Plaintiff says he asked Ochse, "Is the deed all right? I can't read English," and says, "I guess he said it was all right." Ochse says plaintiff did not ask anything about the deed, but that he told him it included the whole property, and he says he told him so in the face of the fact that Graham, who drew the deed, had just told him, Ochse, the contrary. If plaintiff was deceived it was by Ochse, and his action for deceit should have been against him. The evidence is entirely insufficient to support such an action against the defendant, the utmost that it amounts to against her being that plaintiff did not get the whole of the land he thought he was buying, and that by reason of the circumstances he might be entitled to a rescission on tender of reconveyance. The defendant's point should have been affirmed, and verdict directed for her on the insufficiency of the evidence to maintain this action.

Judgment reversed. S. H. T.

Oct. '94, 39. October 23, 1894.

Sturgis v. Kountz.

Negligence — Proximate cause—Ferry-boat — Defective guard rail—Duty of ferryman.

A ferryman must provide his boat with all proper and suitable guards and barriers for the security of property carried by him, although ordinary care is required of the traveler.

Plaintiff took passage with his horse and wagon upon a ferry-boat, a tug passing sounded its whistle, which frightened the horses on the boat and plaintiff's horse backed against the entrance rail of the boat, which being in a defective condition broke and let the plaintiff's horse and wagon fall into the river:

Held, that as the blowing of a steam whistle by a passing vessel was not out of the ordinary course of things, and as it was not out of the ordinary and usual habit of horses to take fright at such a sound, the ferryman must be required to have foreseen and provided against the consequence of such fright on the part of horses carried by him, and that the breaking of the rail by the pushing of a frightened horse against it, was the natural and probable consequence of the use of such a defective bar; and that this constituted negligence, which was, under the circumstances, the proximate cause of plaintiff's injury.

Township v. Watson, 3 Atlantic Rep. 869, followed.

Appeal of William J. Kountz, Jr., defendant, from the judgment of Common Pleas No. 2, of Allegheny County, in an action of trespass brought by W. W. Sturgis, to recover for damages incurred through the alleged negligence of the defendant.

The facts in this case, appearing on the trial before WHITE, J., are fully stated in the opinion of the Supreme Court, *infra*.

The defendant excepted and assigned as error that the Court refused to direct a verdict for the defendant and also because the Court entered judgment for the plaintiff upon the point reserved in the special verdict as follows:

"We find for the plaintiff $365, and also find the following facts: The accident to the plaintiff was caused by the blowing of steam on a tug boat passing near the ferry-boat, which frightened the horses on the ferry-boat, causing the team in front of plaintiff's to prance and back against plaintiff's horse, thereby causing plaintiff's horse to rear and back and in a frightened condition whirl around suddenly, strike the guard rail across the entrance of the wagon way with his body, breaking the rail and plunging into the river.

"The verdict subject to the opinion of the Court on the question of law reserved, to wit, whether upon the facts stated the proximate cause of the accident was the blowing of steam on the tug-boat, in the sense that the defendant was not responsible for the accident, although

Digitized by Google

the guard rail may have been defective; and if so, judgment to be given for defendant *non obstante veredicto.*"

E. Z. Smith, (*Thomas Patterson* with him), for appellant.

The testimony and the special finding of the jury show that the whistling or escaping steam of the tug-boat "John Dippel" was the moving cause of the accident, and that the alleged defect in the guard rail, if it contributed at all, was but incidental.

The liability of a ferryman is not that of a common carrier, at least where the passenger retains control of his own property. It is most nearly like the liability of the owner of a bridge or turnpike. The ferry is really but a continuation of the public highway.

Amer. & Eng. Enc. of Law, Tit. Ferries, Vol 7, pp. 941 and 947.

The defendant is therefore not liable.

Herr *v.* Lebanon, 149 Pa. 222.
Township *v.* Wagner, 127 Id. 184.
Worrilow *v.* Township, 149 Id. 40.
Schaeffer *v.* Township, 150 Id. 145.
Kieffer *v.* Hummelstown Borough, 151 Id. 310.
Behling *v.* Pipe Line, 160 Id. 359.

If the owners of the ferry are bound to take proper precautions for the safety of travelers, the traveler himself is bound to take every precaution that he can for the safety of himself and property.

White *v.* The Winnisimmet Co., 7 Cush., 155.
Philadelphia Traction Co. *v.* Bernheimer, 125 Pa. 615.

The driver of a horse is obliged to keep control of him as well as he can under all the circumstances. When the plaintiff drove on the ferry-boat all occasion for his remaining seated in the vehicle was at an end. He was in a place where, if he remained seated and his horse frightened, there was no room or means to control him. His vehicle was so light as to form practically no check on the movements of the horse. If for convenience or indifference he preferred to remain seated, he neglected to take necessary precaution, and when in his insecure position he paid no attention to the approaching tug until the whistle frightened his horse and he found himself without any means to control him he was guilty again of neglect of a most apparent precaution. The only reason or excuse for the plaintiff's conduct is that he did not anticipate that his horse would frighten; he hardly seems, then, to be in a position to demand that others should anticipate that which did not seem to him to need precautions.

M. H. Stevenson, (*W. T. Tredway* with him), for appellee.

The general finding of the jury fixes and establishes two facts; first, that the plaintiff was guilty of no contributory negligence, and secondly, that the defendant was guilty of contributory negligence. The case was properly submitted to the jury.

P. R. R. Co. *v.* Hope, 80 Pa. 373.
Haverly *v.* R. R. Co., 135 Id. 59.

"A proximate cause is one which in natural sequence undisturbed by any independent cause, produced the result complained of."

Behling *v.* Pipe Line, 160 Pa. 359.
Township *v.* Watson, 3 Atlantic, 869.

The negligence of the defendant in failing to provide a sound and sufficient guard rail or other protection at the entrance to or exit from the boat to prevent teams and wagons from going overboard into the river, was the direct, proximate and efficient cause of the injury. The plaintiff was not bound, nor was it the usual thing for the driver of a cart or buggy, to step out of the same upon going on the ferry-boat. The cases cited in the appellant's paper book do not fit this case. They are all cases where the *causa causans* was something unexpected, unlooked for, or extraordinary, and something against which no prudence or forethought would have suggested their happening, something for which the defendant was not responsible and was not bound to anticipate.

"In the case at bar it was undoubtedly the duty of those in charge of the ferry-boat to guard against accidents from horses becoming frightened on the boat, for that might fairly and reasonably be anticipated. It was something that might naturally and probably be expected. No doubt for this purpose the guard rail at the wagon entrance was provided. Horses might be frightened by the shaking and moving of the boat on the water. They might be frightened by passing boats or steam whistles on the river, and these were matters to be expected and provided against." (Opinion of Court below on verdict for judgment *non obstante veredicto.*)

January 7, 1895. DEAN, J. The defendant was the owner of a ferry-boat, "William Thaw," plying between lower part of Allegheny City and south side of the Ohio river. On 9th of February, 1892, the plaintiff, Dr. W. W. Sturgis, a practicing physician, drove on the boat in a light two-wheeled sulky, to be ferried from north to south side. The boat left the wharf, and was some distance from it in the channel, when it was passed by a small tug boat, the "John Dippel," which when near to the "William Thaw," blew its steam whistle. This frightened the horses, of which there were a number on the ferry boat. The entrance on the boat from the landing had been closed by a

Digitized by Google

wooden rail or bar to prevent frightened or unruly horses from backing vehicles off the boat, or from plunging over into the water. When frightened by the scream of the whistle, the horses commenced backing and plunging. The plaintiff was sitting in his sulky, the horse's head in the direction of the forward part of the boat, and the rear of the sulky not far from the cross bar which protected the entrance; in front of him was a two-horse team, which backed against plaintiff's horse; his horse then backed, turned almost around towards the outside of the boat, struck the cross bar with his shoulder, broke it, and plunged into the river with sulky and driver. The horse was drowned, the sulky lost, but the owner was rescued without sustainiug any serious personal injury. He brought suit for loss of his horse and sulky against defendant, the owner of the ferry-boat, averring negligence in putting up and using a defective and insufficient cross bar to protect the owners of teams in traveling on the boat. The bar had been broken and spliced to be used temporarily, until a new one was procured. Several days before the accident, the inspector of hulls had called attention to the defective rail, and directed it should be replaced.

The jury rendered a special verdict for plaintiff, in the sum of $365 damages, subject to the opinion of the Court on the question, whether the blowing of the whistle on the tug "Dippel" was the proximate cause of the accident in the sense that the owner of the "Thaw" was not responsible, even if the guard bar or rail was defective. If so, then judgment to be entered for defendant notwithstanding verdict for plaintiff.

The Court, afterwards, in an opinion filed entered judgment for the plaintiff on the verdict. From this defendant appeals. While, as argued by appellant, the liability of a ferryman, under the facts in this case, was not exactly as great as that of a common carrier of goods, nevertheless, having undertaken to carry the plaintiff, with his horse and vehicle, for hire, his duty was to carry safely as against defects and insufficiency of his boat or neglect on part of himself and servants. At the same time the plaintiff, the owner of the horse and sulky, assuming the care of them while on the boat, was bound to exercise ordinary watchfulness and skill to prevent loss or injury: Wyckoff *v.* Ferry Co., 52 N. Y. 32. And, as is said in Clark *v.* Ferry Co., 35 N. Y. 485: "They (the owners of the boat) are also required to be provided with all proper and suitable guards and barriers on the boat, for the security of the property thus carried, and to prevent damage from such casualties as it would be naturally exposed to, although ordinary care is required on part of the traveler." In this last case, as here, a horse was lost while the owner was in the vehicle; it took fright and backed against the chain which was used to close the entrance to the ferry deck, the chain broke because of a defective hook in it. The ferry company was held answerable for negligence. To the same effect are Lewis *v.* Smith, 107 Mass. 334; Walker *v.* Jackson, 10 M. & W., 161. Therefore in view of the verdict, the single assignment of error for our consideration is the one urged that, even if the broken rail was defective, the proximate and controlling cause of the accident was the blowing of the tug whistle, for which defendant is not answerable, and that the Court erred in not so instructing the jury.

The question of negligence of defendant, in not providing such a guard rail as ordinary care required; the question of the alleged contributory negligence of plaintiff in not getting from his sulky and taking his horse by the head and quieting him, were both fully and impartially submitted to the jury and found against defendant.

It seems to us, under the facts, the blowing of the whistle, although the originating cause of the injury, cannot relieve the defendant from liability. The cases cited and presented so concisely by the learned counsel for appellant are unanswerable when applied to the facts in them, and even to facts as he assumes them to be in this issue, if some of the significant intermediate facts be not noticed. "The true rule is, that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrong-doer, and likely to flow from his act:" Township *v.* Watson, 3 Atlantic R., 869. To the same effect is Behling *v.* Pipe Line, 160 Pa. 359. And so all the cases cited on both sides, either expressly or by implication, rule.

Was the plunging of this frightened horse against the guard rail such a consequence as ought to have been foreseen by the owner of the ferry-boat? The primary cause of the plunging was the blowing of the whistle; but the primary is by no means always the natural and probable cause of the particular injury. It is not when there is a sufficient and independent cause between it and the injury. In such case resort must be had by the sufferer to the originator of the intermediate cause. As is said by AGNEW, J., in Railroad Co. *v.* Hope, 80 Pa. 377, the question is: "Was there a continuous succession of events so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent and the final result cannot be said to be the natural and probable conse-

Digitized by Google

quence of the primary cause." The primary, natural and probable consequence of the blowing of the whistle was the fright of the horses and their rearing and plunging; any injury they might have done to each other, or those in charge of them on the boat, would not have been attributable to the owner of the ferry-boat, because that was the consequence of the primary cause, the blowing of the whistle. But what is naturally to be expected from a frightened horse on the narrow circumscribed deck of a ferry-boat? Manifestly, that he will plunge off it into the water. This the ferry-boat owner, to a large extent, provided against by guard railing of sufficient strength all around the boat except at the one place, the entrance; and here it was, usually, strong enough to prevent such an accident, but on this day was not. The horse plunged against the spliced and defective rail, which broke and it went over. Here was an independent intermediate cause, or omission of duty, without which, notwithstanding the primary cause, the injury would not have been suffered. And the jury, on sufficient evidence, have found defendant was negligent in maintaining a defective guard rail at that point. Says APPLETON, C. J., in Moulton *v.* Sanford, 51 Me. 134: "Ordinarily, that condition is usually termed the cause whose share in the matter is the most conspicuous and is the most immediately preceding and proximate to the event." It does not help us much in the administration of justice to refine on the distinctions between cause and condition in bringing about results. Taking the case before us on its facts it is not essentially different from Hey *v.* City of Phila., 81 Pa. 44. The plaintiff was driving his horse in a park maintained by the city for the use of the public. He was on a road-way 50 feet wide which curved round the declivity very near a steam railroad, the high bank on the right of the roadway descending very abruptly to the Schuylkill river; at this side there was no barrier or railing; the horse took fright at a locomotive whistle on the railroad, plunged down the bank into the river and was drowned. This Court held it was for the jury to say whether under the circumstances, it was negligence in the city not to have erected a proper barrier at such a point. If such omission were negligence, then, that condition interposed between the originating cause, the blowing of the whistle, and the event, was such as to constitute the negligent omission the efficient and proximate cause of the loss. To the same effect are Alger *v.* Lowell, 3 Allen, 402; Norris *v.* Litchfield, 35 N. H. 271; Joliet *v.* Verley, 35 Ill. 58.

The owner of the ferry-boat in this case on whom was the duty of care according to the circumstances ought to have foreseen such a result because it was natural and probable, and have guarded against it by a sufficiently strong rail. The fact is, he did foresee it, but negligently did not guard against it. His business was to ferry persons and vehicles across a navigable river at a point where other water craft were constantly passing and repassing. When approaching each other, passing or crossing each other's path, signalling or warning by steam whistles is the settled custom. Whether any less startling signal might, with comfort and safety, have been adopted, has not yet been determined; it is now, and has been, since the use of steam power, the recognized method of communication between steam vessels. He knew this, and could not have been ignorant of the fact that fright by a screeching whistle was a constant menace to the safety of the animals and those having them in charge on that boat. Horses will take fright at just such noises, especially in such a situation penned up on a boat. That, when frightened, they would press against each other and the guard rails, he was bound to know, for he was bound to have such knowledge of his business as would enable him to conduct it with reasonable safety to the public, whose patronage he invited. If the blowing of a steam whistle by a passing vessel had been out of the ordinary course of things, or if it were out of the ordinary and usual habit of horses to take fright at such a sound, he would not have been expected to foresee and provide against such an accident; ordinary care would not have required precaution against extraordinary contingencies. But here, the breaking of the bar, by the pushing of a frightened horse against it, was the natural and probable consequence of putting such a defective bar there; and this was the negligence, which, under the circumstances, was the proximate cause of plaintiff's injury.

The learned Judge of the Court below, in his opinion on the reserved point, has very clearly distinguished this from the cases cited and claimed to establish the blowing of the whistle as the proximate cause.

The assignments of error are overruled, the judgment affirmed. W. C. S.

Oct. '94, 93. November 6, 1894.

Dennis v. Pittsburgh & Castle Shannon Railroad Company.

Negligence—Carrier—Person in place of danger by carrier's invitation.

Where a person is, through the act and invitation of a carrier, in a place of danger from which he cannot extricate himself without risk of greater danger and is thus

Digitized by Google

injured through the act of the carrier's agent, he cannot be held guilty of contributory negligence which will defeat his right to recover against the carrier.

Where it is testified that a conductor of a railway car announced "there is room inside here; this train is going out right away," that led by such announcement the plaintiff got upon the platform of the car and found it so crowded that he could not get inside, and in the meantime others had crowded behind him so that he could not get off, that some one having got upon the car and finding it a wrong one was commanded by the conductor to get off, that the conductor began pushing the passengers to make way for this person, whereby the plaintiff was pushed backward through an opening in the platform railing, there is sufficient evidence to sustain a verdict against the railway company, and if the above statement of facts is contradicted the case is for the jury.

Appeal of the Pittsburgh and Castle Shannon Railroad Company, defendant, from the judgment of the Common Pleas No. 3, of Allegheny County, in an action brought by Peter J. Dennis to recover for injuries sustained by reason of the alleged negligence of defendant.

The facts of the case are sufficiently stated in the opinion of the Supreme Court.

The defendant presented several points, all of which were affirmed except the seventh, which was as follows: "Under all the evidence the verdict should be for defendant." This point was refused.

Verdict for plaintiff for $800 and judgment thereon. The defendant took this writ and assigned as error, (1), the refusal of its seventh point, (2), that the Court did not direct a verdict for defendant.

S. B. Schoyer, (with him *S. Schoyer, Jr.*, and *J. M. Cook*), for appellant.

The burden of proof was on plaintiff in this case, not only to affirmatively prove the negligence of appellant, but to disprove his own contributory negligence; and this because the injury in this case did not result from any accident to the train, nor from any defect in the means of transportation, nor was it connected therewith.

Herstine *v.* R. R. Co., 151 Pa. 244.

Plaintiff having been injured while riding in a place of known danger and by reason thereof, has the burden, not only of proving that he was free from negligence while there, but must prove that he was there from necessity and not from choice.

R. R. *v.* Hoosey, 99 Pa. 492.
Langdon *v.* R. R. Co., 92 Id. 21.
Wills *v.* R. R. Co., 129 Mass. 351.
Torrey *v* R. R. Co., 147 Id. 412.
Hickey *v.* R. R Co., 14 Allen (Mass.), 429.
Graville *v.* R. R. Co., 105 N. Y. 525.

That the accident would not have occurred if plaintiff had not been occupying a precarious position, or had been holding on, does not admit of a doubt, because it is evident that plaintiff would have been necessarily overbalanced by any ordinary movement of the crowd, or by the slightest push or contact with any of the people on the platform, or by any ordinary jolt of a moving train; because it does not appear from any evidence in the case that plaintiff would have fallen if he had been in a different position, or had been holding on. Nor does it appear that the conductor used any unusual force; because plaintiff was the only one on that crowded platform who fell, and he himself does not say, nor does it appear. that he was obliged to take his place in the open space nor that he could not have held on; on the contrary he could easily have done so.

It was negligent in plaintiff, as a matter of law, to place himself in the above position, and remain there without holding on to the rails.

R. R. *v.* Hoosey, *supra*.
Malcom *v* R. R. Co., 106 N. C. 63.
R. R. *v.* Bisch, 120 Ind. 549.
Wills *v.* Ry. Co., 129 Mass. 351.
Ward *v.* Central Park R. R. Co., 11 Abb. Pr. (N. S.) 411.

Even if the whole train had been so overcrowded that plaintiff could not get inside any of the cars thereof, that fact would not justify his riding upon the platform, if he perceived or ought to have perceived that state of affairs before he got on. In such case it would be his duty to remain off the train. A breach of duty on the part of the railroad company does not justify an intending passenger in placing himself in a dangerous position. Nor does the fact that a railroad company overcrowds its cars imply a contract to convey on its platforms a passenger who purchased a ticket for that train. A contract to carry passengers on the cow-catcher, if the platforms were crowded, might, with equal reason, be implied.

The reasoning of those cases which decide that the failure to provide a seat does not justify a passenger in riding on the platform, supports the above contention and applies equally to the case of a passenger who boards a crowded train, knowing that he will not be able to get inside. He should appeal to the law for redress.

Siner *v.* R. R. Co., 87 Law J. Ex., p. 98.
Lucas *v.* R. R. Co., 6 Gray, 64.
Saunders on Neg., 25-28.
Graville *v.* R. R. Co., 105 N. Y. 525.

"A mere desire to be first on or first off, or hurry to arrive at one's destination, is no excuse for being on the rear platform."

Hickey *v.* R. R. Co., 14 Allen, 429.
Torrey *v.* R. R. Co., 147 Mass. 412.

"A railroad company is not negligent in failing to provide with a seat a passenger who voluntarily boards a crowded train and takes his

Digitized by Google

place upon the platform without complaint or effort to secure better accommodations."

Raymond on Imposed Duties of Carriers, sec. 227.

James S. Young, (*S. U. Trent* with him), for appellee.

The case was one for the jury under the evidence.

January 7, 1895. DEAN, J. The defendant operates a narrow guage railroad running about seven miles out of Pittsburgh. On the 18th June, 1893, defendant, to accommodate a German society in an excursion to West Liberty, on the line of its road, ran excursion trains to that point from Carson street in Pittsburgh. The route was up an incline railway from Carson street to summit of a hill, then down an incline operated by a cable, 1300 feet, to foot of hill on other side where the cars were attached to a locomotive which took them to West Liberty. The plaintiff, with his son and a friend, took passage at Carson street, ascending the incline, then got off to enter the cable cars to descend to the level. Here there was a large crowd of people, all, as usual on such occasions, eager to enter the cars; there were two trains scheduled to start ten minutes apart, of four or five cars each, standing ready; plaintiff and his son and friend got upon the rear platform of the first train; the car was very full of passengers; the train started and had moved but two or three hundred feet when plaintiff was pushed and fell to the ground, dislocated his elbow and sustained other injuries which have seriously disabled him. He brought suit against defendant for damages, alleging the fall from the car was in consequence of its negligence in so crowding the body of the car with passengers that he could not get inside, and in crowding the platform after he was upon it that he could not get off before starting or maintain his place upon it afterwards. There was a verdict and judgment for plaintiff, from which defendant appeals, assigning for error the refusal of the Court on all evidence to direct a verdict for defendant.

The Court instructed the jury that if plaintiff got on the platform when he saw the car was so crowded he could not get in; or if having got on and then before the car started saw its crowded condition but did not get off; or without any necessity for so doing remained on the platform after the car started he could not recover. But appellant alleges there was not sufficient proof of any negligence of defendant, while the proof was undisputed of contributory negligence on part of plaintiff. Undoubtedly, as the injury did not result from any accident to the train, nor from any defect in the means of transportation, the burden of proof was throughout on plaintiff to show his injury was the result wholly of defendant's negligence. He was standing in a known place of danger, one not intended for passengers, after the car started, and then fell or was pushed off. In other words, there are no presumptions in his favor or against the defendant. How came he to be in a place of danger where he had no business to be? His place was inside the car, not on a crowded platform. The plaintiff, his son, and his friend, Shantz, undertake to account for this otherwise manifest negligence, in substance thus: He got off the car when it reached the summit of the incline; the two trains were standing there and about them was a large crowd; in looking for a car to enter, the three passengers were separated; the son got to the rear car of the first train; the conductor was standing by it and said: "There's lots of room inside here; this train is going out right away." He immediately found his father and Shantz, repeated what the conductor had told him, and they all got on the platform to get in the car, but at the door found it was so crowded, they could not push their way in; then, others so crowded up behind them, that they could not get down from the platform. The car started and the conductor, who was on the platform, immediately began taking up the tickets; one passenger, by his ticket, was on the wrong car, and the conductor commanded him to get off and commenced pushing the passengers on the platform aside to enable this man to get down the steps, when plaintiff was pushed off backwards through the opening in the platform railing and injured. There was much evidence to contradict this statement of the fact, but still there was sufficient testimony to warrant the jury in finding it to be true. If true, the plaintiff, through the invitation of defendant, was in a place of danger from which he could not extricate himself without risk of greater danger; then, by the rude manner of defendant's agent, he was jostled or pushed from the car. He was on the platform of a crowded car by fault of defendant, and was pushed therefrom by fault of defendant. The testimony of defendant that the car was not crowded; that, if crowded, it must have been obvious to plaintiff before he got on the platform; that the conductor did not invite passengers to get on after it was reasonably filled; that he did not rudely push or jostle those on the platform, was all submitted to the jury by the learned Judge of the Court below in a charge which, while just, was quite favorable to defendant. That was the end of the Court's duty and is the end of ours.

The judgment is affirmed and the appeal is dismissed. H. B.

Digitized by Google

Oct. '94, 305. November 9, 1894.

Thatcher v. Central Traction Co.

Negligence—Street railways—Trespass—Right to streets.

Street railway companies must share the right to the use of the public streets and of their tracks with the public.

The question of the rate of speed at which a car may be going at the time of an accident is one of fact and solely for the jury; if this speed be found to be too great considering the conditions of the case, it is negligence on the part of the company.

Ehrisman *v.* East Harrisburg R. R. Co., 150 Pa. 180; Gilmore *v.* Railway Co., 153 Id 31, followed.

Appeal of the Central Traction Company, defendant, from the judgment of the Common Pleas No. 2, of Allegheny County, in an action of trespass brought by Allen S. Thatcher to recover damages for injuries received by being run over by a car of defendants in the city of Pittsburgh. The facts of the case are set out in the opinion of the Supreme Court. There was a verdict for plaintiff for $6,000 and judgment thereon.

The defendant appealed and assigned as error, (1), that the Court [MAGEE, J.] refused to charge: "That under all the evidence in this case if the jury believe that the direct cause of the accident was the fact that the wagon coming down the hill turned to the left just as Thatcher turned to the right, that this was negligence on the part of the driver of the wagon coming down and is not to be attributed to the defendant company, and the verdict must be for the defendant," and (2), that the Court refused to direct a verdict for defendant.

Thomas Patterson, (*E. W. Smith* with him), for appellant.

The burden is on plaintiff to show defendant's negligence.

Brownfield *v.* Hughes, 128 Pa. 194.
Kelley *v.* Railroad, 102 Id. 115
Bernheimer *v.* Phila. Traction Co., 125 Id. 619.

It was plaintiff's duty to exercise the same watchful care when upon the track that the law exacts from the railway company in running its cars.

Gilmore *v.* Railway Co., 153 Pa. 31.

T. T. Donehoo, (with him *L. K. Porter* and *W. A. Boothe*), for appellee.

The public has an equal right to use the public streets with the railway companies.

Gilmore *v.* Railway Co., 153 Pa. 31.
Ehrisman *v.* East Harrisburg Ry. Co., 150 Id. 180.

January 7, 1895. DEAN, J. On the 12th of February, 1891, about 3 o'clock in the afternoon, the plaintiff, while driving with a companion in a light sewing machine wagon on Wylie avenue, Pittsburgh, was run into by a cable car and very seriously injured. Wylie avenue has a very steep grade for about 600 feet from the foot of Minersville Hill to the top. Fulton is a cross street at foot of the hill and Arthur a cross street at the summit level. Between these are three other cross streets, Vine, Tannehill and Crawford, about 150 feet apart. Wylie avenue is about thirty to forty feet wide, being seven or eight feet narrower above Fulton street than below; above Vine it curves toward Arthur. The defendant occupies with double tracks, the middle of the avenue, and operates its railway by cable. Looking up the avenue from Fulton, the ascending cars take the right hand track and the descending cars the left hand one. Thatcher and his companion, John Crusan, the latter having the lines, drove on Wylie avenue and up across Fulton street in the direction of Crawford, the next cross street, keeping on the right hand car track, when hearing a car behind them, and seeing wagons standing on the space between rails and curb on the street to the right, they turned off on the left hand track for the car to pass; it passed them between Crawford and Tannehill, when they attempted to get back on the right hand track, at a point near Tannehill, but before they were entirely clear of the track, a car coming down struck the wagon, throwing both out, and Thatcher, falling under the car, had his left arm crushed, so that it is permanently useless. He brought suit for damages against defendant, averring negligence in running the car on a much-traveled street at a high rate of speed, and in giving no notice of its approach to vehicles driven on the rails, so that they might avoid a collision. The evidence as to the circumstances tending to show negligence or absence of it, was conflicting; it was submitted to the jury to find the fact by the learned Judge of the Court below in a very full charge. Of the six written points presented by counsel for defendant, he peremptorily affirmed four; the two negatived practically requested him to direct a verdict for defendant. There was a verdict and judgment for plaintiff in the sum of $6,000.

On appeal, error is alleged in negativing defendant's fifth and sixth points. The first of these asked the Court to instruct the jury that if the direct cause of the collision was owing to the fact that a wagon coming down the avenue turned to the left just as plaintiff turned to the right and thus prevented him clearing the track and avoiding the collision, it was the negligence of the driver of the wagon which was the cause of the injury, and the company is not answerable.

Digitized by Google

As the plaintiff himself testified: "We attempted to pull back and in getting back on the other track, there was a wagon turned in front of us from the left hand track, and cut our way off from getting back, and the car that was coming down was coming at such a rate of speed that we couldn't get out of the way and it ran into us," an affirmance of this point would have been, in substance, an instruction that plaintiff could not recover. The assignment is without merit; the driver coming down on the, to him, right hand track, suddenly made an effort to escape from the rapidly approaching car behind and turned to his left just as plaintiff turned to his right, the driving of the wagon off the track was not the negligent interposition of an independent responsible cause which produced the result. On this question "Wharton on Negligence," sec. 134, illustrates the application of the rule thus: "I am negligent on a particular subject matter as to which I am not contractually bound. Another person moving independently comes in and, either negligently or maliciously, so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor and insulates my negligence so that I cannot be sued for the mischief which the person so intervening directly produces." And the same rule, is, in substance, laid down in "Bigelow's Cases on Torts," 611. The case in hand, in its facts, is wholly outside the rule. The wagoner was moved by the same impelling motive as the plaintiff; both sought escape from the same impending danger; he neither acted maliciously or negligently; both displayed prudence in acting with the utmost promptness. If the speed of the car was a dangerous and negligent one, the natural consequence was that on a much-traveled street, those in peril would obstruct each other's movements in attempts to escape. This was one of the very contingencies which defendant was bound to foresee and avoid by due care, for it would be the natural and probable result of high speed; under such circumstances, one driver will not remain on the track and be run over that he may not impede another in his movement towards safety. There is no question of approximate or remote cause raised by the facts; nor of the interposition of an independent act of negligence to which the injury is lawfully attributable.

As to the sixth assignment, it is argued, there was not sufficient evidence of negligence of defendant to submit to the jury.

Taking the statements of witnesses on both sides, it seems the gripman did sound the gong at about Vine street but did not lessen speed, although then, plaintiff's wagon was in full view and the up car passing them; it must have been plain to the gripman then, that the vehicle was on the left hand track, because it must get out of the way of the car going in the same direction; but there is the significant testimony as to the speed of the car, that it could not be stopped until it reached Fulton street, 300 feet beyond the point of the accident. It is not our duty now, nor was it that of the Court below, to pass on the credibility of plaintiff's witnesses to the rate of speed, and the absence of effort to stop the car when the danger was manifest. That was for the jury. If the gripman recklessly ran on at a high rate of speed, when the probable consequence was a collision, that was negligence for which defendant is answerable. As is held in Ehrisman *v.* East Harrisburg Ry. Co., 150 Pa. 180: "It is not negligence *per se* for a citizen to be anywhere upon such tracks (railways on streets). So long as the right of a common user of the tracks exists in the public, it is the duty of passenger railway companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence on their own part, may not at the moment be able to get out of the way of a passing car." Or, as is said in Gilmore *v.* Railway Co., 153 Pa. 31, "Street railway companies have not an exclusive right to the highways upon which they are permitted to run their cars, or even to the use of their own tracks." In both these cases the Court is speaking of the relative rights of the public and the railway companies on the streets of cities and boroughs where the grant is of the right to occupy the surface in common with the public. The construction of the track and the form of the rail are with a view to a user in common. The right of the wagon, in certain particulars, is subordinate to that of the railway; the street car has, because of the convenience and exigencies of that greater public which patronizes it, the right of way; whether going in the same direction ahead of the car, or in an opposite one to meet it, the driver of the wagon must yield the track promptly on sight or notice of the approaching car; but he is not a trespasser because upon the track; he only becomes so if, after notice, he negligently remains there.

A careful examination of the whole evidence satisfies us there was no error committed in leaving the question of negligence to the jury. The assignments of error are overruled and the judgment affirmed. W. D. N.

Digitized by Google

Oct. '94, 297. November 9, 1894.

Iaquinta v. Citizens' Traction Co.

Contributory negligence—Conflicting testimony—Refusal to withdraw from jury—Minor under fourteen years.

Where there is conflicting testimony, bearing on the question of defendant's negligence, and the alleged contributory negligence of the deceased, the case cannot be withdrawn from the jury without manifest usurpation of authority and invasion of the province of the jury.

Appeal of Citizens' Traction Company from the judgment of Common Pleas No. 3, of Allegheny county, in a suit by Dominica Iaquinta to recover damages for the death of a minor son, a boy about twelve years of age.

On the trial of this case before McClung, J., it appeared that the plaintiff's son, a boy twelve years old was, about noon on May 31, 1893, killed by being struck by a car of the defendant on Frankstown avenue, near Torrens street, where the defendant company had in operation a double electric railway. At the time of the accident some Italians were laying gas pipe on the Torrens street side of Frankstown avenue, between Torrens street and Findlay street. They had a ditch open between the curb and the track. This ditch was two feet wide, from one-half to two and one-half feet from the curb and about the same distance from the first rail of defendant's outbound track. The plaintiff's witnesses testified, in substance, that the boy lived on Frankstown avenue; that about a minute before the accident occurred, he came out of Torrens street upon Frankstown avenue and at a point where there was no crossing jumped over the ditch upon the track of the defendant, or upon the narrow space between the ditch and the track, as an outbound car was approaching in plain view. He stood there for about a minute, when the car, without ringing the bell, came down, struck him, and inflicted injuries from which he died almost instantly.

The defendant's witnesses testified to the following effect: The car at the time was descending a grade which extends from Lincoln avenue to a point considerably beyond Torrens street. After the car left Lincoln avenue, which is two squares from Torrens street, the motorman took off his power, partly set his brake, and ran the car at what was about the usual rate of speed. He sounded his gong repeatedly as he approached Torrens street. The boy at this time was on the sidewalk watching the Italians, but when the approaching car was only a few feet from being opposite where he stood, suddenly and without any intimation or notice hat he was going to do so, and at a point where there was no crossing in the street, jumped over the ditch upon the track immediately in front of the moving car; when he did this the front end of the car was not more than ten or twelve feet from him and within from two to five seconds from the time he landed on the track he was under the car. The motorman testified that the car was stopped within fifteen or twenty feet; that the car could not have been stopped more promptly, and the uncontradicted testimony was that all the appliances of the car were in perfect order.

At the close of the case, defendant's counsel, in a point submitted, asked for binding instructions in favor of the defendant. This was refused. Verdict and judgment for plaintiff. The defendant took this appeal and assigned as error the refusal of its point.

George C. Wilson, (*William D. Evans* with him), for appellant.

A. B. Reid, (*A. V. D. Watterson* with him), for appellee.

January 7, 1895. Sterrett, C. J. Refusal of the Court to direct a verdict for defendant, and thus withdraw the case from the jury, is the only error assigned. In view of the conflicting testimony, bearing on the question of defendant's negligence and the alleged contributory negligence of the deceased boy, this could not have been done without manifest usurpation of authority and invasion of the province of the jury. If the testimony relied on by the plaintiff was believed, there could be no doubt as to the gross negligence of the defendant, in recklessly running its car at a dangerously high rate of speed without exercising any of the precautions necessary to warn the deceased and others on the public street of the danger to which they were exposed. On the other hand, the testimony on which defendant relied as tending to prove contributory negligence was of such a conflicting character that it had to be submitted to the jury for their consideration. In any view that can possibly be taken of the case, it involved questions of fact which were exclusively for the determination of the jury; and to them they were fairly submitted in a clear and able charge, distinctly presenting all the issues of fact, and the law applicable thereto, in such a way that no complaint is made by either party.

Further elaboration is unnecessary. The case was well tried, and there is no error apparent on the record.

Judgment affirmed. W. C. S.

Digitized by Google

Oct. '94, 58. October 23, 1894.

Stoltenburg v. Pittsburgh & Lake Erie R. R. Co.

Negligence—Protection from dangers—Master and servant.

A tinsmith employed by a railroad company was engaged in making repairs on the roof of a passenger car which was standing on a side track. He was told the car would remain there until noon, but when he had been on the roof but a short time the car was drawn rapidly forward and he was struck by a wire stretched across the track a few feet above the roof of the car:

Held, there was nothing to call for unusual vigilance on plaintiff's part and the question of the negligence of the defendant was properly left to the jury.

Appeal of the Pittsburgh and Lake Erie Railway Company from the judgment of the Common Pleas No. 2, of Allegheny County, entered on a verdict in an action of trespass, wherein John Stoltenberg was plaintiff and appellant defendant. The facts are sufficiently set out in the opinion of the Court.

The Court below, (WHITE, J.), charged the jury, *inter alia:*

"If it could be reasonably anticipated by the defendant company that at some time a passenger car might pass under the wire while an employé of the company might be on the top, or a mechanic be making repairs on the roof, it would then be the duty of the company to place the wire high enough to avoid striking such a person, and a failure to place it that high would be a neglect of duty, which would be negligence." (First assignment of error).

And refused to charge "that under all the evidence the verdict must be for the defendant." (Second assignment of error).

Verdict for plaintiff for $750 and judgment thereon. Defendant appealed and assigned error as above indicated.

Edwin W. Smith, (with him *P. C. Knox* and *James H. Reed*), for appellant.

"When men are hired something must be predicated of their judgment and prudence, and hence, when the employer furnishes them with tools and appliances, which, though not the best possible, may, by ordinary care, be used without danger, he had discharged his duty and is not responsible for accidents."

P. & C. R. R. Co. *v.* Sentmeyer, 92 Pa. 281.

Employers are liable for the consequence of negligence, not danger.

Titus *v.* R. R. Co., 136 Pa. 626.
Melchert *v.* Brewing Co., 140 Id. 448.

A master does not warrant his servant's safety.

Green Street Ry. Co. *v.* Bresmer, 97 Pa. 106.

"An employer is not bound to furnish for his workmen the safest machinery, nor to provide the best methods for its operation in order to save himself from responsibility for accidents resulting from its use."

Payne *v.* Reese, 100 Pa. 301.

"And the employer will be presumed to be familiar with the dangers, latent as well as patent, ordinarily accompanying the business in which he is engaged. Authorities upon these points may be found in great abundance in the notes to sections 185 to 203 of Shearman and Redfield on Negligence."

Wagner *v.* Jayne Chemical Co., 147 Pa. 479.

Where the facts clearly show a case of contributory negligence, it is error to refuse so to charge the jury.

Payne *v.* Reese, 100 Pa. 306.
City *v.* Magill, 101 Id. 621.

A brakeman and car inspector are fellow servants.

P. & R. R Co. *v.* Hughes, 119 Pa. 314.

Gang boss and workman are fellow servants.

Keystone Bridge Co. *v.* Newberry, 96 Pa. 246.

Railroad shop foreman and workman in outside gang are fellow servants.

N. Y., L. E. & W. R. R. Co. *v.* Bell, 112 Pa. 401.

This may not be material under the pleadings, for no other negligence is charged than the maintenance of the wire.

A. M. Brown, (*John D. Brown* with him), for appellees, cited—

Ely *v.* P., C., C. & St. L. R. R. Co., 158 Pa. 237.
Kehler *v.* Schwenk, 151 Id. 505.
Rummel *v.* Dilworth, 131 Id. 509.

January 7, 1895. FELL, J. At the time of his injury the plaintiff was in the employ of the defendant as a tinner. He had been working for several months at the company's shops, and on the morning of the accident was sent to a station some miles distant to make repairs on the roof of a passenger car. The car was standing on a side track, and he was told that it would remain there until noon, and that he would have ample time to do the required work. He had been on the top of the car but a short time when an engine was attached to it. It was drawn rapidly forward, and he was struck by a wire stretched across the tracks and seriously injured. When the car moved he arose from his work and walked forward on the upper deck to learn the cause of the movement. As he approached the front of the car the smoke and cinders from the engine came directly against his face, and to avoid them he turned his head to one side, and was struck by the wire almost immediately afterwards. The wire, which was used as a guy to support a pole, was stretched

Digitized by Google

across the track at a height of nineteen feet and one inch, and the top of the upper deck of the car was fourteen feet and four inches above the tracks. The main roof was some seventeen inches lower.

The plaintiff was not employed in the movement of trains, and he had no knowledge of the existence of the wire. There was nothing to call for unusual vigilance upon his part to avoid such a danger, nor was there anything to warn him of it. His only opportunity to avoid it was during the few moments after the car had started when he was in a position of danger without neglect on his part, and when he was bewildered by smoke and cinders from the engine. He was held by the charge to the full measure of duty in this respect, and the case could not have been taken from the jury either upon the ground of contributory negligence or of the negligence of an employé in moving the car.

The remaining assignment relates to the portion of the charge excepted to, and we are of opinion that under the facts of the case it cannot be sustained.

The negligence charged against the defendant was in maintaining a wire improperly and negligently strung across the tracks. While this might not have been dangerous to men employed in the movement of freight trains, because of the smaller size of the cars, or to those engaged in the ordinary operation of the road, it was still a fair question for the jury whether in the use of the siding for passenger cars and their repair thereon the wire was not a source of manifest danger to the company's employés. If the use was probable and the danger was one to have been reasonably anticipated, the defendant was held to the duty of guarding against it.

The case, as was said by the learned Judge before whom it was tried, is a close one, but we think it could not have been taken from the jury; and it was submitted in a charge which clearly and adequately stated the law applicable to the testimony.

Judgment affirmed. W. D. N.

Orphans' Court.

January, 1894, 334.

Freed's Estate.

Commissions to accountants—Rate of.

Commissions to accountants are allowed as compensation for labor and responsibility; and, as these vary in each case, there can be no fixed rate. Five per cent. is about the maximum; and where there has been no labor or responsibility there is nothing to be compensated.

Exceptions to adjudication.

The facts are sufficient stated in the opinion.

William B. Crawford, for exceptions.

E. A. Miller, contra.

February 2, 1895. FERGUSON, J. Commissions to accountants are allowed as compensation for labor and responsibility, and therefore there cannot be any fixed rate, as the amount of labor and responsibility differs in every case. No unbending rule can be established as to the rate of percentage. In the case now before us, the auditing Judge allowed the trustee a credit claimed in the account of five per centum upon the whole principal of the estate. This is about the maximum allowed in any case, and yet here, the trustee received the estate invested in securities approved by law and held them for a period of six months, when the trust terminated by the death of the *cestui que trust*. There was no labor that was apparent, or disclosed to us, and there could be no responsibility because the estate was already invested. The trustee simply took custody of the securities, which could not have been transferred without an order of this Court, and for so doing a compensation is claimed of over $1 200, or commissions at the rate of five per centum upon the whole principal of the estate, besides the commissions on the income at the same rate, which is not objected to. This allowance is too large, not only because no such compensation was ever earned in this case, but in view of the law on this subject as laid down by our Supreme Court. In McCauseland's Appeal, 38 Pa. 470, there was a specific bequest of $4,000 in the loan of the district of Southwark. The Court says: "The investment was never changed by the trustee, and could not have been except at his risk. For the interest on the loan he was allowed commissions, but he had incurred no responsibility for the principal, nor had he performed any labor in regard to it. Commissions are given as a compensation for labor and responsibility, and where neither the one has been performed, nor the other incurred, there is nothing to be compensated."

In this case, we think that an allowance of two and a-half per centum would be a very liberal compensation.

The exceptions are sustained, and the adjudication will be modified in accordance with the views herein expressed. F. B. N.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, MAR. 15, 1895.* [No. 5.

Supreme Court.

Jan. '95, 375. March 2, 1895.

Petition of Clerks of Councils.
Appeal of Frederick C. Simon.

Investigation by councils—Acts May 17, 1883, P. L. 33, and June 1, 1885, P. L. 53—Action by Court on question of evidence certified to it —Practice.

Where in the course of an investigation conducted by a committee of councils by virtue of the Acts of May 17, 1883, P. L. 33, and June 1, 1885, P. L. 53, a witness refuses to answer a question, and the matter is certified to the Court of Common Pleas, which without allowing the witness a sufficient time in which to reply to a rule taken upon him to show cause why he should not answer the questions propounded to him by the committee, makes an order that he answer, the Supreme Court will reverse the action of the Common Pleas, without regard to the merits of the controversy.

In the case before the Court the action of the Court below reversed, although its order made about three hours after the rule was granted was that witness answer, "unless there be other sufficient reasons for not answering."

WILLIAMS and MCCOLLUM, JJ., dissent: (1), because no appeal is given by the Act; (2), because the order of the Court below was interlocutory and left the witness free to show cause against an attachment should one be asked for.

Appeal of Frederick C. Simon, from the order of the Common Pleas No. 3, of Philadelphia County, directing him to answer a certain question propounded to him by an investigating committee of the councils of the City of Philadelphia.

The select and common councils of the City of Philadelphia, by resolution passed January 23, 1895, appointed a joint special committee to investigate accusations that a large amount of stock of the Mutual Automatic Telephone Company was used in securing the passage by the said councils of the ordinance approved July 2, 1894, granting certain privileges to the said company. In the course of the investigation it was testified before the said joint special committee that among the assets of one Hugh T. Pigott, deceased, there were found six shares of the stock of the Mutual Automatic Telephone Company, and that at the time of the passage of the ordinance of July 2, 1894, the said Hugh T. Pigott was a member of common council of the City of Philadelphia from the Twenty-fifth ward. The administrator of said estate testified that the said six shares of stock were sold to Frederick C. Simon, also a member of councils from the Twenty-fifth ward. At a meeting of said committee, held on the 11th day of February, 1895, the said Frederick C. Simon was examined as a witness. He testified that he was a member of councils and that he purchased the six shares of stock in the possession of the estate of Hugh T. Pigott, deceased. Upon being asked for whom he purchased the stock he refused to state the name of the party upon the ground that he acted in a professional capacity; that he was a member of the bar, and that his whole connection in the transaction was professional, and that his client declined to permit him to disclose his name; that upon the refusal of the said Frederick C. Simon to answer the questions, Joseph H. Paist, clerk of the select council, and George W. Kochersperger, clerk of common council, presented a report to the Court of Common Pleas No. 3, in pursuance of Article 15 of the Act of June 1, 1885. The said report was presented in open Court on February 13, 1895, at 10 o'clock A. M. The Court fixed the hearing for 1 o'clock P. M. that day, and notice of said hearing, together with a copy of the report, was served on Frederick C. Simon.

At the time fixed, counsel for Mr. Simon appeared and stated that the petition had been served at 12 o'clock on Mr. Simon and had just been handed to counsel, who was unable in the short time allowed, to prepare an answer, and asked that the matter be adjourned until next day, and a colloquy, as follows, ensued between the Court (FINLETTER, P. J.,) and counsel:—

The Court: There is an answer filed by Mr. Simon, I think.

Mr. Johnson: There is a refusal to answer, and that is all. I would not be able to plead to this petition unless I have until to-morrow to do so. It is for the Court to determine what you will do.

The Court: Mr. Simon filed an answer, and I adjourned the case until one o'clock in order to give him an opportunity to appear and show cause why the order of the Court should not be made—basing it upon his answer.

Mr. Johnson: It is impossible to prepare that answer. Of course we are in your Honor's hands, and without having an opportunity to file an answer we will have to submit to the order of the Court.

The Court: I understand that he simply declines to answer, because he was an attorney-at-law, and acted as such in the purchase of the stock in question, and that he declined to an-

Digitized by Google

swer because he was directed by his client not to answer. I want to hear whether that is a good reason or not. I think it is not.

Mr. Johnson: I will ask your Honor for time until to-morrow to determine what answer we shall file.

The Court: I cannot grant that, because he has already filed an answer, and we already have knowledge of the reason why he refuses. All that I can determine now is that that answer is insufficient, and that he must answer, as a witness, the question propounded, unless he has other good and sufficient reason.

Mr. Johnson: That being your Honor's ruling, I will protest against a hearing so far as we are concerned—we not having time to make an answer—and, of course, your Honor's ruling will govern. I shall not argue the case, and Mr. Simon will not argue it, under my advice, until he has had an opportunity to answer.

Mr. Warwick: Will the Court make an order that Mr. Simon shall answer before the investigating committee?

The Court: Yes, sir; I will make such an order.

The Court then delivered the following opinion:—

"There was no professional duty, as an attorney-at-law, involved in the purchase of the stock by Mr. Simon—he was merely an agent or broker.

"He is not, therefore, justified in refusing to answer on the ground that he was the attorney-at-law of the purchaser, and that his client had required him not to disclose his name.

"It is therefore ordered that he answer the question, unless there be other sufficient reason for his not answering."

Mr. Simon took this appeal, assigning as error the making absolute of the rule upon him to answer.

John G. Johnson, for appellant.

This case will not be argued on its merits. A final decree was entered upon an *ex parte* petition. A rule was granted after 10 o'clock and disposed of at one o'clock on the same day, notwithstanding the protest of counsel that he was not ready to proceed. The appellant was not in default; there was no rule of Court prescribing a default in a case like this. A suitor can only be in default, so as to be deprived of an opportunity to make defence, if he fail to plead within the time fixed by rule, or if there be no rule, within a reasonable time. No reasonable time was here allowed.

James Alcorn, assistant city solicitor, (*Charles F. Warwick*, city solicitor, with him), for appellee.

The Act of June 1, 1885, gives no appeal from such an order as here made. The Common Pleas simply considers the report of the clerk, and passes upon the question of evidence as if presiding over the investigation. In the trial of a cause a witness ordered to answer cannot suspend proceedings by taking an appeal. If the appellant refuse to obey the order and his committment be ordered, he may then appeal.

At the time the appellant was examined before the committee and refused to answer the question propounded, he gave his reason, so that the Court had before it all that was material to the proper determination of the question whether the appellant could be compelled to testify.

Purchase of stock not in connection with any suit pending, or which may be instituted, is no part of the profession of an attorney-at-law, and the appellant in purchasing acted as a broker or agent.

Besides this, an attorney may be required to give the name of his client.

Brown *v.* Payson, 6 N. H. 443.
Martin *v.* Anderson, 21 Ga. 301.
Parce *v.* Stetson, 2 WEEKLY NOTES, 110.
2 Rice on Evidence, 644.
1 Greenleaf on Evidence, 287 (13th Ed.).

March 5, 1895. STERRETT, C. J. It appears that in January last by joint resolution of councils a special committee of those bodies was raised "to investigate accusations against members of Councils of the city of Philadelphia in reference to the passage of the ordinance approved July 2, 1894, granting privileges to the Mutual Automatic Telephone Company." After reciting certain newspaper charges to the effect "that a large amount of stock of said company was used in securing the passage of said ordinance," etc., and that "it is due to the members of councils, as well as to the public, that there should be a full, searching and impartial investigation of these charges," the resolution provides for the appointment of "a joint, special committee of five (5) members from each chamber to investigate the aforesaid accusations, with full power and authority to send for persons, papers, books and documents, in the hands and possession of whomsoever the same may be, and the production and examination thereof before the committee." It also provides that "the committee in the discharge of their duties shall exercise all the powers conferred by the Acts of May 17, 1883, and June 1, 1885."

In these enactments, the Legislature appears to have recognized the necessity for full, thorough and complete investigation in certain cases that might thereafter arise, and to that end ample provision was made for necessary process and its proper enforcement. The authority to create such committee and invest it with the powers conferred by said Acts cannot be doubted. In

Digitized by Google

a similar case, which came into this Court on appeal from Common Pleas No. 1, of Philadelphia, we said the investigation, then in progress under the provisions of the same Acts, was lawful, and that the witness who had been regularly subpoenæd by the committee was bound to obey the process, etc: Eckstein's Petition, Yard's Appeal, 148 Pa. 509.

In the case before us, it is alleged by the appellees that on February 11, last, appellant appeared before the joint committee and testified to certain matters in relation to which he was interrogated, but refused to say for whom he acted in purchasing certain stock from the personal representative of Hugh Pigott, deceased. Whereupon it was resolved by the committee that the refusal of the witness to testify as to that fact should be certified to the Court for its action in the premises. That was accordingly done in the form of a petition by the clerks of Select and Common Councils purporting to set forth said proceedings before the joint committee, and praying that an order be issued commanding appellant "to testify before said committee as to whom he represented in the purchase of the stock of Hugh Pigott, deceased, and all other matters necessary and pertinent in reference to said stock and the purchase thereof, in accordance with the 15th article of the Act of June 1, 1885." Upon presentation of the petition, February 13, 1895, the Court granted a rule on appellant to appear and answer why he should not answer the questions propounded by said committee, returnable at 1 o'clock P. M., same day. At 12 o'clock noon of same day notice of the rule was given to appellant, who was barely able, within the hour that intervened, to retain counsel to appear in Court at 1 o'clock. The Court was then fully informed of the facts by appellant's counsel, who, among other things, stated that the petition upon which the rule to show cause was issued, had just been handed to him; that it would be impossible for him to be ready with an answer to this long petition at the hour named, and that he would therefore ask the Court to give him until to-morrow to prepare an answer, etc. In reply to the following questions put by the Court: "What is the nature of the answer?"; "Is it a denial?" Appellant's counsel replied: "I cannot tell;" "I do not know, as I have not had time to consider. Until I read it over I cannot tell whether I will put in additional matters, or demur to it, or deny it. I am not ready to file an answer at 1 o'clock in a matter handed to me at 12 o'clock." Other appeals on behalf of defendant, for barely sufficient time and opportunity to examine the petition, and prepare an answer, etc., together with the negative replies of the Court thereto, are shown by the stenographer's notes of what occurred at the time, but inasmuch as they disclose nothing that tends to justify the action of the Court in the premises, further reference to them is unnecessary. The entirely reasonable and, in the circumstances, legal demand of appellant and his counsel was denied, and thereupon the Court handed down its opinion together with the order complained of.

The reason for referring to the Court, for its consideration and determination, questions involving the rights and duties of witnesses and others as provided for in the 15th article of the Act of June 1, 1885, doubtless was that they are strictly judicial questions of such importance, and sometimes fraught with such serious consequences that they could not be safely submitted to the determination of any investigating committee. While it is in every way desirable and necessary that such questions should be heard and decided as speedily as is consistent with the rights of the parties concerned, it was never intended that they should be so speeded as to deprive the respondent of both time and opportunity of answering the petition and otherwise presenting his defence, as was done in this case. Appellant's rights in that regard were wholly ignored. It was manifestly impossible for him or his counsel to prepare an answer to the petition and present his defence, if any he had, within the one hour that intervened between service of the rule to show cause and the time fixed for hearing. In Yard's Appeal, *supra*, opportunity was given for filing an answer, and the case was heard and disposed of in a regular and orderly way. The merits of the present case are not before us for the obvious reason that the proceeding was practically *ex parte* and therefore illegal.

The decree is reversed with costs to be paid by the appellant, and it is ordered that the record be submitted to the Court below with instructions to proceed and determine the case according to law.

Eo die. WILLIAMS, J. (dissenting). This appeal should be quashed for two unanswerable reasons. First, no appeal is given by the statute under which the proceeding was conducted. If it be conceded that a common law certiorari might properly issue, yet it would bring up nothing but the record and the record proper discloses no irregularity. But second, if an appeal was given no final order has yet been made from which an appeal will lie. The order complained of is in these words: "It is therefore ordered that he answer the question unless there be other sufficient reasons for not answering." This was not a final order. It left an open door before the defendant. It afforded him opportunity to

Digitized by Google

be further heard before an attachment could be awarded or a commitment directed. No appeal lies from such an interlocutory order. A simple statement of the situation shows our duty so plainly that no amount of argument could make it clearer. The appeal should be quashed and the defendant remitted to the forum he has so hastily fled, for his own final answer and a final order of the Court.

McCollum, J. I concur in the foregoing dissent.

July '94, 59. January 11, 1895.

Barry v. Hill, defendant, and Gillespie, terre tenant.

Trustee ex maleficio—Resulting trust—Proof of—Act of April 22, 1856.

A trust *ex maleficio* can only result from some act of bad faith and a mere refusal to perform a parol contract to hold or convey land is not sufficient to create such trust.

Equity will not decree a holder of title to be a trustee for another unless there is something more than a mere violation of a parol agreement.

The Act of April 22, 1856, section 6, providing that no action shall be maintained to enforce any implied or resulting trust as to realty but within five years after such trust accrues, applies as well to resulting trusts which arise *ex maleficio* as to those which are founded upon the payment of purchase money.

Appeal of Rebecca L. Gillespie, intervening terre tenant, from the judgment of the Common Pleas No. 1, of Philadelphia County, in an action of assumpsit sur ground rent, in which Thomas Barry was plaintiff and Edward C. Hill, defendant.

The action was brought on the 4th February, 1893, to recover arrears of ground rent reserved out of premises on Bancroft street in Philadelphia, conveyed, in 1871, by Matthew Hall to Edward C. Hill, by deeds which reserved two ground rents of $48 per year each. These ground rents were assigned by Matthew Hall, the covenantee, to John Bardsley in 1873, and by John Bardsley to Thomas Gannon in 1877. The deeds above referred to were recorded at Philadelphia, each within a few months of its date. Thomas Gannon died on October 24, 1880, having by his last will, dated October 3, 1880, devised all his estate to the Rev. Thomas Barry, the plaintiff. The specific claim was for arrears of ground rent accruing on and after September 1, 1881, with interest on each item of the arrears.

The present owner of the premises, Rebecca L. Gillespie, by leave of the Court, intervened to defend.

At the trial, before Biddle, J., Thomas Barry, the plaintiff, having testified that he knew Thomas Gannon, the deceased assignee of the ground rents and plaintiff's testator, and that Gannon had died three or four weeks after the witness first met him (which had been at a time when Gannon was lying sick), was asked by his counsel: Q. "Do you know where he had been employed prior to his illness?" Objected to. Objection overruled. (First assignment of error.)

Defendants' counsel made the following offer: "I propose to show that the alleged assignment of ground rents by Mr. Bardsley to Thomas Gannon was made without consideration, upon the agreement between the parties that they were to be sold subject to the exclusive ownership of John Bardsley, and that Thomas Gannon had no interest in them; and also that as to these two ground rents John Bardsley received the interest for his own use after the date of the assignment." Objected to. Objection sustained. (Second assignment of error.)

Counsel stated that he could show that the ground rent papers other than the assignment to Gannon were in the possession of Mrs. Gillespie, received in the ordinary course of conveyancing from her vendor.

The Court directed the jury to find a verdict for plaintiff. Verdict accordingly and judgment thereon. The defendant appealed, assigning for error the above rulings on offers of evidence and the direction to find for the plaintiff.

John G. Johnson and *Henry T. Dechert*, for appellant.

The plaintiff was an incompetent witness, being a surviving party to the contract and called to testify to a matter occurring before the death of Gannon.

Act of May 23, 1887, sec. 5, P. L. 158.

If a resulting or constructive trust in Thomas Gannon for John Bardsley of these ground rents was established by the circumstances developed by the testimony, including those offered to be proved, the statute of frauds does not apply, and the rejected evidence should have been admitted.

There was nothing to show that Gannon had ever asserted title to the ground rents. It is contended that these facts offered ample evidence of a resulting trust or a trust *ex maleficio*.

Bispham's Equity (5th ed.), page 133.
Lingenfelter *v.* Richey, 62 Pa. 123.
Seichrist's Appeal, 66 Id. 237.
Beegle *v.* Wentz, 55 Id. 369.
Squire's Appeal, 70 Id. 266.
Long *v.* Perdue, 83 Id. 214.

It may almost be stated as now thoroughly ad-

Digitized by Google

mitted by the later English cases that a parol trust in favor of a grantor by a grantee upon the faith of which the conveyance to the latter is made, can be set up.

Daves *v.* Otty, 35 Beav. 213.
Booth *v.* Turle, L. R. 16 Eq. 182.
Haigh *v.* Kaye, L. R. 7. Ch. Ap., 473.

F. B. Bracken, (Jos. V. Gallagher with him), for appellee.

The offer to establish by parol that Gannon had no interest in the ground rent was properly overruled. Because it was an attempt on the part of a grantor's representatives to contradict by parol a deed absolute on its face and reciting a full consideration.

Belden *v.* Seymour, 8 Conn. 304.
Phillips on Evidence, 483.
Bank *v.* Houseman, 6 Paige Ch., 535.
Gardner *v.* Lightfoot, 71 Iowa, 577.
Jack *v.* Dougherty, 3 Watts. 151.

Besides, the proof of this alleged agreement by parol testimony would be in direct contravention of the fourth section Act April 22, 1856, P. L. 533, which provides in part that "All declarations or creations of trusts or confidences of any lands, tenements or hereditaments, and all grants and assignments thereof, shall be in writing, signed by the party holding the title thereof, or by his last will in writing or else be void."

Williard *v.* Williard, 56 Pa 125.
Kellum *v.* Smith, 33 Id. 158.
Porter *v.* Mayfield, 21 Id. 263.
See a so Leman *v.* Whitley, 4 Russ., 423.
Movan *v.* Hayes, 1 Johns. Ch., 342.
Rathbun *v.* Rathbun, 6 Barb , 98.
Seeley *v* Morse, 16 Johns., 199.
St. John *v.* Benedict, 6 Johns. Ch., 111.
Maffitt *v.* Rynd, 69 Pa. 386.
Hoge *v* Hoge, 1 Watts. 214.

The appellant is precluded from setting up a resulting trust in this case owing to the lapse of time since the transaction, in which it is alleged to have originated. Section 6, Act of 22d April, 1856, P. L. 532.

This Act prevents the setting up of any resulting trust after five years from the date of its origin, and clearly applies to the present case, in which the trust arose, if at all, in 1877.

Hollinshead s App., 103 Pa. 158.
Silliman *v.* Haas, 151 Id. 52.
Christy, receiver, *v.* Sill, 95 Id. 380.
Way *v.* Hooton, 156 Id. 8 (1893).

The appellant's first specification of error, alleging the incompetency of the plaintiff to testify in this case, is not sustained by the Act of May 23, 1887, section 7, P. L. 158.

The plaintiff's interest was not adverse to the right of the deceased Gannon, and he is not therefore a "surviving or remaining party" within the meaning of the Act.

Adams *v.* Bleakley, 117 Pa. 283.

February 18, 1895. GREEN, J. The deed from Bardsley to Gannon was made January 18, 1877, and was recorded September 26, 1877. It contained among other things an assignment to Gannon of the ground rents now in question. The appellant alleges that Bardsley, in 1879, by a deed then made and recorded, assigned the same ground rents, as his own, to the Samuel Miller Savings and Building Association, which in 1882, assigned them to William Whiteside, the then owner of the premises, thus effecting an extinguishment. An examination of the record of deeds at any time after September 26, 1877, would have disclosed the conveyance by Bardsley to Gannon, which was therefore notice to all the world of Gannon's title. That title devolved upon the present plaintiff by virtue of the will made by Gannon October 3, 1880, and duly proved on October 27, 1880. The plaintiff's title was therefore disclosed by the record from the latter date. The defendant's title was acquired by deed from Whiteside and Hall, trustees, dated March 7, 1890, at which time plaintiff's title had been nearly ten years of record, and with nothing showing any reconveyance from Gannon to Bardsley.

In these circumstances the defendant, Mrs. Gillespie, offered to show on the trial, that the conveyance from Bardsley to Gannon was made without consideration, and upon the agreement that the ground rents were to be sold subject to the exclusive ownership of John Bardsley, and that Thomas Gannon had no interest in them; also that Bardsley received the interest for his own use after the date of the assignment; also that certain other ground rent papers were in the custody of Mrs. Gillespie, received in the ordinary course of conveyancing.

This offer of testimony was rejected by the Court below, and to this decision the second assignment of error is made, thus raising the chief question in the case.

It is contended that the proof, if received, would have established a trust *ex maleficio* in favor of Bardsley, and therefore, of his successors in the title. It is contended for the appellee that the proof offered would not establish a trust *ex maleficio*, and if it did, the trust is barred by the statutes of limitations.

It seems to us that both these objections are fatal to the offer.

A trust *ex maleficio* can only result from some act of bad faith, and a mere refusal to perform a parol contract to hold or convey land is not sufficient to create such a trust. There is no act of bad faith on the part of Gannon alleged in the

Digitized by Google

offer. He was a mere grantee of the ground rents without consideration and subject to an agreement to sell them for the exclusive use of Bardsley, according to the offer. The absence of consideration would be of no moment of itself, and, in point of fact, Gannon never sold the ground rents to any one. On the contrary it is a part of the offer of proof that Bardsley received the interest for his own use after the assignment. It was not proposed to prove that Gannon ever denied the alleged parol agreement or that he made any effort to prevent Bardsley from taking the rents, or that he ever asserted title in himself, or did any act in contravention of the agreement offered in evidence. He simply continued to hold the title which Bardsley voluntarily gave him, until his death. As his death did not occur until nearly four years after the inception of his title Bardsley had ample opportunity to assert, and secure, his claim of title, during Gannon's life, but it does not appear that he ever did so. In such circumstances we think it impossible to raise a trust *ex maleficio*.

But even if the offer had gone farther, and alleged a breach of the parol agreement, it would not have been sufficient.

In Kellum *v.* Smith, 33 Pa. 158, we held that a promise to purchase real estate at a sheriff's sale, and to convey it to the defendant in the execution, whenever he should repay to the purchaser their advances to him, does not raise a resulting trust in favor of the defendant. STRONG, J., delivering the opinion, said: "When the purchaser at a sheriff's sale promises to hold for the debtor, and afterwards refuses to comply with his agreement, the fraud, if any, is not at the sale, not in the promise, but in its subsequent breach. That is too late. It is abundantly settled that equity will not decree such a purchaser to be a trustee, unless there is something more than the mere violation of a parol agreement. . . . . It may in all cases be assumed that when a promise is made to buy or hold for another, confidence is invited and more or less reposed. So it is in every parol contract for the purchase of lands; but the statute of frauds would be worse than waste paper if a breach of promise created a trust in the promisor, which the contract itself was insufficient to raise."

In Williard *v.* Williard, 56 Pa. 119, we held that in a transaction claimed to create a resulting trust, if there is nothing more than is implied from the violation of a parol agreement, equity will not decree the purchaser a trustee. Said AGNEW, J., in an opinion reviewing the cases, "The language of the cases was almost run into a formula in which it is said 'but where there is nothing more in the transaction than is implied from the violation of a parol agreement equity will not decree the purchaser a trustee.'"

Porter *v.* Mayfield, 21 Pa. 263, is to the same effect. In Hoge *v.* Hoge, 1 Watts, 214, GIBSON, J., said: "The question has been as to the circumstances which constitute such a fraud as will be made the foundation of a decree. A mere refusal to perform the trust is undoubtedly not enough, else the statute which requires a will of lands to be in writing would be altogether inoperative."

There are many other cases of the same kind, but it is unnecessary to cite them.

As to the statute of limitations the cases are equally clear and the bar of the statute applies as well to resulting trusts which arise *ex maleficio*, as to those which are founded upon the payment of purchase money.

In Christy *v.* Sill, 95 Pa. 380, which on its facts, was a clear case of fraud, and a consequent resulting trust *ex maleficio*, we held that the trust was barred by the sixth section of the Act of 22d April, 1856, which prohibited any right of entry by reason of any implied or resulting trust within five years after the trust accrued.

In Hollinshead's Appeal, 103 Pa. 158, we held the same doctrine, and also that there must be more than the violation of a mere parol agreement respecting land to create the trust.

We applied the same rule to another case of trust *ex maleficio*, in Silliman *v.* Haas, 151 Pa. 52, and held it was barred by the statute.

In Way *v.* Hooton, 156 Pa. 8, we enforced the rule again, holding that the Act of 1856 was a statute of repose requiring a liberal construction in support of titles, and holding that it contained no exception in favor of persons under disabilities.

It is not essential to pursue the subject further. This title by means of a trust *ex maleficio*, is sought to be set up without proof of any fraudulent acts either in the inception of the title or subsequently, against a good record title ten years after its inception, and we are clearly of opinion that it can not be done.

We do not consider the first assignment of error, as it becomes entirely unimportant in view of the testimony subsequently given, and of the considerations above expressed upon the main subject of contention.

Judgment affirmed. W. M. S., Jr.

Digitized by Google

July '94, 68. January 14, 1895.

Gandy v. Dickson.

Landlord and tenant—Distress—Right to distrain after death of lessee—Effect of thirty-day clause in lease—Act of Feb. 24, 1834, P. L. 77.

A lessor cannot distrain for rent goods of a deceased lessee which have been removed from the demised premises, notwithstanding the lease contain an agreement that the goods on the premises shall be liable to distress for thirty days after their removal therefrom; such agreement applies only during the lifetime of the tenant.

An agreement in a lease that rights and liabilities of the parties shall extend to their heirs and personal representatives cannot interfere with the administration of an estate, or, by permitting a distraint of the decedent's goods enable the landlord to obtain a preference other than that given by the Act of Feb. 24, 1834, P. L. 77.

Appeal of Frederick S. Dickson, Allen Dickson, Elizabeth Lowrie and Ellen Wilson, landlords, and George B. McClellan, bailiff, defendants, from the judgment of the Court of Common Pleas No. 4, of Philadelphia County, in an action of replevin wherein George S. Gandy, administrator of Harrison Robbins, deceased, was plaintiff.

The facts of this case appear sufficiently by the opinion of ARNOLD, J., *infra*. On the first trial before WILLSON, J., a verdict was directed for the defendants. A new trial was granted. On the second trial, before ARNOLD, J., a verdict was directed for plaintiff. The defendants moved for a new trial, but on the Court stating that an opinion would be filed sustaining the action and in support of the previously granted new trial, the motion was withdrawn. The opinion was delivered by ARNOLD, J., as follows:—

"Harrison Robbins was tenant of 916 Chestnut street, under a yearly lease, at $5,800 a year, payable quarterly on the 24th day of January, April, July, and October. It was agreed in the lease that all goods on the premises, and for thirty days after removal therefrom, should be liable to distress for rent. Mr. Robbins died June 11, 1892, and letters of administration on his estate were granted to the plaintiff, who removed the goods from 916 to 924 Chestnut street, for the purpose of selling the same and applying the proceeds to the payment of the decedent's debts. A quarter's rent fell due on July 24, 1892, and on August 12, 1892, the landlords distrained therefor on the goods of the intestate at Nos. 916 and 924 Chestnut street, to the last of which places most of the goods had been removed between June 11 and July 24, 1892. The plaintiff thereupon commenced this action of replevin, and the question is whether the distress was lawful.

"The right of distress comes from the civil law, under which land that was let to a tenant was considered as hypothecated and held in pledge to pay the rent, and the whole profits arising from the land were liable to be sold for the payment and satisfaction of the rent. (Gilbert on Rents, pages 3, 26, 92; Taylor on Landlord and Tenant, section 556.) At the common law a distress for rent could not be made after the termination of the relation of landlord and tenant, which might happen by the death of either, and therefore the statute of 8 Anne, chap. 14 (1710), was passed, to give a remedy to the landlord, by enacting that his executor might distrain within six months after the termination of the lease, but *during the possession of the tenant from whom such arrears became due*. These italicized words were omitted from our Pennsylvania statute of March 21, 1772, which re-enacts the statute of Anne, probably because they were considered superfluous and merely declaratory of existing law. (Clifford *v.* Beems, 3 Watts. 246.) The English statute limits the right of the executor of a landlord to distrain to six months after his death, while the right of the executor to distrain under our statute is without limit as to the time when it may be exercised. (Moss' Ap., 35 Pa., 162; Lewis' Ap., 66 Pa., 312.) So much as to the right of the landlord to distrain.

"As to the liability to distraint, another question arises, and, notwithstanding the early decisions in England, the law may now be considered as well settled there that there is no right to distrain in a case like this. In Bradby on Distresses, 77, it is said that as a distress is in the nature of a remedy upon the land, if the tenant be dead the goods of the deceased remaining thereon may be distrained in the hands of his executor or administrator for rent accruing before and after his death. For this the author cites Bolton *v.* Canham, executor, Pollexfen, 125 (25 and 26 Car. II., A. D. 1675), which was not a proceeding on a distress, but an action against an executor for rent in arrear, and the dispute was over a question of priority in the distribution of the personal estate of a decedent. Another case cited by Bradby is Braithwaite *v.* Cooksey, 1 H. Blackstone, 465 (1790), decided *per curiam*, and without reasons assigned. On looking at the arguments in behalf of the successful landlords we find it based on three English statutes, neither of which, however, by express words or fair inference, confers a right on the landlord to distrain on the goods of a deceased tenant. Perhaps, however, the reason given by the Court of Appeals of New Jersey was the true reason of the old law. That Court said that "under the old law it was a mere struggle among the creditors for the priority, and the law was indifferent who succeeded." (Wood *v.* Hopkins, 1 Pennington, 692.) In Turner *v.* Barnes, 2 Best & Smith, 110 E. C. L., 435 (1862), Braithwaite *v.*

Digitized by Google

Cooksey was declared not to furnish a precedent to be followed, and it was decided that when a tenant at will at a yearly rent died owing rent in arrear, and the day after his death the landlord distrained, the house being occupied by the lessee's servants, the distress was unlawful. A modern English writer (Foa on Landlord and Tenant, on page 408) well expresses the law when he says that the right to distrain after the death of the tenant must be limited to the case in which the personal representative becomes tenant under the lease in his testator's place, and the arrears distrained for have not actually fallen due until after the death.

"The question has been considered and decided in two cases in this State, in the first of which, Hoskins *v.* Houston, 2 Clark, 489 (1844), Judge LEWIS, in the Common Pleas, held that a landlord has no right to distrain for rent after the death of the tenant. Judge LEWIS' opinion is an elaborate dissertation upon the law on this subject, and he comes to the conclusion that since our Acts of 1772, 1794, and 1834, providing for the distribution of a decedent's estate, no priority can be obtained by a distress levied after the death of a tenant. The other case is Stahlman's Est., 26 Pitts. L. J., 113, (1879), in which Judge HAWKINS, of the Orphans' Court of Allegheny County, issued an injunction to prevent a landlord from proceeding by a distress for rent after the death of the tenant.

"We have not overlooked the agreement in the lease in this case that the goods on the premises should be liable for rent for thirty days after their removal from the premises, but consider that this applies merely to a removal during the life of the tenant; nor the other agreement in the lease, that the rights and liabilities of either of the parties shall extend to the heirs, executors, administrators, successors, and assigns of such party. The tenant cannot, by any such agreements, deprive other parties of their right to have the personal estate of a decedent administered according to the statute of distributions without any preference other than those given by it.

"It is a rule without an exception, said Chief Justice GIBSON, in Pierce *v.* Scott, 4 W. & S. 344, that a landlord cannot distrain goods which are in the custody of the law; and Judge LOWRIE, in Mickle's Admr. *v.* Miles, 1 Grant, 320, said that the goods of a deceased lessee are not liable to distress. The Act of February 24, 1834, which gives the landlord the second preference in distribution, would be neutralized if the landlord could by a distress obtain the first place as to goods on the demised premises. There would be no necessity for giving the landlord a second preference as to such goods if he could by a distraint obtain a priority over all other creditors. The insolvency of the deceased tenant makes no difference in the application of the law, which was intended principally for just such cases, for if the estate were solvent the preferences would not consume the estate before all the creditors were paid. In the language of Judge WOODWARD, in Moss' Ap., 35 Pa., 162, no attentive reader can doubt that the Legislature meant to substitute the landlord's claim on the proceeds of an execution or administration for his right of distress. As death brings administration, the same as judgment brings execution and levy, with their preferences and equalities, it is not in the power of parties to defeat the rights of creditors which are vested in them by law. Upon the death of a tenant his personal estate is placed at once in the grasp of the law, and no creditor can obtain any advantage over another, either by distraint, execution, or agreement."

Judgment was entered for plaintiff and the defendants appealed and assigned error as follows:

1. The learned Court erred in entering its judgment upon the verdict for the plaintiff in the replevin, and which verdict was given upon the instruction to the jury to render it.

2. The learned Court erred in not giving effect to the contract stipulations of the lease by entering a judgment in favor of the lessors and the defendants in the replevin upon the undisputed evidence of the case.

3. The learned Court erred in deciding that the tenant could not by the contract of lease in evidence interfere with the administration of his estate, according to the Act of 24th February, 1834.

The quarter's rent of $1,450, for which the distress issued, fell due 24th July, 1892. The tenant, domiciled in New Jersey, had died six weeks before, and an administrator had been appointed, who at once entered upon and occupied the demised premises and began the removal of the goods for sale to a store in the same square. He was requested to pay the rent due, but refused, and thereupon, on 12th August, 1892, the landlords distrained upon the goods remaining in the demised premises as well as upon those which had been removed.

E. Hunn Hanson, for appellants.

The Act of Feb. 24, 1836, P. L. 77, does not prevent a distress in this case.

(*a.*) The Act does not *in terms prohibit* a contract of lease or any contract from being operative after the death of a party to it.

(*b.*) The Act applies *to debts* owing at the time of the decease.

But when Robbins, the tenant, died no rent was due, nor did anything become due (and, therefore, a debt) until six weeks afterward.

(*c.*) The Act provides for the payment of the decedent's debts, so far as his legal representative has *assets*.

Digitized by Google

But the residue of the demised term cannot be deemed assets, or available for the payment of debts, until the consideration of the existence of such term is deducted, and that is the rent.

A contract may be made which will defeat the order of payment of debts intended by the Act of 1834, *e. g.*, agreement for the carrying on of a partnership after a member's death.

Gratz *v.* Bayard, 11 S. & R. 41.
Laughlin *v.* Lorenz, 48 Pa. 275.
Leaf's Appeal, 105 Id. 505.

The Act of 1834 applies only in cases of insolvency, and Robbins' estate is not shown to be insolvent.

John G. Johnson (*Frank P. Prichard* with him), for appellee.

February 25, 1895. McCollum, J. We think the learned Judge of the Court below reached a correct conclusion in this case and gave good reasons for it. The contention, briefly stated, concerns the right of the legal representatives of a deceased lessor to distrain, for rent due, the goods and chattels of his deceased lessee in the hands of the administrator of the latter. They base their claim of a right so to do upon the lease which created the relation of landlord and tenant between the decedents, and by its terms extended to their respective "heirs, executors, administrators, successors and assigns," their respective rights and liabilities under it. The right of distress as defined by the lease was exercisable on the non-payment at maturity of any quarter's rent, and included goods while on the premises and for thirty days after their removal therefrom. It is undisputed that the goods replevied in this case were distrained by the legal representatives of the lessor while in the custody and under the control of the administrator of the lessee, and the question to be decided is whether the distress was authorized by the provisions of the lease to which reference has been made. The distrainors have not brought to our notice any decision of this Court which directly sustains their claim nor do we know of any. They have cited, Gratz *v.* Bayard, 11 S. & R., 41; Laughlin *v.* Lorenz, 48 Pa. 275, and Leaf's Appeal, 105 Pa. 505, as analogous in principle to the case at bar. In the first case cited, it was held that by express agreement a partnership may continue after the death of one of the partners, and further, that upon the assignment by the survivor of the firm effects for the benefit of creditors, the whole partnership fund including what was contributed thereto by the deceased partner's estate, passed to the assignee and was applicable to the partnership debts. Laughlin *v.* Lorenz decided that the legal representatives of a deceased partner may carry on the business for, and bind the estate, where a covenant to that effect existed in the articles of co-partnership, or he directed by will that it should be done. Leaf's Appeal recognized the validity of a stipulation in the co-partnership articles for the continuance of the firm after the death of a member, and enforced the principle that during the continuance of it real estate constituting a part of the partnership fund must be regarded as personalty, subject, however, to the qualification that one partner cannot dispose of the firm interest in it, unless specially authorized to do so. These cases acknowledge and sustain the power to create a partnership which may survive the death of one of its members. The exercise of the power may postpone the recovery by the estate of the deceased partner of a possible asset ascertainable on the dissolution of the partnership and the liquidation of its affairs, and it may, perhaps, diminish the same, but such asset when recovered is on the footing of other assets of the estate, as regards distribution among creditors. It is believed, therefore, that the cases cited do not govern the case at bar, nor afford material assistance in the decision of the question involved in it. The distrainors had no lien on the goods, for rent, in the lifetime of the decedent, and at his death they passed to his administrator as other assets of the estate did. His custody of them was lawful, and for the purposes of administration. It was his duty to apply them to the payment of the decedent's debts in the order prescribed by the statute. In this order, funeral expenses, medicine furnished and medical attendance given during the last illness of the decedent, and servants' wages not exceeding one year, constitute the first class and have precedence; rents not exceeding one year form the second class, and all other debts belong to the third class, "except debts due to the Commonwealth which shall be last paid." It is possible that the order thus prescribed may be qualified as to assets on which there are liens acquired in the lifetime of the decedent, but as no liens of this character appear in the case before us, the qualification suggested does not require present consideration. Our conclusion is, that the distress of which this litigation is the outcome was not warranted by the lease, and was in plain violation of the laws governing the administration and distribution of the estates of decedents.

We do not consider it necessary to add anything further to what was well said by the learned Judge of the Court below in vindication of the judgment entered there.

Judgment affirmed. H. B.

Digitized by Google

Oct. '94, 119. October 24, 1894.

Goddard, Hill & Company v. Leopold Weil & Company.

Personal property—Bill of sale of—Change of possession necessary to perfect sale—Constructive delivery—Character of such delivery—Question of fact—Inadequacy of price as badge of fraud.

Where personal property sold is not reasonably susceptible of actual delivery, a constructive delivery is sufficient; and it is not necessary that the vendee should do more than assume such control of it as will reasonably indicate the fact of the change of ownership.

If there has been neither delivery nor the assumption of control, it may be the duty of the Court to pronounce the sale void for legal fraud; but when the vendee has assumed control the question whether the sale is *bona fide* is usually one of fact, and it is for the jury to find if the vendee has done all that could reasonably be expected in such a case.

Renninger *v.* Spatz, 128 Pa. 524, followed.

While gross inadequacy of price standing alone as the only fact established may justify an inference of fraud, when connected with other facts, it must be considered in connection with them, and the question must be submitted to the jury.

Appeal of Leopold Weil and Julius Koch, partners, doing business as Leopold Weil & Company, defendants, from the judgment of the Common Pleas No. 3, of Allegheny County, in a feigned issue, wherein George E. Goddard, E. W. Hill and E. M. Quimby, partners, doing business as Goddard, Hill & Company, were plaintiffs, and Leopold Weil & Company were defendants, to try the title as to certain goods and chattels, to wit: all that certain stock consisting of diamonds, watches, clocks, jewelry, etc., contained in the premises at No. 5 Federal street, Allegheny City.

Upon the trial, before PORTER, J., the following facts appeared: On January 25, 1893, Leopold Weil & Co., wholesale dealers in jewelry, doing business in the City of New York, recovered a judgment against Edward J. Black, a retail jeweler, doing business in Allegheny City, Pa., in the sum of $1681.50, for an indebtedness to them for merchandise sold and delivered by them to Black. On the same day execution was issued on this judgment, and the sheriff levied upon the stock of watches, clocks, jewelry, etc., in the premises No. 5 Federal street, Allegheny, where Black for three years prior to that date had carried on a retail jewelry store. The goods levied upon by the sheriff were claimed by the firm of Goddard, Hill & Co., wholesale dealers in jewelry, doing business in the City of Pittsburgh, under a bill of sale from Black to them, dated January 23, 1893. Notice of their claim was given to the sheriff, who made application under the sheriff's interpleader Act of March 10, 1858, and an issue was awarded between the claimants, Goddard, Hill & Company, and the execution creditors, Leopold Weil & Company, to determine the ownership of the property levied upon. On January 23, 1893, E. J. Black was indebted to Goddard, Hill & Company in the sum of $2,810. At that time there was an execution in the sheriff's hands against Black amounting to about $590, and a claim of back rent amounting to about $175; the exact amounts were not proven. This execution and rent claim were paid by Goddard, Hill & Company. On that date Black executed and delivered to Goddard, Hill & Company a bill of sale for his stock of watches, clocks, jewelry, etc., in premises No. 5 Federal street, the consideration named in the bill of sale being $3,710. Prior to the execution of this bill of sale no inventory or list of this stock had been taken. Afterwards an inventory was taken and the schedule attached to the bill of sale. The inventory was taken on a basis of the cost prices of the goods in Black's store and amounted to $5,296.15. On the afternoon of January 23, 1893, Black delivered the keys of the premises to Mr. Hill, a member of the firm of Goddard, Hill & Company, and on the next day the work of taking the inventory was begun by two employés of the firm of Goddard, Hill & Company, named Allison and Cowen. This inventory was completed about a week later. After the work of taking the inventory had been completed Cowen left the store at No. 5 Federal street and did not return. Allison remained there for about a week longer. E. J. Black remained in the store. He never left it after the bill of sale was executed. It was claimed by the plaintiffs that during the time Allison was there he, Allison, was in charge, although they admitted that Black continued to remain in the store. It was admitted that Allison left within two weeks from January 23, 1893, and Black, after Allison left, had entire charge and control of the store at No. 5 Federal street, Allegheny, and continued to remain there buying and selling goods as he had done prior to January 23, 1893, up until after the trial of this case. He had full control. His brother, David S. Black, who had been in his employ prior to January 23, 1893, remained in the store continuously until after the trial of this case. He was the only person employed by E. J. Black at the time of the execution of the bill of sale.

On January 23, 1893, there were three signs bearing Black's name upon the outside of the store, No. 5 Federal street, Allegheny. Two of these signs were removed on January 25, 1893, after the execution issued by Leopold Weil & Company on their judgment was lodged

Digitized by Google

with the sheriff. One of these two signs was painted on a board extending across the front of the building over the door. When this was taken down it disclosed the name E. J. Black painted on the building in black letters, and this name was painted over with white paint, but not obliterated. The third sign remained on the store as late as January 30, 1893. No new signs were put up after January 23, 1893. Other than the removal of these signs, and the fact that Cowen and Allison, employés of Goddard, Hill & Company remained in the store, the former for one week and the latter for two weeks after January 23, there were no external appearances of a change of ownership of the stock of watches, clocks, jewelry, etc., in the premises No. 5 Federal street. The defendant submitted, *inter alia*, the following points:—

First. "That under all the evidence in this case, the verdict must be for the defendants." *Refused.* (First assignment of error.)

Third. "If the jury find that the property covered by the bill of sale was worth $5,200 or thereabouts, and that the total indebtedness of Black to Goddard, Hill & Company did not exceed $3,710, then they will be justified in inferring from this fact that the sale was not absolute and unconditional, and if they so conclude, the alleged sale was fraudulent and void in law, and the verdict must be for the defendants." *Refused.* (Second assignment of error.)

Fifth. "That the retention of Black upon the premises, and in and about the business carried on therein, and the keeping up of the signs of said Black, were circumstances from which the jury may infer that the sale was not absolute and unconditional, and that said Black was not excluded from all interest in the property in question, and if the jury so conclude then the alleged sale was fraudulent in law, and the verdict must be for the defendants."

Answer. "The point as here stated is refused. If the retention of Black upon the premises was simply as an employé, without indications of ownership or control of the property, then such retention would not be improper. The removal of the signs from the building and the time when they were removed are questions for the jury to consider, with all the other testimony in the case. The purchaser would be required to remove such evidences of ownership from the building, and would only have a reasonable time to do so. If you find that the signs were permitted to remain an unreasonable time, then you will consider that fact in connection with all the other evidence in the case. And if you find that Black was retained upon the premises and continued in possession of the goods as an owner, then your verdict must be for the defendants. If you find that Black continued in concurrent possession with the purchaser, your verdict must be in favor of the defendants. If you find that the possession of the purchaser was not exclusive of any ownership or control by Black, then your verdict must be for the defendants. But if you find simply that Black was retained on the premises as the agent, and with all the indications that he was so retained, then his retention would not be fraudulent." (Third assignment of error.)

Verdict for plaintiffs and judgment thereon. Whereupon the defendants took this appeal, assigning for error the answers to their points, as given above.

J. S. Ferguson, (*E. G. Ferguson* with him), for appellants.

Under the facts in this case the Court below should have instructed the jury that their verdict must be for the defendants.

Miller *v.* Garman, 69 Pa. 134.

The discrepancy between the value of the goods as inventoried, and the actual debt of Black to Goddard, Hill & Co. was sufficient to justify a finding that the sale was not absolute and unconditional, and defendant's fourth point should have been answered in the affirmative.

Adams *v.* Hitner, 140 Pa. 166.
Davis *v.* Charles, 8 Id. 82.
Watch Company *v.* Bedillion, 131 Id. 390.

R. H. Jackson, (*Charles P. Lang* with him), for appellee.

If a sale of a store of goods is not in fact fraudulent, it will not be declared fraudulent in law, for want of an open and unambiguous change of possession, if there was an actual delivery of possession in such a form as usually and naturally attends such a transaction.

Hugus *v.* Robinson, 24 Pa. 9.
Garretson *v.* Hackenberg, 144 Id. 107.
Janey *v.* Howard, 30 WEEKLY NOTES, 379.

The facts of the case of Miller *v.* Garman, 69 Pa. 134, cited by the appellant, are clearly distinguishable from the case at bar, for in the former case there was nothing from which the conclusion could be drawn of a change of ownership

The goods were inventoried at their actual cost to the vendor, but their intrinsic value did not exceed the amount paid for them, and there could be no inference from this discrepancy that the sale was fraudulent.

Adams *v.* Hitner, 140 Pa. 166.

January 7, 1895. FELL, J. Where personal property sold is not reasonably susceptible of actual delivery a constructive delivery is sufficient, and it is not necessary that the vendee should do more than assume such control of it as to reasonably indicate the fact of the change of ownership. If there has been neither delivery

Digitized by Google

nor the assumption of control, it may be the duty of the Court to pronounce the sale void for legal fraud; but when the vendee has assumed control the question whether the sale is *bona fide* is usually one of fact, and the question is whether the vendee has done all that could reasonably be expected in such a case. This is to be determined in view of the relation of the parties, and the nature, use and situation of the property. This rule has been upheld in a long line of cases, among the later of which is Renninger *v.* Spatz, 128 Pa. 524.

A verdict could not have been directed against the plaintiff for want of a delivery or for want of continued and exclusive possession. The testimony showed a symbolic delivery at the time of the sale, and the assumption by the vendee of immediate and exclusive control of the property, followed by a change of all indication of the former ownership of the vendor. The contest of the validity of the sale on any ground raised questions of fact, and the case was necessarily one for the jury.

It would have been error to have affirmed the defendant's third point, the refusal of which is the subject of the second assignment of error. Mere inadequacy of price was not sufficient ground for the inference that the sale was not absolute and unconditional. It was a matter proper for the consideration of the jury in connection with the other facts of the case. Gross inadequacy of price standing alone as the only fact established might justify such an inference, but here the inadequacy was to be taken in connection with the other facts, and the conclusion was to be drawn from all of them.

We find no error in the rulings of the learned Judge, and the judgment is affirmed.

S. H. T.

Oct., '94, 115. October 25, 1894.

Young v. Patterson.

Bond — Construction of — Right of action — Parties — Paper book.

When a bond is executed to C. for her interest in a fund and as trustee for others, payable to C. "her attorney, executors, administrators, or assigns," the obligor cannot, after C.'s death, and in a suit on the bond by C.'s administrator set up an agreement with the others interested in the fund, that the bond was only intended to secure C.'s interest and that at her death the principal was to be paid directly to the others interested in the fund.

Such a bond is not like a recognizance in the Orphans' Court, but is a mere private agreement and will be enforced according to its terms.

A paper book which in lieu of a history of the case contains under that title an averment of facts without proof, and an argument, is defective, and liable to be quashed on motion.

Appeal of T. H. Baird Patterson, from the judgment of the Common Pleas of Allegheny County.

James Young, administrator of Jennie Young, deceased, brought suit for the use of the heirs of William Young upon the following bond:

Know all men by these presents, That I, T. H. Baird Patterson, of the City of Pittsburgh, in the County of Allegheny, and State of Pennsylvania, am held and firmly bound unto Mrs. Jane Young, of same place, for her own interest and as trustee of the heirs of William Young, deceased, according to their respective interests, in the sum of forty-four hundred and forty-six dollars ($4,446), to be paid to the said Jane Young, her certain attorney, executors, administrators or assigns; to which payment well and truly to be made I do bind myself, my heirs, executors and administrators and every of them, firmly by these presents:

Witness my hand and seal, the seventeenth day of August, in the year of our Lord one thousand eight hundred and eighty-three.

Now the condition of the above obligation is such, That if the above bounden, T. H. Baird Patterson, his heirs, executors or administrators and assigns do well and truly pay, or cause to be paid unto the said Mrs. Jane Young, her executors, administrators or assigns, the just sum twenty-two hundred and twenty three dollars in two years from the date hereof, with legal interest from the date hereof, payable semi-annually, and in case of default in payment as aforesaid, shall also pay all costs, fees and expenses of collecting the same, including an attorney's commission of five per centum without any fraud or further delay, then this obligation is to be void, otherwise it is to remain in full force and virtue.

The interest had been paid in full to Mrs. Jane Young.

Defendant objected to the admission of the above bond in evidence, because the plaintiff in this suit had no interest in nor connection with said bond. Objection overruled. (First assignment of error.)

Defendant further offered to prove that the money unpaid on the bond belonged to the children, and that the giving of the bond was in pursuance of an agreement with the children that by this means the payment of the interest should be made to the mother during life and at her death the principal to them. Offer objected to and overruled.

The Court directed the jury to find a verdict for the plaintiff for the penal sum of the bond and the real debt $653.93 with $32.61 attorney's commissions, and judgment was entered upon the same.

Defendant appealed, assigning for error the overruling of his objections and offers and the direction to find for plaintiff.

T. H. Baird Patterson, appellant, p. p.

A widow's interest is a charge on land in the nature of a lien and is payable as personalty to the heirs upon the widow's death.

Digitized by Google

Mentzer *v.* Menor, 8 Watts, 296.
Hillbish's App., 89 Pa. 497.
Hise *v.* Geiger, 7 W. & S. 273.
Gourley *v.* Kinley, 66 Pa. 273.

James Bredin, for appellee.

January 7, 1895. DEAN, J. There is no history of the case in appellant's paper book. What purports to be one, is an averment of facts, with no proof to sustain them, and an earnest argument to convict the Court below of error at the trial. It gives us no aid in a proper understanding of the case, and if a motion to quash for this cause had been made by opposing counsel before argument, the motion, probably, would have prevailed.

As we gather from the fragments of evidence in the paper book, on the 17th of August, 1883, there was due and owing from T. Baird Patterson, defendant, to Mrs. Jane Young, widow of William Young, deceased, partly in her own right, and as trustee for her nine children, the sum of $2,223. For this, Patterson delivered to her his bond duly sealed in the penal sum of $4,446, to be paid to her certain attorney, executors and administrators. The conditions of the bond were, that the obligor was to pay to Jane Young, her executors, administrators or assigns, in two years from the date thereof, the sum of $2,223, with legal interest from date, payable semi-annually, and in case of default, pay all costs, fees and expenses of collecting the same, including an attorney's commission of five per cent.

In 1891, Jane Young, the obligee in the bond, died. Her interest in the money was the right to the interest due semi-annually. This had been paid her. The principal belonged in equal shares to her nine children. At her death, this plaintiff took out letters of administration on her estate, and the bond passed into his possession. He brought suit upon it, as legal plaintiff, for the use of the children, as equitable owners, to enforce payment of a balance alleged to be unpaid. The obligor, this defendant, denied the right of plaintiff to bring suit, because he had no interest in the obligation; further, offered to prove, that the money unpaid on the bond belonged to the children, and that the giving of the bond was in pursuance of an agreement with the children, that by this means the payment of the interest should be made to the mother during life, and at her death, the principal to them.

The Court ruled, the plaintiff could bring the suit, overruled defendant's offer of proof, and directed a verdict for plaintiff for the penalty of the bond, to stand for the use of the equitable plaintiffs, setting out their names, and the amounts respectively due them as part of the verdict. Some of them had been paid in part, and the aggregate claimed to be unpaid on the real debt, $2,223, was, with attorney's commissions, only $686.62. Judgment having been entered on the verdict, defendant brings this appeal, assigning nine errors, which involve but two questions: 1. Had the legal plaintiff a right of action on the bond? 2. If so, had the defendant the right, in answer to the claim on the bond, to offer proof that some of the heirs had arranged with him to settle concerning their respective shares severally?

Clearly the legal title to the bond was in the administrator, without regard to the beneficiaries under it. The defendant, in the penal clause of it, says: "I am held and firmly bound unto Mrs. Jane Young, for her own interest and as trustee of the heirs of William Young, deceased, according to their respective interests." He is not bound to the heirs, but to her for them. Then, the condition of the bond is to "well and truly pay or cause to be paid to said Mrs. Jane Young, her executors, administrators or assigns, the just sum of $2,223 in two years from the date hereof, with legal interest payable semi-annually." Jane Young lived eight years after she received the bond, and six years after it became due and payable. Can her right to sue in her lifetime upon it, after maturity, be doubted? Or can her answerability, or that of her representative be doubted, to the beneficiaries for the money due them? As this defendant made the obligation expressly payable to her or her administrators, he has no standing to object to the suit by plaintiff, merely because her estate is not entitled to the principal.

Then as to appellant's offers to prove, that the principal sum in the bond was part of the estate of William Young, deceased, and by an arrangement between the mother and children, at her death, they were to receive their respective shares, and that he had made part payment to several of the children. They were properly overruled; it was immaterial to defendant what arrangement had been made between the children and their mother. His contract was not to pay to the children, but to her or her administrator, as evidenced by his bond. As between them and their mother, or the personal representative, the trust confided to her would be settled by the terms of it. With this, defendant had nothing to do. It is probable, as would have been entirely proper, if defendant had offered to prove that before suit brought, he had settled with and paid all the children in full their respective shares, and all interest on the debt, and of this the administrator had notice, the Court below would have permitted him to establish that fact, and if established, would have directed a verdict in his favor. This, not

Digitized by Google

because there was a legal right in the children to demand, or in him to pay to those not the legal obligees in the bond, but because such payment would have been in equity a discharge of the legal obligation, and the estate of the mother could thereafter have been in no peril, which it would have been the duty of the administrator to guard against. But no such offer was made, nor the semblance of it. The character of defendant's evidence, which was objected to and ruled out by the Court, is indicated by the interrogatories to the witnesses, thus: "What interest had Jane Young in this fund? Do you know how much money has been paid these heirs? Did these heirs all authorize you to bring this suit?" Then the offer was: "I propose to prove this was a fund arising from the estate of William Young, deceased, and that after the settlement of his estate, this money belonged to these heirs in severalty, subject to an arrangement by which their mother was to receive the interest on it during her lifetime." Admit this, what had that to do with the obligation in the bond? It might be important, if the mother had sought to appropriate the principal of the bond in her lifetime, or if her administrator denied the right of the children to it after her death, but appellant has no concern in such a controversy, his duty is to pay what he owes, and not withhold payment because those to whom it belongs might wrong each other when they get it.

Not a single one of the cases cited by appellant, has any bearing on the question before us. Mentzer *v.* Menor, 8 W. 296; Hise *v.* Geiger, 7 W. & S. 273; Hillbish Appeal, 89 Pa. 497; Kurtz's Appeal, 26 Id. 465; Gourley *v.* Kinley, 66 Id. 273; are all cases of recognizances in the Orphans' Court, on the lands of decedents. By statute and order of the Court, these obligations are a lien upon the land, the interest to be paid to the widow during life, and at her death the principal sum to the heirs. But this bond is, in no respect, a recognizance in the Orphans' Court, it is a personal obligation taken by agreement of the parties without intervention of the Court.

No injustice can be done this appellant. The Court below has full control of the judgment, and will not permit the collection from him of any greater sum than he owes. If he have made any payments to any of the children not already credited, the Court, on proper proof, can order such payment to be credited against the shares of the ones who have received the money. The judgment is affirmed.

W. M. S., Jr.

July, 94, 220. February 5, 1895.

Commonwealth ex rel. Holland v. Schneipp et al.

Constitution—Repeal of statutes—Act February 27, 1851, P. L. 115—Act March 18, 1863, P. L. 158—Act of May 23, 1893, P. L. 113—Burgess—Quo warranto.

The right of a burgess to sit in borough councils as presiding officer and to vote upon measures there introduced, although derived from an Act of Assembly which especially confers it upon him, is removed by the repealing clause of the Act of May 23, 1893, P. L. 113, which Act by section 2, provides he shall not preside at Councils meetings.

Where the provisions of a General Act of Assembly are utterly hostile to those of special laws the latter are repealed by the repealing clause of the former.

Com. *ex rel.* Braughler *v.* Weir, 165 Pa. 284; 35 WEEKLY NOTES, 556, followed.

Appeal of William F. Schneipp, from the judgment of the Common Pleas of Montgomery County, entered against him on a quo warranto, issued at the relation of James B. Holland, district-attorney of the said county, ousting said Schneipp from presiding at the meetings of the borough councils of Bridgeport.

The facts appear in the opinion of the Court.

Montgomery Evans, (*Edward F. Kane* with him), for appellant.

The borough of Bridgeport was created by a special Act, viz: of February 27, 1851, P. L. 115, and "it is against reason to suppose that the Legislature in framing a general system for the State, intended to repeal a special Act which the local circumstances of one county had made necessary."

Brown *v.* Commissioners, 21 Pa. 37.
Malloy *v.* Reinhard, 115 Id. 25.
Harrisburg *v.* Sheck, 104 Id. 53.
Evans *v.* Phillipi, 117 Id. 226.
Trust Co. *v.* Fricke, 152 Id. 231.
Bell *v.* Allegheny Co., 149 Id. 381.

The duties and functions of the burgess of Bridgeport are not met by the provisions of the Act of May 23, 1893, as to collection of taxes; by the Act of Incorporation "he shall issue his precept," while the Act makes no provision whatever. This is contrary to the Constitution.

Constitution, Art. III., secs. 3, 7, 8.
Trust Co. *v.* Fricke, 152 Id. 237.

Statutes of a general nature do not repeal by implication.

McCleary *v.* Allegheny Co., 163 Pa. 578.

N. H. Larzelere, (*M. M. Gibson* with him), for appellee.

It has been distinctly said by this Court that

Digitized by Google

the Act of May 23, 1893, "applies to *all* the boroughs" in the Commonwealth.

Quinn *v.* Cumberland Co., 162 Pa. 55.

February 18, 1895. GREEN, J. In the case of Commonwealth *ex rel.* Braughler *v.* Weir, 165 Pa. 284, reported now in 35 WEEKLY NOTES, 556, we considered and decided the very question involved in the present contention. In that case, as in this, the official whose title was in question, was a burgess of a borough (Indiana). We decided that the special law of March 12, 1869, P. L. 344, "regulating the election of burgess and town council of the boroughs of Indiana and Brookville," so far as the election of burgess was concerned was repealed by the general law of May 23, 1893, P. L. 113. We held that the special repealing clause of the Act of 1893 was an express repeal of the Act of 1869, with which it was so inconsistent that they could not stand together. The same repealing clause of the same general law (Act of 1893) is now invoked as having the same effect in this case upon the law which, prior to 1893, regulated the election of burgess of the borough of Bridgeport, in the County of Montgomery. The points of difference are not identical with those appearing in the former case, but they are of the same character, and are sufficiently inconsistent with the provisions of the former law in this case to bring it within the operation of the repealing clause of the Act of 1893.

In this case the borough was chartered by a special law approved February 27, 1851, P. L. 115, which incorporated within its terms eight sections of the General Borough Law of 1834, P. L. 163, to wit, sections seven to thirteen, both inclusive, and also section sixteen.

By section three of the Act of 1851, the burgess was to be elected for the term of one year, whereas by the Act of 1893 the burgess is elected for the term of three years, and is not eligible to election for the next succeeding term, a disqualification which does not appear in the Act of 1851.

By the eighth section of the General Law of 1834, which is made a part of the borough charter, the burgess is constituted a member of the borough council with full power to act and vote as a member upon all bills and ordinances which may come before them. The language of the section is, "It shall be the duty of the town council of each borough hereinafter incorporated, four of whom including the burgess, if present, shall be a quorum, to meet at such times and places, as by the by-laws and ordinances of said boroughs shall be appropriated, at which meetings they may enact, revise, repeal and amend all such by-laws, rules, regulations and ordinances," etc. Numerous powers are specially conferred upon them by the remainder of the section. The section further provides: "And the burgess shall be president of the town council and shall have and exercise all the rights and privileges as a member thereof, but in case of the absence of the burgess the members present may elect one of their number to preside for the time being."

By the second section of the Act of 1893, it is provided, "Such burgess shall not hold any other borough office or appointment during the term for which he is elected, nor be a member of, nor preside at the meetings of the town council of said borough. But such meetings shall be presided over by a president of council to be at the annual organization thereof elected by such council from among their number, and in the absence of such president shall be presided over by a president *pro tempore*."

It will be perceived at once that the provisions of these two Acts upon this subject are utterly hostile to each other and cannot possibly stand together.

Under the Acts of 1851 and 1834 there is no power in the burgess to veto any ordinance or resolution of council, but under the third section of the Act of 1893, a full power to veto all such ordinances and resolutions is conferred upon the burgess, with an additional provision requiring a vote of two-thirds of the members to pass the measure over the veto. In case of a veto it would require a vote of two-thirds of all the members to pass an ordinance or resolution, whereas under the former laws a majority was always sufficient.

Under the Act of 1851 the burgess, being a member of council, could vote on any measure, but under the Act of 1893 he could not in any circumstances cast such a vote. If under the Act of 1893 he should veto a measure, he could, under the Act of 1834, vote as a member on the question of sustaining his own veto.

For these and other reasons which it is unnecessary to point out, we hold that the Act of 1893 repeals the Acts of 1851 and 1834, so far as they relate to the election of a burgess, and that the Act of 1893 is now the only one in force.

There is much discussion in the paper books which we do not regard as relevant, and therefore do not stop to consider it. The assignments of error are dismissed.

The decree of the Court below is affirmed at the cost of the appellant. W. D. N.

Digitized by Google

Orphans' Court.

April, 1894, 96.

Naglee's Estate.

Statute of limitations—Acknowledgment of indebtedness—Promise to pay.

The claim made against N.'s estate matured October 1, 1883; testator died March 20, 1893. During the interim no demand for payment was made by claimant, and no acknowledgment by decedent to claimant of the debt. Proof was offered to show loose declarations of decedent to members of claimant's family, tending to acknowledge the debt:

Held, claim barred by statute of limitations.

A promise to pay, or an acknowledgment consistent with and equivalent to such promise must be made to the creditor or his known agent; and such acknowledgment must be clear and definite, and the sum of the amount due must be specified, or a reference made to something by which such amount can be definitely ascertained, in order to remove the bar of the statute of limitations.

The Orphans' Court will not breathe fresh life into a claim that has died through the laches of the claimant in the lifetime of the debtor.

Exceptions to adjudication.

The facts are sufficiently stated in the opinion.

W. Henry Sutton, for exceptions.

Charles E. Pancoast, contra.

February 2, 1895. HANNA, P. J. A creditor who fails for more than eleven years to urge, by legal process, his claim against his debtor, who was possessed of property sufficient to pay the claim, and then not until more than one year after the death of his debtor, and from the inception of his employment and creation of the indebtedness never made any personal demand upon the debtor, either for payment or some evidence of indebtedness, must be considered as having weak faith in the justice of his claim, or unwilling to meet the denial his debtor might have interposed in his lifetime.

The claim in this case matured October 1, 1883, and testator died March 20, 1893, ten years, less seven months, thereafter. During this time no demand for payment was made by the claimant, nor was any acknowledgment by decedent to him of his indebtedness attempted to be proved. In view of these facts, it must be conceded that the statute of limitations is an insurmountable obstacle in the way of a recovery, unless such facts and circumstances be proved as will remove the bar of the statute. To do this, proof of loose declarations and admissions of decedent is offered, and these not made to claimant, but to members of his family. But a promise to pay, or an acknowledgment consistent with and equivalent to a promise to pay, sufficient to toll the running of the statute, must be made to the creditor or his known agent: McKinney *v.* Snyder, 78 Pa. 500; Hostetter *v.* Hollinger, 117 Id. 606; Spangler *v.* Spangler, 122 Id. 358. And in the case last cited, it is held that proof of the declarations of the debtor to strangers to the transaction, that he had acknowledged the indebtedness to his creditor, and promised him to pay it, will not be sufficient to toll the bar of the statute.

Here it was not shown that either of claimant's relatives to whom the admissions and promises were made, acted or were authorized to act as the agent of the claimant. But great reliance is placed upon the payment of the sum of $10 by decedent to the father of claimant, and this is thought sufficient to take the case out of the statute.

Conceding this was in part payment, and the father of claimant was his "known agent," of which there is no proof, yet the testimony is that this payment was made in January, 1888, more than six years prior to the presentation of the claim before the auditing Judge, in October, 1894. See Irwin's Estate, 133 Pa. 1; Yorks's Appeal, 110 Id. 69.

And, also, more than six years prior to the commencement of the suit in the Court of Common Pleas on June 1, 1894 (since the filing of the account), which we presume is upon the same cause of action, although it did not appear that any statement had been filed.

In the very recent case of Patterson *v.* Neuer, 165 Pa. 66, Advance Reports, although the facts differ very materially from those in the case before us, yet where an admission or acknowledgment is relied upon to remove the bar of the statute, it is again held, that to have that effect, there must be proof of "a clear and definite acknowledgment of the debt, and a specification of the amount due, or a reference to something by which such amount can be definitely and certainly ascertained."

The claimant may have a meritorious claim, and it is unfortunate he should lose it, but he has no one to blame but himself. He has been neglectful of his own interest, and it is too late now in his dilemma to invoke the aid of the Court. The forcible language of PAXSON, J., in York's Appeal, *supra*, may well be applied in this, and all similar cases: "Equity abhors laches. Hence I can imagine no greater anomaly than a creditor presenting his claim—a legal claim—against a dead man's estate in the Orphans' Court and saying, 'I might have brought my suit at law within six years but did not, and it is now barred by the statute; I appeal to the equity powers of the Orphans' Court to breathe fresh life into my dead claim and condone my laches.' If the statute of limitations be necessary to protect the living from stale claims, how much more so is it to protect the estates of the dead."

The exceptions are dismissed and the adjudication confirmed. F. B. N.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, MAR. 22, 1895.* [No. 6.

Supreme Court.

Oct. '94, 232. November 2, 1894.

Park Fire Clay Company v. Ott.

Contract—Construction of—Inspection—Agents—Evidence.

Where a manufacturer of bricks agreed with a contractor for borough work to furnish bricks of the size and quality stipulated for by the borough, with a knowledge of the use for which they were intended, and subsequently, after objections by the borough to the quality, agrees with the borough authorities that an inspector shall be appointed, such inspector becomes the agent of both the manufacturer and the borough, and in an action by the manufacturer against the contractor, the former cannot complain that the inspector threw out as bad bricks some of which were in fact good.

The appointment of an inspector to settle a dispute in which both the manufacturer and the borough had an interest, relieved the contractor from any further duty than to furnish bricks that had passed inspection.

The fact that the inspector was not expressly clothed with the power to bind both parties by his decision, is not important, as it will be assumed under the circumstances of his appointment that he represented both parties.

Evidence tending to show the relations of the three parties before the contract was entered into was offered in evidence and was admitted for the purpose only of showing the quality of the bricks furnished:

Held, that it should have been admitted fully to show the relation of the parties, and the interest the borough and the manufacturer had in appointing the inspector.

Appeal of Charles and Matt Ott, trading as Ott Brothers, defendants, from a judgment of the Common Pleas No. 3, of Allegheny County, in an action by The Park Fire Clay Company to recover money alleged to be due under a contract to furnish paving bricks. The action was brought upon a contract, of which the following is a copy:—

PITTSBURGH, August 4, 1892.

MESSRS. OTT BROTHERS, Pittsburgh, Pa.:

GENTLEMEN: We will furnish you from nine to ten hundred thousand No. 1 paving brick, on board cars at Uniontown, Pa., for $12 50 per M., and guarantee 57 to lay a yard of paving. Payments to be made as follows: On the 20th of September (2–6) two-sixths of the whole contract; on the 20th of October (1–6) one-sixth of the whole contract; and on the 20th of December, the balance of the contract.

Yours truly,
PARK FIRE CLAY CO.

Accepted.

OTT BROTHERS.

Plaintiff's claim was for 269,500 bricks sent to Uniontown, and for a loss of $2 per thousand for bricks never delivered which they claimed they should have been permitted to deliver.

On the trial, before McCLUNG, J., defendants offered evidence to the effect that after some bricks were furnished there was a dispute as to the quality, and that plaintiffs, after receiving complaints from the borough committee agreed with them that an inspector should be appointed. This was denied by plaintiff.

Counsel for defendants made the following offers:—

"Defendants' counsel propose to prove by the witness on the stand, to be followed by other witnesses, that prior to the acceptance by the defendants of the writing, Exhibit No. 1, the borough of Uniontown, Pennsylvania, had in contemplation the improvements of certain streets, Fayette street and others, and with that end in view called for samples and bids of different manufacturers of vitrified brick; among others from the plaintiff in this case; that the plaintiff in this case presented to the councils of said borough a sample of fire brick proposed by said company to be furnished for the improvement of said streets, and gave to the councils the price at which they would be delivered; that the councils adopted the fire brick of the plaintiff company as the brick to be used in the improvement of said streets, and ordered all bidders on the street improvements to bid upon the basis of using the fire brick of the plaintiff, and that this fact was known to the plaintiff; that the plaintiff company assured the authorities of the borough that the fire brick to be furnished for the improvement of the streets aforesaid should be in all respects similar to the sample furnished to the borough at the time that the brick of the plaintiff company was adopted by the borough authorities as the brick to be used in the improvements of the streets, and further, that they were in all respects to conform to the specifications made by the borough authorities with the contractor, and subject to the inspection of the borough authorities, as provided for in the contract between the contractor and the borough; that shortly after these arrangements were entered into between the plaintiff company and the borough of Uniontown bids were called for by the borough from contractors for the making of the improvements aforesaid, and the defendants, among others, bid for the work upon the basis of procuring the fire brick of the plaintiff, according to the terms and conditions agreed upon between the plaintiff and the authorities of the borough of Uniontown; that prior to the making of the bid by the defendants to the borough it was distinctly understood and

Digitized by Google

agreed between the plaintiff company and the defendants that the brick to be furnished by the plaintiff should in all respects conform to the requirements of the borough authorities and be subject to their inspection, as provided in the contract between the contractor and the borough authorities; that about July 19, 1892, the defendants were notified by the borough that their bid had been accepted by it, and thereupon the defendants notified the plaintiff to ship the brick to be used in that contract; that the contract was reduced to writing, and dated the 20th of July, 1892, that is, the contract between the defendants and the borough; that the paper, Exhibit No. 1, offered in evidence by the plaintiff in this case, was merely for the purpose of a guarantee upon the part of the plaintiff that 57 of his brick would lay a yard of pavement, and to determine the times when the brick were to be paid for, and did not contain the whole of the contract, but the contract was as hereinbefore mentioned in this offer: this to be followed by evidence that the brick delivered by the plaintiff were not such bricks as they had agreed with the borough authorities should be delivered for the purpose of making the improvements upon the streets of the borough for which the contract was subsequently entered into between the borough and the defendants in this case; that the rejection of the 50,000 brick was because said brick were not according to the contract, and was made by the inspector and proper authorities of the borough."

Objected to—

1st. Because the contract between the plaintiff and the defendants that was reduced to writing on August 4, shows for itself what the contract between them was.

2d. That the offer does not tend to show that at the time of the making of the contract in writing on August fourth, there was any contemporaneous agreement, or parol agreement, made that was not put in the paper.

3d. That the offer does not tend to show that the plaintiff was present at the time of the making of the agreement between the borough and the defendants, or had any knowledge of its contents, or knew anything about it.

4th. That there is no allegations or proof of any fraud, accident or mistake in making this agreement of August second; and, 5th, as generally incompetent and irrelevant.

By the Court:

"As I understand the offer, it is to modify the written agreement by parol. If there is any offer to show that there were brick delivered under another agreement outside of that agreement, that is, that any of these brick were delivered under another agreement, we will receive it, but as the matter now stands and with our present understanding of it, we sustain the objection and seal a bill for defendants." (Second assignment of error.)

Counsel for defendants proposed to prove "that at the time the sample brick, Exhibit No. 4, was presented by Warren, the agent of the plaintiff, at councils, that he represented and explained the sample brick to be a No. 1 vitrified paving brick, and broke the brick, some of the samples, explaining why it was a No. 1 vitrified paving brick; that he knew that the brick adopted by the councils must of necessity be used by the paver or the party getting the contract for the improvement; that he was present when the contract was awarded to Ott Brothers for the use of the brick, being the same meeting of councils. This, for the purpose: First, of meeting any allegations on the part of the plaintiff in this case, that a light colored brick, or a brick differing as to the amount of burning and color from the sample, Exhibit No. 4, is a No. 1 vitrified paving brick. Secondly, for the purpose of showing that the brick meant by the contract sued upon in this case were a brick of the description of Exhibit No. 4."

Objected to as irrelevant and incompetent.

The Court: "The plaintiff admits that the sample in evidence was made by them, and furnished by their agent. That of itself is a representation that they could make brick as good as that one is, and hence affords evidence that any brick of a lower grade than that is not No. 1 brick. The transactions between Warren, the plaintiff's agent, and the council cannot go beyond this; Warren's declarations outside of these declarations made to the members of council are not evidence. We, therefore, sustain the objection. (Third assignment of error.)

Defendants further proposed to show that at the time of the making of the paper, Exhibit No. 1, all of the items of the agreement between the plaintiff and defendants were not incorporated in that agreement, but in addition to what was therein expressed it was agreed and understood that the brick to be furnished by the plaintiff to the defendants were brick that were to be satisfactory to the council of Uniontown, and were to be such brick as would be accepted by the city councils under the terms of the contract between Ott Brothers and the plaintiff in this case, and the borough of Uniontown.

Objected to as incompetent and irrelevant.

Objection sustained. (Fourth assignment of error.)

The Court charged the jury, *inter alia*, as follows:

"I should say further, gentlemen, that there is one aspect of the case in which, even if some of these bricks that were thrown out were fit bricks for use, the plaintiff would not be entitled to pay

Digitized by Google

for them. [If Mr. Park made an agreement there that an inspector should be put on and that whatever bricks that were not fit should be thrown out, then he would be bound by it; but it would not follow from the mere fact that the inspector threw the bricks out that he would be bound by it. If good bricks were thrown out by the inspector, then he would be entitled to pay for them.] He, of course, could make a bargain by which he would be bound absolutely by the judgment of the inspector. If he had agreed to submit to the judgment of the inspector and take back whatever bricks the inspector would not pass, then, as a matter of course, he would be bound by it, but I recollect no testimony that goes to that extent. The testimony in the case is to the effect that it was agreed, he denying this allegation of course, that an inspector should be put on there, and that he would not claim for the bad bricks. But if he made the arrangement for an inspector with the borough councils, or some of them, and after the inspector had thrown out these brick he put them into the hands of Mr. McCormick, as is alleged by the testimony, for sale, then that was a receiving back of these brick. It was a rescission of the contract, so far as they were concerned, and whether they were good or bad, he would not be entitled to pay for them. It would be just the same, practically, as these cars that went to Johnstown. They were first shipped there and then shipped away. The plaintiff could not recover for them even if they were good brick; and so, even if they allowed the inspector to throw out these brick, and then put them into the hands of Mr. McCormick for sale, of course they could not recover for them."

Verdict and judgment for plaintiff for $3,500.

Defendants appealed, assigning for error the rulings in the evidence above noted and the portion of the charge in brackets.

J. S. Ferguson and *J. H. White*, (*E. G. Ferguson* with them), for appellant.

Lewis McMullen, (*Wm. T. Guiler* with him), for appellees.

January 7, 1895. FELL, J. By the terms of the contract entered into by the parties to this action the plaintiff were to furnish the defendants with nine hundred thousand paving bricks at an agreed price and of a stipulated quality and size. The action was for one hundred and seventy thousand brick furnished and accepted, and for the loss sustained by the refusal of the defendants to receive the balance. The contract called for "No. 1 paving bricks," and the main contention at the trial was as to the quality of the bricks tendered.

The bricks were to be used in paving streets in Uniontown, and the contract should be considered as having been made with reference to that use and to the previous action of the borough authorities upon the subject. Before awarding the contract for paving the streets the borough council procured from a number of manufacturers samples of paving bricks with the prices at which they would be furnished, and finally selected those made by the plaintiff as best adapted to their purpose, and the contract for paving made with the defendants required the use of these bricks. When the plaintiff entered into the contract with the defendants to furnish bricks they knew that the contract for paving called for the use of their bricks, and that the selection of these was based upon the samples furnished by them to the borough authorities. A street committee represented the borough in the supervision of the work and had the power, conferred by the paving contract, to determine finally between the defendants and the borough all questions as to the quality of the work done. Differences arose between this committee and the plaintiff as to the bricks furnished. It was alleged that the plaintiff after receiving complaints from members of the committee agreed with them that an inspector should be appointed. This was denied by the plaintiff, and in commenting upon the issue of fact thus raised, the learned Judge used the language which constitutes the first assignment of error. The whole charge upon this point should however, be considered in explanation of the part excepted to. It was said, "If Mr. Park made an agreement there that an inspector should be put on and that whatever bricks were not fit should be thrown out, then he would be bound by it; but it would not follow from the mere fact that the inspector threw the bricks out that he would be bound by it. If good bricks were thrown out by the inspector, then he would be entitled to pay for them. He of course could make an agreement by which he would be bound absolutely by the judgment of the inspector. If he had agreed to submit to the judgment of the inspector and take back whatever bricks the inspector would not pass, then, as a matter of course, he would be bound by it, but I recollect no testimony that goes to that extent. The testimony in the case is to the effect, he denying the allegation of course, that it was agreed that an inspector should be put on there and that he would not claim for the bad bricks." The instruction was in effect that if the plaintiff agreed with the committee for the appointment of an inspector not expressly clothed with the power to bind them by his decision, and he in disregard of his duty threw out good bricks, they would not be bound by his action. The only question to be considered is whether this was correct.

Digitized by Google

The contract to pave the streets was between the defendants and the borough. The contract to furnish bricks was between the defendants and the plaintiff. These contracts were distinct and independent, and did not together constitute a tripartite agreement which gave the borough any right of action against the plaintiff. The plaintiff might have stood upon their contract rights and refused to deal with any one but the party to whom they were responsible. They, however, did not do this. Upon complaints of the quality of the bricks they were furnishing made directly to them by the borough authorities they visited Uniontown and conferred with the street committee. The purpose of the conference was to reach a mutual understanding as to the subject of dispute. Each party had an interest in doing this. The borough would thus secure without dispute or litigation with its contractor the bricks for which it had stipulated. The plaintiff, as indicated by the testimony, were moved by a desire not to have the reputation of their bricks injured by their rejection; and another motive to be gathered from the relation of the parties was the moral obligation arising from the fact that the selection by the borough of the bricks to be used was based upon the samples which they had furnished. Whatever the interest or the motive, at this point these parties attempted the adjustment of the dispute between them concerning the quality of the materials which the defendants were required to buy of one and use for the other. If they agreed upon this the defendants were relieved of responsibility with regard to it.

If an inspector was appointed by agreement it must be assumed that he was to represent both parties in making an inspection. Otherwise the agreement would have been senseless. The committee was at liberty to inspect without the assent of anyone. That was its right, and as between the borough and the contractor it had the power to determine finally what bricks should be used. An inspection in the interest of either party would have effected nothing, and the desired end, a settlement of the question as to what bricks should go into the pavement, could be reached only by an inspection by some one who represented both. There was nothing else to agree about. If then the inspector represented the plaintiff as well as the borough, his inspection, however unjust or unwise, determined what bricks the defendants were to use. If the parties by agreement had jointly made an inspection, the committee would have been estopped from afterward asserting that the bricks selected as fit for use were in fact unfit; and the plaintiff likewise would have estopped themselves from making any claim for bricks rejected, for the reason that they had by their own act determined what were good and what were bad, and led the defendants to use the one and reject the other. The act of their joint agent would have the same effect, and as fully as if he had been expressly clothed with power to bind them by his decision. While the dispute between the committee and the plaintiff lasted the defendants were left to their own judgment. They were bound by their contracts on the one hand to use the plaintiff's bricks and on the other to use only such bricks as were satisfactory to the committee, and the responsibility of selection rested with them. When, however, these parties agreed as to the quality of the bricks a new course was marked out for the defendants. Before, the test to which they were held was the use of a No. 1 brick. Now it became a brick which had passed inspection, and they were not required to use any other.

The case was carefully and ably tried by the learned Judge, and the charge and answers to points clearly and fully presented the issue involved. We find no error in the record except in the portion of the charge which we have considered. Testimony of what had occurred between the plaintiff and the borough authorities before the awarding of the contract was admitted, but with a limitation to show the quality of the bricks to be furnished. Holding the opinion we have expressed as to the effect of an agreement to appoint an inspector, we think that upon a retrial this testimony should be admitted in full as bearing upon that question.

The first assignment of error is sustained, the judgment is reversed and a venire de novo awarded. W. M. S., Jr.

July, '94, 228. January 31, 1895.

City of Philadelphia v. Schofield.

Municipal claim—Act of March 23, 1866—Preliminary notice to the owner to pay before issuing sci. fa.—Waiver of—Amicable action.

The purpose of the Act of March 23, 1866, regulating the filing and collection of municipal claims in Phi'adelphia, was to protect property owners against costs on claims of which they were ignorant, and to prevent, as far as possible, the sale of their properties without actual notice to them.

The requirement by the Act that notice be served upon the owner as a condition precedent to the issuing of the sci. fa. on the claim, is not, however, mandatory in the sense that it can not be waived by the party for whose benefit it was enacted.

Digitized by Google

An owner, who having knowledge of a claim, announces his intention to contest it, and enters into an agreement with the city solicitor for an amicable sci. fa. upon it, cannot after judgment against him be heard to allege as ground for setting aside or opening the judgment that the city failed to give the statut ry notice before issuing the sci. fa.; nor does the opening of the judgment enable him successfully to interpose such a defence.

Such an agreement, in the absence of fraud or dure s, may well be regarded as a waiver of the notice prescribed by the statute, or as an admission that it had been duly given. There is no object to be accomplished by serving the notice and delaying the issuing of the writ for that purpose.

Appeal of the City of Philadelphia, plaintiff, from the judgment of the Common Pleas No. 1, of Philadelphia County, upon a case stated in an amicable proceeding by scire facias, wherein Mary E. Schofield was defendant, upon a claim for water pipe laid, against a lot of ground belonging to the said Mary E. Schofield.

The facts of this case, as set forth in the case stated, were as follows:—

The city of Philadelphia, plaintiff, on the sixteenth day of April, 1883, filed its claim against all that certain lot or piece of ground situate on the northerly corner of Mercer and Clearfield streets, in the Twenty-fifth Ward of the city of Philadelphia; containing in front on said Mercer street one hundred and eleven feet six inches, and extending in depth northwesterly of that width, parallel with and along the northeasterly side of said Clearfield street, one hundred and forty feet to Almond street, for work and material furnished by the said city in front of said lot, and duly assessed and charged as follows:—

"OCTOBER 18, 1882.

"To one hundred and eleven feet six inches of water pipe, at one dollar per foot, $111.50, which sum, together with lawful interest, is claimed as a lien against said premises, whoever may be the owner or owners thereof, agreeably to the several Acts of Assembly in relation thereto."

Mary E. Schofield, wife of Albert R. Schofield (now deceased), became the owner in fee of said premises, February 3, 1862; the deed for said premises being duly registered on the eighteenth day of December, 1865, and recorded in Deed Book F. T. W., No. 128, page 408, etc., December 18, 1865.

The said Mary E. Schofield, at the time the work was done, resided in the city of Philadelphia with her said husband, and at the time of and long prior to issuing the writ in the case she resided on Ridge avenue, at Upper Roxborough, in said city.

On March 24, 1886, after written notice had been given to the city solicitor to proceed on the claim, an amicable action of sci. fa. was entered under the following:—

"CITY OF PHILADELAHIA *v.* MARY E. SCHOFIELD.	Docket Page C. P. No. 1, March Term, 1883, No. 39, M. L. D.

"And now, to wit, March 18, 1886, it is hereby agreed between the above named plaintiff and defendant that an amicable action of scire facias be entered in the above case with the same effect as if a writ of scire facias sur municipal claim had been issued, returnable on the first Monday in April and July, returned by the sheriff 'made known.'

E. SPENCER MILLER,
CHAS. F. WARWICK,
City Solicitor,
CHAS. DAVIS,
Attorney for Defendant."

Before the above agreement was signed the words "Preliminary notice is waived," were first stricken out. After the amicable sci. fa. had been issued, the case was put to issue upon affidavit of defence and pleadings, and pending trial the city solicitor, in accordance with the provisions of the Act of March 23, 1886, served the usual ten days notice upon the defendant, and on April 13, 1888, a sci. fa. was issued, and returned, "made known, by posting and advertising, and to Mary E. Schofield, owner." The pleas entered in the amicable action were: (1), non-assumpsit; (2), payment with leave, etc., and set-off; (3), special plea, setting forth substantially that the claim was filed under the provisions of the ordinance of January 29, 1855, and that the terms of said ordinance as to notice of payment had not been complied with, etc. The plaintiff demurred to said special plea: (1), because the terms of the ordinance are directory only; (2), because by statute it is provided that no defence shall be admissible except that the work was not done, or that the price charged was greater than the value thereof, or that the amount claimed has been paid or released; (3), because the said plea is multifarious and otherwise informal.

On December 18, 1890, judgment against the defendant upon the demurrer was entered, and the damages were assessed at $166.13. On November 4, 1893, judgment was opened by agreement. Upon these facts it was agreed by the case stated, that if the Court be of the opinion that the plaintiff had a good and valid lien, then judgment to be entered for the plaintiff, but if not, then judgment to be entered for the defendant.

The Court entered judgment for the defendant upon the case stated. Whereupon the plaintiff took this appeal, assigning for error this action of the Court.

Digitized by Google

E. Spencer Miller, assistant city solicitor, (*Charles F. Warwick*, city solicitor, with him), for appellant.

Amicable proceedings having been begun, the defendant had all the notice which it was the intention of the Act to give him.

If the city solicitor had followed out the proceedings required by the Act of March 23, 1866, he would only have unnecessarily increased the costs falling upon the defendant.

The agreement was in itself, by its necessary effect a waiver of notice, and it can not reasonably be contended that an express waiver of notice should have been incorporated therein.

Charles Davis, for appellee.

No one is held to have waived a right unless it appear that he knew his rights, and intended to waive them.

Estate of The Bank of Pennsylvania, 60 Pa. 471.

Where an amicable action is entered by agreement without pleadings, and is proceeded to trial, such agreement is not a waiver of a statutory defence.

Mosgrove *v.* Golden, 101 Pa. 605.

Under the Act of March 23, 1866, ten days notice is required to be given before any scire facias can issue.

City of Philadelphia *v.* Hanbest, 15 WEEKLY NOTES, 349.

By giving ten days notice and issuing the second writ of sci. fa., the city solicitor practically abandoned the proceedings under the amicable sci. fa. and attempted to proceed regularly in accordance with the Act of 1866.

It is confidently submitted that, proceedings upon municipal liens being in derogation of the common law, the city should be held strictly to the law in all such cases, in order that no person's property shall be taken without "due process of law."

February 18, 1895. McCOLLUM, J. The city filed its claim on the 16th of April, 1883, and an agreement for an amicable scire facias thereon was entered on the 24th of March, 1886. An affidavit of defence to the claim was filed on the 9th of April, 1886, and in September following a plea, a rule to reply, a demurrer and a joinder in demurrer were filed. The demurrer was sustained on the 17th of December, 1890, judgment in favor of the plaintiff was entered the next day and the damages were assessed at $166.13. A rule to show cause why the judgment should not be stricken from the record was taken on the 24th of October, 1893, and on the 4th of the next succeeding month the judgment was opened by agreement. A case stated, embodying the above facts, was filed on the 4th of June, 1894, and two days thereafter judgment was entered thereon in favor of the defendant.

The claim in suit is subject to the Act of 23d March, 1866, regulating the filing and collection of municipal claims in Philadelphia, which Act in the first section thereof, provides that before any scire facias shall be issued on any such claim diligent search shall be made for the owner or reputed owner of the property liened, and that a written or printed notice shall be given to him or her to make payment to the city solicitor within ten days. The obvious purpose of the Act manifested by the preamble to and the provisions of it, was to protect property owners against costs on claims of which they were ignorant, and to prevent, as far as possible, the sale of their properties without actual notice to them. A written or printed notice served upon the owner, or reputed owner, whose residence is known, is thus made a condition precedent to the issuing of the sci. fa. on the claim. It is not mandatory, however, in the sense that it cannot be waived by a party for whose benefit it was enacted. If such a party, having knowledge of the claim, appears at the office of the city solicitor and announces his intention to contest; and enters into an agreement for an amicable sci. fa. upon it, he thereby confesses the knowledge, and rejects the opportunity for payment that the statutory notice would have given him. There is no object to be accomplished by serving the notice and postponing the issuing of the writ after that.

Because it does not affirmatively appear in the case stated that the notice required by the Act had been given, the learned Court below inferred that it had not been, and accordingly entered judgment for the defendant. In this, we think, there was error. There is no admission in the case stated that the city failed to comply with the provisions of the statute in regard to notice, but it distinctly appears therein that the owner agreed with the city to the issuing of the sci. fa. This agreement in the absence of fraud or duress, may well be regarded as a waiver of the notice prescribed by the statute, or as an admission that it had been duly given. An owner who voluntarily becomes a party to a suit on the claim, and who enters a plea and files an affidavit of defence to it, cannot, after judgment against him on a demurrer filed to them, be heard to allege as ground for setting aside or opening the judgment that the city failed to give the statutory notice before issuing the sci. fa. expressly authorized by his agreement with it. Nor does the opening of the judgment enable him to successfully interpose such a defence. We think therefore that, upon the facts appearing in the case stated, judgment should have been entered on

Digitized by Google

it for the sum of $166.13, with interest thereon from December 18, 1890, with costs. In reaching this conclusion we have not overlooked the entries of April 13, 1888, showing the filing of an affidavit of service of notice and the issuing of another sci. fa. But we do not regard these as admissions that the city failed to give the proper notice before the agreement for the first sci. fa. was filed. If they could be so regarded they would not constitute an answer to the agreement which, as we have seen, is a waiver of notice.

Judgment reversed and record remitted to the Court below, with direction to enter judgment n accordance with this opinion. S. H. T.

Jan. '95, 10. January 28, 1895.

Wessels v. Weiss.

Partnership—Agreement in writing—Act of April 6, 1870, P. L. 56.

At common law an agreement to advance money to a business concern and to receive a share of the profits of the business makes the lender a partner in the business so far as concerns third persons.

Where a loan of money to an individual or a firm has been made upon an agreement to receive a share of the profit of the business of the borrower as compensation for the use of the money, the exemption from liability as a partner, under the Act of April 6, 1870, P. L. 56, is on condition that the agreement shall be in writing, and that the share of profits shall be in lieu of interest; a deviation from the requirements of the statute has the effect of imposing a liability as a partner.

Where A. loans to B. money and there is an agreement in writing that A. shall receive a percentage of the profits of B 's business and there is also an oral agreement that A. shall receive interest on the loan, there is not a sufficient compliance with the Act of April 6, 1870. as the entire contract is not in writing and the lender duly receives a share of profits in lieu of interest, and A. becomes liable as a general partner in B. s business.

Appeal of Gerhart Wessels and Charles T. Wessels, trading as G. Wessels & Co., plaintiffs, from the judgment of Common Pleas No. 3, of Philadelphia County, in an action against Ernest Weiss and Charles W. Schmidt, trading as E. Weiss & Co.

Assumpsit. The return was served as to Charles W. Schmidt; *nihil habet* as to Ernest Weiss. The statement set out two promissory notes dated November 8, 1890, at ninety days and four months respectively, made by E. Weiss & Co., that Charles W. Schmidt was at the time of contracting the debt for which the notes were given a member of the firm of E. Weiss & Co., by virtue of an agreement made November 22, 1887, the essential parts of which were as follows: "Whereas the said Charles W. Schmidt has advanced and loaned to Ernest Weiss the sum of $6,000, . . . the said Ernest Weiss agrees to give to the said Charles W. Schmidt fifteen per cent. of the net profits of the business for the term of one year, after first deducting the sum of $3,000, being the yearly salary of the said Ernest Weiss"; that it was further agreed at the time of making said contract that Weiss should pay to Schmidt interest on the said $6,000 at the rate of six per cent. per annum; that Schmidt received said interest until a short time before the failure of E. Weiss & Co., viz., about the 13th of January, 1891, until which time the above agreement continued in force and that he received from time to time certain sums as his share of the profits of E. Weiss & Co., until December 30, 1889.

The affidavit of defence filed by C. W. Schmidt set out that he never gave or authorized the giving of the promissory notes; that he was not at the time the notes were given or the debt for which they were given was contracted or at any time a partner of Ernest Weiss, and admitted the agreement set out in the statement.

The plaintiff took a rule for judgment for want of sufficient affidavit of defence, which the Court discharged.

The plaintiff took this appeal, assigning as error the refusal of judgment against Charles W. Schmidt.

Isaac S. Sharp, (*S. Horace Alleman* with him), for appellants.

Schmidt does not deny the facts averred in the statement but says that he was not a partner, and that he did not authorize the execution of the notes sued upon.

These denials are simply averments that the law under the facts averred in the statement does not make the defendant a partner, and that not being a partner the signing of the notes was not by implication authorized by the defendant. An affidavit of defence is to be construed most strictly against the affiant.

Comley *v.* Bryan, 5 Whart. 261.
Rising *v.* Patterson, Id. 316.
Lafferty *v.* Sheriff, 16 Atlan. 90.
City *v.* Brady, 127 Pa. 169.

"The affidavit should state specifically and at length the nature and character of the defence relied on, and should set forth such facts as will warrant the legal inference of a full defence to plaintiff's cause of action."

Bryar *v.* Harrison, 37 Pa. 233.
Black *v.* Halstead, 39 Id. 64
Woods *v.* Watkins, 40 Id. 458.
Blackburn *v.* Ormsby, 41 Id. 97.
Anspach *v.* Bast, 52 Id. 356.

Schmidt has simply sworn to a conclusion of law. This cannot avail him.

Digitized by Google

Stitt *v.* Garrett, 3 Whart. 281.
Dewey *v.* Dupuy, 2 W. & S. 553.
Marsh *v.* Marshall, 53 Pa. 396.
Potter *v.* Price, 3 Pitts. 136.
McConeghy *v.* Kirk, 68 Pa. 200.

The agreement which is admitted at common law would make Schmidt a partner of Weiss so far as third parties are concerned, being an agreement to participate in the profits of the business.

Edwards *v.* Tracy, 62 Pa. 374.
Purviance *v.* McClintee, 6 S. & R. 259.
Gill *v.* Kuhn, 6 Id. 332.
Miller *v* Bartlett, 15 Id. 137.
Churchman *v.* Smith, 6 Whart. 148.
Dunham *v.* Rogers, 1 Pa. 255.
Caldwell *v.* Miller, 127 Id. 442.
Walker *v.* Tupper, 152 Id. 1.
Gibbs' Estate, 157 Id. 59.
Parsons on Partnership, page 58, note 2, (Ed. 1893), and cases cited.

How has the question been affected, if at all, by legislation? The decision in Edwards *v.* Tracy was made in 1869, and the next year the Legislature passed an Act, approved the 6th of April, 1870, P. L. 56, allowing persons loaning money to a business concern to receive a share of the profits as a compensation for the loan, without becoming partners. The Act contains two conditions: (1), the loan must be for a share of the profits in lieu of interest; (2), the agreement must be in writing. Here the agreement gave Schmidt fifteen per cent. of the net profits and six per cent. interest, and only part of the contract was in writing; the agreement for the six per cent. was oral. Besides, after the first year the whole agreement rested in parol. The conditions of the Act were therefore not complied with—a partnership arose.

Caldwell *v.* Miller, 127 Pa. 442.

A contract is not in writing unless it is wholly in writing.

Schafer *v.* Bank, 59 Pa 144.

Samuel Peltz, for appellee.

The affidavit denies that defendant was a partner in the firm and there is nothing before the Court to show that he was a partner.

The case seems to depend upon the question as to whether the agreement between Weiss and Schmidt constituted Schmidt a partner.

The agreement was drawn in conformity with the Act of April 6, 1870. The mere fact that Schmidt was to receive fifteen per cent. of profits would not make him a partner unless he was held out to the world as such. The paper must be taken as a whole to ascertain the intention of the parties and the effect of what they did.

Meehan *v.* Valentine, 19 WEEKLY NOTES, 206.

The principal requirements of the Act of 1870 are: 1. That the agreement must be in writing, and 2, that the person loaning the money shall not hold himself out as a general partner. The appellee has complied with the first requirement of the Act, and it has not been shown that he has held himself out as a partner. It has not been averred in the statement filed, and the proof of it can only be brought out when the appellants attempt to show it as a question of fact before a jury.

March 4, 1895. FELL, J. The agreement between the defendants made them partners at common law in this State. The case of Waugh *v.* Carver, 2 H. Blackstone, 235, decided in 1793, which followed Grace *v.* Smith, 2 Wm. Blackstone, 998, decided in 1775, was followed and adopted to its full extent in Purviance *v.* McClintee, 6 S. & R. 259, in 1820. The well settled rule of Waugh *v.* Carver was overruled in England in 1860 by the case of Cox *v.* Hickman, 8 H. L. C. 268, but there has been no departure from it in this State except by legislation in 1870. In the opinion in Edwards *v.* Tracy, 62 Pa. 374, decided in 1869, SHARSWOOD, J., pointed out the new English rule of Cox *v.* Hickman, but followed the old one of Waugh *v.* Carver, saying: "It is entirely too late now to question either the rule or the exception. We are bound to stand *super antiquas vias* by our own decided cases." In the opinion in Lord *v.* Procter, 7 Phila., 630, decided at *nisi prius* the same year, he said that the rule in Waugh *v.* Carver was too ancient a landmark in our law to be now disturbed, and that it has accordingly been followed in Edwards *v.* Tracy. Since the Act of 1870 there has been no change in judicial decision. The question whether the agreement between the defendants made them partners as to third parties did not arise in Hart *v.* Kelley, 83 Pa. 286. The agreement had been rescinded, and the claim in suit was for goods sold before it went into effect or after it had been abandoned. Caldwell *v.* Miller, 127 Pa. 442, re-affirms the rule, and both Walker *v.* Tupper, 152 Pa. 1, and Gibbs' Estate, 157 Pa. 59, came within the well recognized exceptions almost as ancient as the rule itself, which were made to avoid the injustice of its universal enforcement.

This rule has been so long established as a part of our jurisprudence that it is needless now to consider whether it is philosophical and in harmony with the principles governing the partnership relation. The departure from it in this State—and it was doubtless the wiser course—has been by legislation. The Act of April 6, 1870, provides that a loan of money to an individual or a firm upon an agreement to receive a share of the profits of the business as compensa-

Digitized by Google

tion for the use of the money and in lieu of interest shall not make the party loaning the money liable as a partner except as to the money loaned, provided that the agreement for the loan shall be in writing and that the party shall not hold himself out as a general partner. This legislation distinctly recognized the rule as it had existed in this State for fifty years and in England from 1775 to 1860, and modified it to conform more nearly to the modern English rule of Cox *v.* Hickman, *supra.*

The affidavit of defence contains a denial of the partnership, but it admits or leaves unnoticed all the allegations of fact in the statement. It is a denial therefore of a conclusion of law only, and raises the single question whether under the facts as stated, the defendant, Schmidt, is liable as a partner. As he would have been liable before the Act of 1870, it remains only to determine whether he comes within its protection. This cannot be unless he has complied with its provisions. The exemption from liability is on condition that the agreement shall be in writing and that the share of the profits shall be in lieu of interest. Only a part of the agreement in this case was in writing, the stipulation for interest on the loan being oral. The interest to be paid was six per cent. and the defendant was to receive in addition thereto fifteen per cent. of the profits. The fifteen per cent. was not to be paid in lieu of interest, but in addition to it. The six per cent. was not to be received as a part of the profits in lieu of interest, but was payable as interest in any event, whether there were profits or not. This agreement is not in compliance with the requirements of the statute either in letter of spirit, and its effect is to impose a liability as a partner.

The judgment is reversed and the record is remitted with direction that judgment shall be entered for the plaintiff unless other just or equitable cause shall be shown.

W. C. S.

Jan. '94, 240½. January 8, 1895.

Fitzwater v. Kirk et al.

Replevin—Non-suit—Issue of fact—Should go to jury.

When an issue of fact is raised, although the testimony is not presented in a clear and orderly manner, and is far from being clear and convincing, it is a matter for the jury and a non-suit should not be entered.

Appeal of Emma C. Fitzwater, plaintiff, from the judgment of the Common Pleas No. 3, of Philadelphia County, in an action of replevin wherein H. G. Kirk and Harry Roberts, trading as Roberts & Co., were defendants.

The facts of this case are stated in the opinion of the Supreme Court, *infra.*

The plaintiff issued a writ of replevin for a carriage and two sets of harness in the possession of the defendants, who were livery stable keepers. The defendants filed a claim property bond. The plaintiff declared in the detinet. The defendants pleaded *non cepit.*

On the trial, before FINLETTER, P. J., the plaintiff proved property and gave evidence of a demand for the carriage and harness and their value.

The defendants claimed to hold the carriage and harness as security for the payment of a bill due by the plaintiff's husband for the keep of the horse and gave evidence that plaintiff told them to sell the carriage and pay the said bill out of the proceeds. The plaintiff in rebuttal testified that needing money she had written to the defendants to sell the carriage for $140 and if her husband owed to them $42 to take that amount out of the price received.

The Court (FINLETTER, P. J.) entered a non-suit, which the Court in banc refused to take off. The plaintiff took this appeal and assigned as error the entry of and refusal to take off the non-suit.

Charles L. Smyth, for appellant.

1. The plea of *non cepit* puts in issue only the taking and the detention.

T. & H. Pr., Sec. 1744.
MacKinley *v.* McGregor, 3 Whart., 370.

The unlawful detention, is a taking sufficient to support the averment of the narr, alleging an unlawful taking.

Morris on Replevin, 76.
MacKinley *v.* McGregor, *supra.*

2. The defendants did not file any plea of "property," and all the testimony tending to show a lien was admitted under objection.

The entry of a non-suit, after testimony given on both sides upon facts about which there is a flat contradiction, is against all rules of procedure. If the case had been submitted to the jury, the jury might have believed the plaintiff's witnesses, who denied any agreement having been made that the defendants should hold the carriage to secure the payment of the claim for the keep of the horse.

No counsel appeared *contra.*

March 4, 1895. FELL, J. The plaintiff brought replevin for a carriage which was in the possession of the defendants and had been left with them as keepers of a livery stable. The defendants claimed a right to retain possession of the carriage for storage charges, and also by

Digitized by Google

reason of an agreement that it should remain in their possession as security for a debt due them by the plaintiff's husband for keeping a horse.

Both grounds of defence were controverted. It was testified by the plaintiff that the carriage was left with the defendants under an agreement that no charges should be made for storage, and it was denied by her husband that an agreement had been made that it should be held as security for his debt.

That the plaintiff after the removal of the horse authorized the defendants to sell her carriage for a price named and to retain from the money received the amount they claimed to be due by her husband did not defeat her right to recover in the action. This authority was given five months before the writ issued. It was not for an indefinite time, and it was to sell, not to retain the carriage; and if her testimony was correct, it was revocable at her pleasure.

The testimony was not presented in an orderly manner, and was far from being clear or convincing, but we are of opinion that it raised an issue of fact for the jury and that a non-suit should not have been granted.

The judgment is reversed and a venire de novo awarded. W. C. S.

Oct. '94, 26. October 22, 1894.

Whissler v. Walsh.

Trespass—Negligence—Damages.

In an action for damages caused by a runaway horse the case went to the jury upon the question whether the flight of the horse was chargeable to the negligence of the driver. It was not error in such case to tell the jury that if they found the driver's negligence was the cause of the escape of the horse the disposition of the horse was immaterial.

Appeal of Morris Walsh, defendant, from the judgment of the Common Pleas No. 2, of Allegheny County, in an action of trespass wherein Erhart Whissler was plaintiff.

On the trial of the case, before WHITE, J., the facts appeared as follows:—

The defendant's horse was in charge of a driver and suddenly broke away from him and dashing down Mint alley, ran up Eighth street and came into collision with a wagon standing on the public street. The plaintiff was wholly on the public street working under this wagon; heard the noise of the approaching horse or cart; paid no attention whatever to it; never looked up and was injured by the force of the collision of the cart against the wagon. The defendant's horse was an animal aged 22 years, had been used 14 years in heavy hauling; had never been known to run away before and was known to everybody as a very gentle and tractable animal.

The Court refused defendant's motion for a non-suit, and in the charge said:—

"The question then is whether this plaintiff, being a mechanic working at the wagon to repair it, and knowing that that wagon was out on that street, and under the surrounding circumstances, was guilty of imprudence, of negligence or of carelessness in going under those wheels to repair it."

And in reply to a request by plaintiff to instruct the jury that it did not make any difference what the disposition of the horse was, said:—

"Of course if there was negligence on the part of the driver it would be no difference what the disposition of the horse was, if the horse ran off on account of the negligence of the driver."

Verdict for plaintiff for one hundred dollars and judgment thereon. Defendant appealed, and assigned as error, *inter alia*, the above instructions to the jury.

W. A. Challener, (with him *Clarence Burleigh* and *John R. Harbison*), for appellant.

Defendant was guilty of contributory negligence, and this accident happened in spite of care.

Brown *v.* Collins, 53 New Hampshire. 442.
Harris *v.* Commercial Ice Co., 153 Pa. 278.

A keeper of a domestic animal is not usually held responsible for mischief he may do of a kind not expected from him.

Cooley on Torts, 342.

Samuel A. Ammon, (*Franklin A. Ammon* with him), for appellee.

Negligence is presumed when a horse is found running at large on a public street.

Overington *v* Dunn, 1 Miles, 39.
Hummell *v.* Wester, Bright. 133.
McIlvaine *v.* Lantz, 4 Out. 586.
Bernheimer *v.* Traction Co., 125 Pa. 615.
Edwards *v.* Reading R R. Co., 148 Id. 531.
Henry *v.* Klopfer, 147 Id. 178.

The disposition of the horse should be disregarded, because accidents will happen to the best-natured horse in the world and cause him to run away and do damage.

Henry *v.* Klopfer, 147 Pa. 180.
Overington *v.* Dunn, 1 Miles 39.

Even if the plaintiff violated an ordinance or law in leaving a wagon on the street and working under it, either on the sidewalk or the street, it would constitute no defence, for this would only be a condition and not a cause of the accident, and is, therefore, not contributory negligence.

Gannon *v.* Wilson, 18 WEEKLY NOTES, 7.
Brown *v.* Lynn, 7 Casey, 510.
Steele *v.* Burkhardt, 104 Mass. 59.

Digitized by Google

Greenwood *v.* Callahan, 111 Mass. 298.
Mohney *v.* Cook, 2 Casey, 342.
Piollet *v.* Simmers, 10 Out. 95.
Gray *v.* Scott, 16 P. F. Smith, 570.
Creed *v.* Pa. R. R Co., 5 Norris, 145.

January 7, 1895. WILLIAMS, J. The plaintiff was injured in consequence of the running away of the defendant's horse in September, 1889. He was a wagon maker in the employ of Deisenroth, whose shop is at the corner of Eighth street and Cabot Way, in that part of the city of Pittsburgh known as the South Side.

At the time of the injury he was at work upon the running gears of a wagon in front of the shop and on the edge of the cartway of Eighth street. The evidence would indicate that he was sitting down between the hind wheels at work upon the axle-tree. While so occupied the horse came running down Eighth street dragging a cart and turned in at one of the doors of the shop. The cart struck the wheels between which the plaintiff was and he was injured.

His right to recover depended upon whether the running away of the horse was chargeable to the negligence of the defendant's driver, and if so, whether his own negligence contributed to his injury. Both of these questions were submitted to the jury under general instructions of which little complaint is made.

At the close of the charge the plaintiff's counsel stated to the Court: "There is only one thing I would have liked your Honor to have said to the jury, that it did not make any difference what the disposition of the horse was." The learned Judge replied: "Of course, if there was negligence on the part of the driver it would be no difference what the disposition of the horse was, if the horse ran off on account of the negligence of the driver." This was not a responsive answer and if the verdict had been in favor of the defendant we should probably have the plaintiff before us complaining that his point was not fully answered. The defendant cannot urge that objection, and unless the answer was wrong upon the facts of this case he was not injured by the instruction

Looking at the evidence and the charge of the learned Judge it is evident that the case was tried upon the theory that the driver did not exercise ordinary prudence after he discovered that the horse was in trouble and was starting away. The Judge said to the jury upon this subject: "Then again when the horse started did the driver do what he ought to have done to stop him? If he saw that the horse had his foot in the belly-band what would a driver do? Of course it would be his duty as quickly as possible to get at the head of the horse. Did the driver do what he ought to have done? What an ordinarily prudent and careful driver would have done? If he was negligent in that respect and in consequence of that negligence the horse got a start and ran off, then there was negligence. In the other aspect of the case if the driver did all he could do, all that an ordinarily prudent man would have done under the circumstances to stop his horse and failed to do it, why then he was not guilty of negligence."

The answer complained of was made with the instruction just quoted in mind, and it must in justice to the learned Judge be considered in the same manner. It then becomes a direction to the jury that if upon this question of negligence on the part of the driver they find for the plaintiff the disposition of the horse became wholly unimportant. This was right. If the jury found that the driver failed to do what an ordinarily prudent driver would have done for the relief of his horse and for its control when he saw its hind foot entangled in the harness and the horse trying to move off on three feet, the disposition of the horse was immaterial. It was in trouble. The driver saw it. If he failed to go to its relief and do what common prudence required of him in view of the situation known to him to be an unusual and troublesome one he was guilty of negligence for which his employer must respond. Cases may arise in which the disposition of a horse, as known by the driver, should be taken into account in determining whether the measure of care used in a given case is such as a reasonably prudent person would take under the circumstances, but upon the facts of this case and in view of the questions raised on the trial, we think the learned Judge committed no error in his answer to the oral request submitted by plaintiff's counsel. The question of contributory negligence was raised upon the circumstance that the work at which the plaintiff's employer had set him was outside of the shop and within the bounds of the cartway. This circumstance was called to the attention of the jury and the question of contributory negligence fairly submitted to them. The assignments of error are overruled and the judgment affirmed. W. D. N.

Oct. '94, 51. October 2, 1894.

Commonwealth v. Carson et al.

Criminal law—Indictment— Housebreaking—Act of April 22, 1863, P. L. 531—Burglary—Act of March 31, 1860, sec. 135, P. L. 415—Misjoinder of Counts—Time of committing offence—Pleading.

An indictment which charges felonious entry into a dwelling without st ting that it is by night, cannot be sustained as an indictment for burglary, but may be good as an indictment for housebreaking under the Act of April 22, 1863, sec. 2, P. L. 531.

Digitized by Google

In the offence of housebreaking under the Act of April 22, 1863, sec. 2, P. L. 531 it is the intent with which the entry is made and not the manner or hour of making it that is essential and controlling, and therefore in an indictment for such offence it need not be stated whether the entry was made in the day or night time

The words of the statute should be used in drawing an indictment for an offence under it, but the substitution of "feloniously" for "maliciously" is not fatal to the count.

When one count charges that defendant did break into a house with intent to steal, and did steal, and a second count charges on the same date the destruction of a window of the same house, there is no misjoinder of counts, the latter count charging part of the same affair to which the former related.

Appeal of the Commonwealth, from the judgment of the Court of Quarter Sessions of Clarion County, quashing the first count of an indictment found against J. M. Carson, William Reoth, Bub Gilger.

In the case an indictment was found as follows:—

"The grand inquest of the Commonwealth of Pennsylvania, inquiring in and for the County of Clarion, upon their respective oaths and affirmations do present, that J. M. Carson, late of said county, yeoman; James McAbee, late of said county, yeoman; William Reoth, late of said county, yeoman; Bub Gilger, late of said county, yeoman; on the 6th day of January, A. D., 1893, at the county aforesaid and within the jurisdiction of this Court, wilfully and feloniously did break and enter the dwelling house of M. J. Baker, there situate, with intent to steal the goods, chattels and property of M. J. Baker, in the said dwelling house then and there being, then and there feloniously to steal, take and carry away one range of the value of eight dollars, one lot of carpets of the value of five dollars; one lot of carpenter tools of the value of ten dollars; one lot of lumber of the value of forty dollars; the goods, chattels and property of the said M. J. Baker, then and there being found did then and there the goods, chattels and property above mentioned in the said dwelling house, feloniously steal, take and carry away to the great damage of the said M. J. Baker, contrary to the form of the Act of Assembly, in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

"And the inquest aforesaid inquiring as aforesaid upon their oaths and affirmations respectively as aforesaid, do further present that J. M. Carson, late of said county, yeoman; James McAbee, late of said county, yeoman; William Reoth, late of said county, yeoman; Bub Gilger, late of said county, yeoman; on the day and year aforesaid, at the county aforesaid, and within the jurisdiction of this Court, did wilfully and maliciously break, injure and destroy a certain window, belonging to the dwelling house of one M. J. Baker, contrary to the form of the Act of Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania. G. G. SLOAN,

"District Attorney."

The indictment was indorsed "Larceny, malicious mischief"

The information on which the indorsement rested was as follows:—

"CLARION COUNTY, SS:

"Before me, a justice of the peace, in and for said county, personally came C. T. Baker, who being sworn in due form of law, says, that at the county aforesaid, on January 6, 1893, one J. M. Carson, James McAbee, William Reoth, and Bub Gilger, did break and enter his dwelling house and did take and carry away one range, and sundry other articles of the value of one hundred dollars, the goods and property of M. J. Baker. That they did then and there in the dwelling house aforesaid, maliciously break, injure and destroy a window belonging to the said dwelling house, contrary to the form of the Act of Assembly.

"Sworn and subscribed this day of March 28, 1894. J. H. SWENY, Justice of the Peace." } C. T. BAKER.

A motion was made to quash the indictment for the following reasons:—

1. The indictment in this case is fatally defective in that it does not state in what county the offences charged are alleged to have been committed.

2. The two counts of the indictment are repugnant, in that one charges a felonious breaking of the dwelling house of M. J. Baker, and the second charges a mischievous breaking of the same dwelling on the same day. They are distinct offences, of a different nature, with different punishments, and not variations of the same offence.

3. The first count in the indictment is not based on the information sworn to and subscribed by the prosecutor in this case, in that said count is for felonious breaking and larceny, whereas neither of said offences is charged in the information.

4. There is a material and fatal variance between the information and the indictment in that the former charges the offences, viz: the breaking and entering and breaking a window in the dwelling house of C. T. Baker, while the latter charges the said offences against the dwelling house of one M. J. Baker.

The Court (CLARK, P. J.), made the following order:—

"And now, December 5, 1893, upon due

Digitized by Google

consideration of the motion to quash, appearing from the face of the indictment, that the breaking and the entering of the dwelling house is neither laid therein, as having been done in the night time or in the day time, the rule is made absolute as to the first count in the indictment and the first count therein quashed."

The Commonwealth took this appeal, and assigned the above order as error.

John W. Reed and *Don C. Corbett*, district attorney, (*G. G. Sloan* and *Harry R. Wilson* with them), for appellant.

The Court assumed that the first count in this indictment was drawn under the second section of the Act of April 22, 1863, P. L. 531, which defines a species of burglary, and quashed it because of an omission to state that the crime was committed either in the day time or in the night time. The count in effect charges that the defendants, within the jurisdiction of the Court broke and entered the dwelling house of one M. J. Baker, with intent to steal, and did steal, the goods of M. J. Baker. This all appears in the count, and whatever else may appear there, if unnecessary, may be treated as surplusage. Even after verdict the district attorney has power to enter a *nolle prosequi* as to any part of a count.

Commonwealth *v.* Tuck, 20 Pick. (Mass.), 356.
Rex *v.* Moss *et al.*, 1 Russell & Ryan, 520.

Charging that the stolen property was in a dwelling house, and that the defendants broke and entered said house and stole the property therefrom is only matter of aggravation. But even if the statement of these facts could be made to raise a suspicion that the count was for burglary, if it contained the essential ingredients of larceny, a conviction could be had and sentence passed for the lesser crime. An indictment charging that the goods were feloniously and burglariously taken from a dwelling house, without charging that it was done in the night, is not a good indictment for burglary, but is only an indictment for a larceny."

Wharton on Crimes, Vol. 2, Sec. 1612.

Under an indictment for burglary there may be a conviction for larceny, if the jury so find.

Hollister *v.* Commonwealth, 60 Pa. 103.

Burglary and larceny can both be included in a single count when they are part of the same act.

Commonwealth *v.* Tuck, 20 Pick. (Mass.), 356.
Commonwealth *v.* Hope, 22 Id. 1.
Josslyn *v.* The Commonwealth, 6 Met. (Mass.) 236.
Wharton's Criminal Law, § 819.

Frank R. Hindman (*J. A. F. Hoy*, with him), for appellees.

The first count shows on its face, that it is either a count for burglary, or a felonious breaking into a dwelling house under the Act above referred to. If the former, an essential of the offence is that the breaking be done in the night time. If the latter, that it be done in the day time. One is triable in the Oyer and Terminer and the other in the Quarter Sessions. In either case a failure to state the time is fatally defective.

Rolland *v.* Commonwealth, 82 Pa. 306, 325, 326.

An indictment must be sufficiently precise as to furnish the accused with "the nature and cause of the accusation against him; the Bill of Rights secures this to an accused." The indictment in this case is far from being so precise. The Act of 1863 is distinct from the burglary Act, and designed to punish offences of lesser grade, not covered by the former. It is as necessary to set forth the charge so as to bring it within the offence described in the Act, as it is necessary to set forth the essentials to constitute the crime of burglary.

Hollister *v.* The Commonwealth, 60 Pa. 103.

In the case in hand if the jury were disposed to find, "not guilty," on the first charge in first count, they could not know whether to find "not guilty of burglary," or "not guilty of the statutory offence of felonious house breaking," neither could the defendants know from which they had been delivered. A motion to quash is a proper motion and entitled to be heard, and whether a *nolle prosequi* might be allowed if asked is not involved in the present controversy, neither is involved what the jury might or might not do if the case were allowed to go to them in its present condition. The offences of felonious housebreaking and that of maliciously breaking a window are not cognate, but distinct offences, of a different nature with different punishments, one imprisonment at labor, the other fine or simple imprisonment, and are not variations of the same offences. They cannot be joined in the same indictment.

Henwood *v.* Commonwealth, 52 Pa. 424.
Commonwealth *v.* Birdsall, 69 Id. 482.
Staeger *v.* The Commonwealth, 103 Id. 469.

January 21, 1895. McCollum, J. The defendants moved to quash the indictment, alleging in support of their motion that it was not authorized by or in conformity with the information, that it did not state in what county the offences were committed, and that the counts were repugnant. The learned Court below, without expressing any opinion in regard to these objections, quashed the first count on the ground that it did not state whether the offence charged in it was committed "in the night time or in the day time," and sustained the second count. It may be inferred from this ruling that

Digitized by Google

the Court did not consider the objections tenable, and such an inference would accord with our conclusion based on an examination of the information and the indictment. It is manifest from the brief opinion filed that the Court thought the first count was intended to charge the crime of burglary at common law or under the 135th section of the Act of March 31, 1860, P. L. 415, or the offence defined by the second section of the Act of April 22, 1863, P. L. 531. It is clearly defective as a count for burglary, because in that it must affirmatively appear that the breaking and entering with felonious intent was by night. But is it not a good count under the Act of 1863? That Act prescribes a penalty for breaking and entering a dwelling house in the day time, and also for wilfully and maliciously entering the same with felonious intent, "either by day or by night, with or without breaking." In this case a breaking and entering with felonious intent is charged, together with the larceny of the prosecutor's goods in consummation of the purpose for which the entry was made. As we have already seen it is not material whether this offence was committed in the night time or in the day time. It is an offence under the Act of 1863, and the punishment for it is prescribed by that Act. It is the intent with which the entry was made and not the manner or hour of making it that is essential and controlling. We hold therefore that it is not necessary in an indictment under the Act of 1863 for entering a dwelling house with felonious intent to state therein whether the offence was committed "in the night time or in the day time." The fact that the commission of the felony intended was also charged in the count that was quashed did not vitiate it. If it was deemed necessary to state therein the manner and hour of the entry, the count should not have been quashed because it was obviously a good count for larceny.

In drawing an indictment under the statute it is well to use its language, but as "feloniously" includes "maliciously," the substitution of the former for the latter is not fatal to the count in which it appears. There was no misjoinder of counts because the matters charged in the second were a part of the affair to which the first related. The fact that the information did not contain as full and specific a statement of the offence as the indictment did, furnished no ground for quashing the latter or either count of it. If there was room for surprise an application for time to prepare to meet the graver charge would have been allowed. The order quashing the first count in the indictment is reversed and a procedendo is awarded. W. C. S.

Orphans' Court.

October, 1894, 228.

Lennig's Estate.

Appeals from register—Testamentary capacity—Issue devisavit vel non.

In appeals from the register of wills on the ground of want of testamentary capacity or undue influence, the inquiry is always to be directed to the mental condition of the testator at the time of the execution of the will, and to the circumstances then surrounding him or affecting his action.

Neither old age, nor lessened mental activity, nor impaired memory is at all inconsistent with ability to make a will.

Appeal from the register of wills.

The essential facts are stated in the opinion, *infra*.

Joseph Mellors, for contestants.

Joseph B. Townsend and *Leoni Melick*, for proponents, cited—

Titlow *v.* Titlow, 54 Pa. 216.
Pidcock *v.* Potter, 68 Id. 342.
Graham's Appeal, 61 Id. 43.
Cozzens' Will, Id. 196.
Bitner *v.* Bitner, 65 Id. 347.
Thompson *v.* Kyner, Id. 368.
Tawney *v.* Long, 76 Id. 106.
Cauffman *v.* Long, 82 Id. 72.
Grubbs *v.* McDonald, 91 Id. 236.
Wilson *v.* Mitchell, 101 Id. 495.
Landis *v.* Landis, 1 Grant, 248.
Mentzer's Will, 5 Phila.
Frowert's Estate, 11 Phila. 136.
Shaver *v.* McCarthy, 110 Pa. 339.
Rodger's Estate, 19 WEEKLY NOTES, 383.
Palmer's Estate, 5 Id. 542.
Swails *v.* White, 149 Pa. 261.

Charles Hart, for executor.

February 2, 1895. PENROSE, J. In appeals from the register of wills on the ground of want of testamentary capacity or undue influence, the inquiry is always to be directed to the mental condition of the testator at the time of the execution of the will, and to the circumstances then surrounding him or affecting his action. That at a later date, as the result, perhaps, of acute disease, great distress, advancing age, or from all these causes combined, the mind may have become impaired to a degree inconsistent with ability to make a valid disposition of property, can have little weight in such an inquiry—even if it be not altogether irrelevant.

This is well illustrated by the case now before us. The will in question was executed in the summer of 1890. It was written by the brother of the testatrix, a gentleman of large means aud high social position, as a copy, with slight modifications, of a paper of earlier date, given to him by the testatrix for the purpose, and was duly signed by her in his presence. By an oversight of the brother, the day and month of exe-

Digitized by Google

cution were omitted, but his testimony that it was in the summer of the year stated, was without contradiction. The testatrix was then about eighty years of age, but the brother stated in the most unqualified terms that her mental condition and full comprehension of the act thus performed were unimpaired, and in this he was corroborated by very many witnesses. There was, moreover, evidence that the will was in accordance with ideas which she had often expressed as to the disposition she intended to make of her property.

Two witnesses only were called by the contestant to testify as to their personal knowledge of facts occurring in the year in which the will was executed. One was the contestant himself —a grandson of the testatrix, and the other one of her sons. The former asserted that she had an attack of double pneumonia in the latter part of 1888 or early in 1889. That during the first of these years she "acted strangely . . . would lock herself in the two third story rooms at the south side of the house, and when anybody would knock at the door she would not answer them; would also hide her keys and forget where she put them; would wander around the house at two o'clock in the morning; her memory was very weak; had the habit of sending for things and forgetting she had sent for them," etc., etc. He admitted, however, that from 1888 to 1890 the only evidence of mental weakness that he observed was a weakening of memory, and that he had never supposed her insane during the lifetime of her husband. How frequently this locking herself in the third story rooms, or the wandering about the house at two o'clock at night occurred was not mentioned, and no other witness speaks of it, but it would shock very many housekeepers in the community to be told that the locking of themselves up occasionally to escape family annoyances, or even their forgetfulness as to where they had left or "hidden" their keys, were symptoms of mental derangement.

The son speaks of the illness in 1888 or 1889 as of so serious a character that the testatrix was at "the point of death." After she had sufficiently recovered, in August, 1889, she came to his house at Bryn Mawr, where she stayed for a week or ten days. Her condition at that time, said the witness, "was not altogether satisfactory. She seemed muddled and could not find her way very readily about the house; would get confused about the rooms, although it was a very small house; would get into the wrong room constantly. Would wish to go to a certain room and would get into another . . . . would wish to go to the water-closet and get into one of the other rooms, although the door was in full sight of her bed-room—just on the right hand side as she came out, at right angles to the bed-room. . . . . After the serious illness in the early part of 1889 I had serious doubts of her ever regaining her mental condition the same as she possessed it before. . . . . I think her mind never acquired the tone it possessed before." It was not pretended that in her own house the testatrix was ever confused as to the rooms, or that she ever failed to find the place she was seeking; and the witness admitted on cross-examination that there was afterwards great improvement in her mental condition; that she always recognized him and never made any mistake about who her relatives were; and that she "showed by her conversation that she kept posted as to the doings of the family." He further explained what he meant by his statement that she "never regained her mental tone after her illness in the latter part of 1888 and 1889," by saying that he did not think "she was capable of a thorough and exhaustive line of reasoning," though even as to this he admitted he could give no illustration. He declared that she was quite capable of carrying on "ordinary conversation," and admitted that as late as February, 1891, after the death of her husband, she gave him the will to read, talked intelligently about its contents, told him of certain articles which it disposed of, and allowed him to exercise his choice with regard to them—which he did. He also admitted that after her death he had consulted counsel with regard to the validity of the will as affected by the fact that it had but one subscribing witness, and with no suggestion of want of testamentary capacity or of undue influence.

This was absolutely the only evidence in support of the allegation of want of testamentary capacity during the year the will was made; and yet the social position of the testatrix was such that if the fact had been as averred there could have been no difficulty in establishing it by very many witnesses. That it was not attempted is very significant. What has been offered is insufficient even to overcome the ordinary presumption in favor of mental capacity, and it is unnecessary, therefore, to refer in detail to the affirmative testimony in support of the will.

Nor is it necessary to refer to the well settled principles of the law on this subject. Neither old age, nor lessened mental activity, nor impaired memory is at all inconsistent with ability to make a will. As was said by Chancellor KENT, in 5 Johns Ch. 148, where the will of a man between ninety and a hundred years old was sustained: "The law looks only to competency of the understanding, and neither age nor sickness nor extreme distress nor debility of body will affect the capacity to make a will if sufficient intelligence remains. . . . Failure of memory is not sufficient to create incapacity,

Digitized by Google

unless it be quite total or extend to his immediate family or property. . . . It is one of the painful consequences of extreme old age that it ceases to excite interest and is apt to be left solitary and neglected. The control which the law gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities."

In Wilson *v.* Mitchell, 5 Outerb. 495, the testator was over one hundred years old when he executed his will; was blind and partly deaf; his memory treacherous as to recent events; would repeat the same thing several times; slept almost constantly; from having been remarkably careful in his observance of the proprieties of life he had become filthy in his habits; and yet all of this, with the testimony of witnesses as to their belief that he lacked testamentary capacity, was held to be insufficient to carry the case to the jury as against the affirmative evidence of his ability to know and understand the business in which he was engaged at the time he executed the will. See also Pensyl's Appeal, 157 Pa. 465; Stevens *v.* Vancleve, 4 Wash. C. C. 267; Thompson *v.* Kyner, 15 Smith, 368,—the case last cited being a very instructive one, both on the question of want of capacity and undue influence—though as to the latter, it is proper to say, there is not in the present case the slightest evidence whatever.

Much testimony has been taken as to the mental condition of the testatrix in the winter and spring of 1891, all of which becomes of little or no importance in view of the fact that early in December, 1890, she had a very severe attack of pneumonia, and just as she was recovering from this, her husband died. It was quite natural that her mind should then be, as it undoubtedly was, greatly disturbed; so much so, indeed, that if the will had been executed while she was thus suffering, an issue, in all probability, would have been granted. As it is, however, the evidence as to this period has but slight relevancy to the questions involved in the appeal. Dr. Mills, who testified for the contestant as to the condition of the testatrix from March 31, 1891 (prior to which date he had never seen her), to April 23 of the same year, and also as an expert on the subject of mental disease, said with reference to the mania or delirium from which she was suffering at the time he attended her: "I don't know what caused it in the first place; such attacks are produced in old people sometimes by physical causes and sometimes by mental causes; her husband had died sometime before; perhaps that had something to do with it."

It is true that the two gentlemen called as experts, one of whom had never seen the testatrix, and the other only during a period of less than a month after the death of her husband, expressed the opinion, in answer to a hypothetical question, that in 1890, "according to the history and statement" in the hypothetical question, she was suffering from a "form of senile weak-mindedness or dementia, using the term in the general sense in which we use it to indicate feebleness;" that she "passed into a condition, gradually passed into a condition of senile dementia, evidently commencing as far back as 1888, 1889; abruptly increasing in December, 1890, and going into complete senile dementia with maniacal symptoms;" "that the evidence was not sufficient for a positive opinion, but so far as it goes it renders it highly improbable that in January, 1891, she was competent to execute a legal document;" but that "*the evidence was not sufficient to base an opinion whether the change of mind had or had not gone far enough in June, 1890, to destroy testamentary capacity.*" It is evident, therefore, that there is nothing in the opinions of the experts to help the case of the contestant; nor would there have been if the opinions had been expressed with much more positiveness. Opinions, even of experts, as to matters not resting upon the personal observation of the witness, are never of much value; and they are of no value whatever where they are in conflict with established facts, and especially facts shown by what may be called documentary proof. There is in this case not only the testimony of absolutely disinterested witnesses as to acts of the testatrix at the time in question, utterly inconsistent with the existence of mental incapacity, but there was also a letter, written by the testatrix herself, in April, 1890, and given in evidence by the proponents, exhibiting in a very remarkable manner the possession of all the qualities—memory, coherency, ability to express continued thought—which the theory of the contestant asserts to have been wanting. And, finally, a deed was executed in the beginning of December, 1890—just before the attack of pneumonia, in which the testatrix joined with her husband in the conveyance of lands in New Jersey—affording in itself the strongest evidence of her mental soundness so late as that date, and becoming still more convincing by reason of the testimony of Wilson H. Jenkins, Esq., a master in chancery, living in Camden, New Jersey, to the effect of her full and entire comprehension of the purpose of the deed and of the property conveyed by it.

We are of opinion that no verdict against the validity of this will would be permitted to stand. The issues asked for are therefore refused, and the appeal dismissed at the costs of the appellant.

F. B. N.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, MAR. 29, 1895.* [No. 7.

Supreme Court.

July, '94, 129. January 22, 1895.

Sewell v. Moore.

Fire escapes—Liability of owner of building—Proximate cause—Acts of June 11, 1879, P. L. 128; June 1, 1883, P. L. 50; June 3, 1885, P. L. 65; June 3, 1885, P. L. 68—Evidence.

An owner of a building who attaches thereto a fire escape of the design prescribed in the Act of June 3, 1885, P. L. 68, is absolutely exempted from the penalties of the Act, but he is left at liberty to erect an escape of a different kind at his own risk that it shall prove "permanent, safe and external," and that it shall be subject to the inspection and approval of the proper officials.

The effect of absence of a certificate of approval of a fire escape is to put on the owner of the building the burden of proof that he has erected a fire escape according to the design in the Act, or has made a "permanent, safe and external" escape, which is substantially equivalent.

In an action under the Act of 1885 to recover for injuries, where the defendant has failed to maintain a sufficient fire escape, evidence of the factory inspector that he visited the escape actually maintained and found it sufficient is admissible; as is also the testimony of an expert that it was of the same kind as escapes in use in the large buildings in the same section of the city as the defendant's building and erected about the same time.

A certificate given under the Act of 1883 for a fire escape since a fire, approving an escape "precisely identical with one" erected prior to the fire, is not admissible in evidence, it does not reach the rank of the best evidence.

The Acts relating to fire escapes authorize a recovery against the owner only where the absence of a proper fire escape has been the proximate cause of the injury suffered by the plaintiff; where owing to the act of a tenant in locking the door to the fire escape, a person cannot reach it, and in consequence endeavors to escape by the window and is hurt, the question of the sufficiency of the fire escape does not arise.

Appeal of James C. Moore, defendant, from the judgment of the Common Pleas No. 3, of Philadelphia County, in an action of trespass, in which Elizabeth Sewell was plaintiff.

This action was brought under the Act of June 3, 1885, to recover for injuries received in escaping from a burning building, the statement setting up that the defendant being the owner of the building, which was used as a factory, had not provided a fire escape as required by the Act aforesaid.

On the trial, before GORDON, J., it was admitted that the defendant was the owner of a factory building on Frankford avenue, Philadelphia, which he had leased to James B. Ryer & Sons.

The following facts appeared by the testimony: The plaintiff was employed by Ryer & Sons, and with some sixty other people worked on the third floor of the building. The building did not have a fire escape of the pattern set forth in the Act of June 3, 1885, P. L. 68. There was, however, what a witness, one of the building inspectors of the city, called a "tower fire escape," *i. e.*, two brick towers constructed apart from the building, containing staircases with a landing at each story of the building and a separate entrance at each story. On March 3, 1892, a fire broke out in the building; the employés, including the plaintiff, rushed for the door leading to the fire escape and found it locked, it having been locked by the direction of Ryer & Sons' foreman; in an attempt to unlock it the key was broken. The plaintiff then attempted to lower herself by a rope, but lost her hold, fell and was injured.

The defendant produced a certificate issued February 14, 1893, and asked a witness, the building inspector, "Does that certificate, which was issued by the board of fire escapes of Philadelphia, approve of a fire escape in 1893 on this building, which was precisely identical with that of 1891?"

Objected to. Objection sustained. Exception. (First assignment of error.)

The Court also rejected the following offers: To prove by George J. McCrane, the factory inspector, that in pursuance of his duty under the Act of May 20, 1889, sec. 12, he visited these tower fire escapes, and he considered them to be perfectly safe and proper for escape from fire. (Second assignment of error.) To prove the kind of fire escapes the defendant had. (Third assignment of error.) And refused to allow defendant to propound to R. C. Bachus, the mechanical engineer who had prepared the plan of the burned property, the following question:—

"Q. The plan of tower fire escapes, which you adopted as a mechanical engineer—are those the plans actually adopted in the large mills in the northeastern section of the city which have been erected during the last ten years?" (Fourth assignment of error.)

The defendant presented the following points:—

1. That if the jury believe that the fire escape for which the certificate of approval of February 14, 1893, was issued, is identical with that in

Digitized by Google

the factory burned, then it affirmatively appears that the owner is relieved from the liability imposed by the Act of June 3, 1885, and the verdict should be for the defendant.

2. If the jury believe that the factory inspector, in accordance with section 12 of Act of May 2, 1889 (page 245), found that the means of egress in case of fire was sufficient, then the verdict must be for the defendant.

3. Defendant is not liable for the act of the tenant in locking the door, and if the jury believe this was the proximate cause of the injury the verdict must be for the defendant.

These points were all refused. (Fifth, sixth and seventh assignments of error.) And the Court charged that there must be a verdict for the plaintiff and left to the jury the question of damages only. Verdict for plaintiff $500 and judgment thereon. The defendant took this appeal, and filed assignments of error as above indicated.

David W. Sellers, (with him *Leon H. Folz* and *David Jay Myers*), for appellant.

By the Act of June 11, 1879, P. L. 128, it was enacted that "every . . . . factory . . . . shall be provided with a permanent, safe, external means of escape therefrom in case of fire;" . . . . and (section 2) it was made the duty of the board of fire commissioners . . . . to first examine and test such fire escape, and after, upon trial, said fire escape should prove satisfactory . . . . shall grant a certificate approving said fire escape. . . . By a supplementary Act of June 3, 1885, P. L. 65, it is provided "and the board of fire commissioners . . . . shall have the right to designate the location of the chains or ropes or such other appliances in conformity with this Act to be attached to any building, ... and shall grant certificates of approval to every person . . . . complying with the requirements of this Act, which certificates shall relieve the party . . . . to whom the same shall be issued from the liabilities, fines, damages, and imprisonment imposed by this Act."

The defendant had no such certificate, but he had constructed tower fire escapes for which, owing to his ignorance of the law, a certificate of approval had not been issued, but which were approved as to kind and model in 1893 by the same board which had the power to do so in 1891. The law in substance was fully complied with if, in fact, there was a permanent external means of escape. If an owner neglected to secure a formal approval, it was yet open to him to show that he had constructed and in use a fire escape which would have received a certificate of approval.

By the Act of May 20, 1889, P. L. 245, it is provided by section 12:—

"That if the inspector of factories find that . . . . the means of egress, in case of fire or other disaster, is not sufficient or in accordance with all the requirements of law . . . . he shall notify the proprietor of such factory . . . . to make the alterations or additions necessary within sixty days." . . . .

The gravamen of this action is that defendant did not have a fire escape—that is, a means of escape from the factory in case of fire. It was this requisite which the factory inspector was obliged to require. Under the Act of 1889, if existing constructions for egress were not sufficient in the judgment of the inspector, he had the right to require an alteration. No saving was made of any structure approved by a local board under previous Acts. If, therefore, it was sufficient to him, it was sufficient in law. As the Act of 1889 fully supplied the needs of egress, it must necessarily be substitutionary of the requirements of the Act of 1885.

B. & L. Association *v.* B. & L. Association, 159 Pa. 308.

The testimony of the factory inspector should therefore have been admitted.

By Act of June 8, 1893, P. L. 373, factories "shall be provided with a tower fire escape, enclosed in incombustible material, adjoining one of its fronts. . . . Such fire escape shall be held and taken as a fire escape under the Act of June 30, 1885."

Inasmuch as the plaintiff had no common law right to have a fire escape constructed according to any specific model, the whole subject was within the legislative power. It could have been withdrawn or modified as an imposed statutory burden and duty. When, therefore, the Legislature provided that such an escape shall "be held and taken as a fire escape under the Act of June 2, 1885," the case of the defendant was included.

City *v.* Hays, 93 Pa. 72, 1880.

The damage recoverable under the Act of 1885 must be that attributable to the want of a fire escape. Here the injury arose from the locking of the door, for which the defendant was not responsible.

James M. Beck, (*William F. Harrity* with him), for appellee.

A fire escape to conform to the law must be such a one as is provided by the Act of 1885, and must have received the approval of the bureau of fire escapes. The Act of 1889 does not repeal the Act of 1885 as to the requirement of such approval, the factory inspector is to inspect and compel compliance with the Act of 1885.

The appellant suggests finally, that the locking of the door by the tenant was the proximate cause of the accident, and plaintiff cannot there-

Digitized by Google

fore recover. The Act, however, fixes the proximate cause, and the learned Judge's charge is the best vindication of his position.

"This is not a common law action of negligence, but a statutory liability. To compel compliance with the penal provisions of the Act, it is provided that the owner who shall neglect to have complied 'shall be liable to a fine, ... and in case of fire . . . . the person shall be liable in an action for damages in case of death or personal injuries being caused in consequence of such fire.' The want of the escape, the fire, and the injury in escaping are the constituent elements of the right to recover."

March 11, 1895. MITCHELL, J. The learned Judge directed a verdict for plaintiff, leaving to the jury only the amount of damages, on the view that the statute required the construction of a fire escape in exact conformity to the method and details prescribed, or in case of any variance, the approval of the proper municipal authorities as a mandatory requirement, the absence of which would create a liability to any person injured in consequence of a fire in the building irrespective of any questions of negligence or proximate cause. The statute will not bear so severe a construction.

The Act of June 11, 1879, P. L. 128, required certain buildings to be provided with "a permanent, safe, external means of escape therefrom in case of fire," leaving the determination of the means to be adopted to the individual owners, subject to the examination and approval of the fire commissioners or other proper officials. A supplement was passed June 1, 1883, P. L. 50, and an amendment to the supplement on June 3, 1885, P. L. 65, neither of which is material to the present case. On the same day, however, as this last Act, June 3, 1885, P. L. 68, was passed an amendment to the Act of 1879, which was the statutory law in force at the time of this accident. This Act prescribes in great detail the nature and mode of construction of the external fire escape required, but also has a proviso that "nothing herein contained shall prohibit any person . . . . from selecting and erecting any other and different device, design or instrument, being a permanent, safe, external means of escape, subject to the inspection and approval of the constituted authorities for that purpose." The result of this Act with its proviso is that while a design and mode of construction of fire escape are prescribed which if followed will absolutely exempt the owners from the penalties and liabilities of the Act, yet he is left at liberty to erect one of a different kind at his own will but at his own risk that it shall prove "permanent, safe, and external," and that it shall be subject to the inspection and approval of the proper authorities.

What then is the effect of a failure to obtain such approval? The Act of 1879 made it the duty of fire commissioners and other officials to examine and test fire escapes (the design and construction not being prescribed by the Act), and if found satisfactory to grant a certificate of approval. The next section imposed certain penalties and liabilities for failure to comply with the Act, which will be discussed later on. The effect of the failure to get a certificate of approval was thus left undefined. In the second Act of 1885, P. L. 70, however, the provision for a certificate of approval was substantially re-enacted, and it was expressly added, "thereby relieving the party to whom such certificate is issued from the liabilities of fines, damages, and imprisonment imposed by this Act." The effect of this clause does not admit of doubt. The certificate of approval is conclusive evidence of non-liability under the Act, but it is not a mandatory requirement, and its absence creates no liability that would not otherwise arise from the facts. It is evidence only, and the sole effect of its absence is to put on the owner the burden of proof that he has complied with section first by building a fire escape in accordance with its directions, or under the proviso has made a permanent, safe, external escape which is substantially equivalent.

It follows that the evidence offered tending to show the erection of a proper and sufficient escape, as permitted by the proviso to section first of the Act of 1885 should have been admitted. The evidence of the certificate offered in the first assignment was not admissible, not for the reasons on which it was excluded, but because it was not of the required rank as the best evidence.

The officer who issued the certificate would have been a competent witness as an expert, but his certificate is only admissible by force of the statute, and that extends only to certificates given on examination and test before the happening of the fire. The second, third and fourth assignments of error are sustained.

The seventh assignment must also be sustained. The defendant's third point should have been affirmed. Section 3 of the Act of 1885 gives the right of action in these words, "every person . . . . neglecting or refusing to comply with the requirements of section one, in erecting said fire escapes shall be liable to a fine," and be deemed guilty of a misdemeanor, etc. "And in case of fire occurring in any of said buildings in the absence of such fire escape, approved by certificate of said officials, the said person or corporation shall be liable in an action for damages in case of death or personal injuries sustained in consequence of such fire breaking out in said

Digitized by Google

building . . . . and such action for damages may be maintained by any person now authorized by law to sue, as in other cases of similar injuries." The construction that this raises an absolute liability for all injuries on the happening of a fire, whether the absence of a fire escape had any connection with such injuries or not, would make the owner responsible for results of which his act was not the cause, or as in the present case, for acts of another over which he had no control. A construction which would make the law of such doubtful constitutionality should not be adopted unless the language renders it imperative. There is no such compulsion here. The last clause of the section quoted, that actions "may be maintained by any person now authorized to sue, as in other cases of similar injuries," shows clearly that what the Legislature had in mind was the large and well known class of actions for death and injuries caused by negligence. This Act added another to that class. The failure to build a fire escape was made an act of negligence for which a liability attached to the owner, but as in other cases of the same class, a liability only to those injured in consequence of such negligence. There could be no better illustration of the wisdom and justice of this view than the present case. The undisputed testimony is that the fire escape was safe, sufficient and effective when it was once reached. All the people on the fourth floor escaped by it uninjured. The difficulty was in the locking of the door that led to it on the third floor. The plaintiff got to this door in time, and had it been open as it should have been, she could have escaped without injury as did the others who came to it, some of them after she did. The only proximate and effective cause of the injury was the locking of the door, and that according to the testimony of Taylor, the boss weaver, was done by him at the order of his employers the tenants. It was not the act of the defendant, or of any over whom he had control or for whose actions he was responsible. The statute does not make him liable except for the consequences of his own act, and there was no evidence on which the jury should have been permitted to find that plaintiff's injuries were the result of anything defendant did or omitted.

Judgment reversed. H. B.

July, '94, 12. January 14, 1895.

Smith, Kline & French Company v. Smith.

Vendor and vendee—False representations—Fraud—Rescission—Affidavit of defence—Statement under Act of 1887.

Even if it be conceded that, in the absence of any confidential relation between the parties or peculiar means of knowledge on the part of the purchaser, false and fraudulent representations as to the market price of a commodity would not avoid the contract (though no Pennsylvania case has gone so far) the rule is not to be extended.

But an explicit, circumstantial mis-statement of a fact, conducing and intended to influence the vendor's action, the falsehood of which he could not reasonably detect, such as that a rival dealer had offered the purchaser the same goods at a specified price, is fraud, and will justify the rescission of the contract.

General averments as to breaches of agreement not to cut prices, etc., not averred explicitly enough to enable it to be determined whether they were conditions or inducements of the sale or mere promises as to future action are not available as matter of defence in an affidavit.

The main requirement of a statement under the Act of 1887 is to secure to the defendant clear and exact information as to what is claimed of him. A common count in the old form without a bill of particulars would be demurrable for vagueness, but using the general form with the insertion of the exact dates, amounts, and particulars of the contract sued on with no irrelevant or impertinent matter could hardly be objectionable for furnishing too much information instead of too little.

Appeal of Rebecca M. Smith, defendant, from the judgment of the Common Pleas No. 4, of Philadelphia County, in favor of plaintiff, the Smith, Kline & French Co., for want of a sufficient affidavit of defence.

Plaintiff filed the following statement:—

"The Smith, Kline & French Company, the said plaintiff, by its attorney, Lewin W. Barringer, complains of Rebecca M. Smith, the said defendant, as follows:—

"On the thirty-first day of August, 1892, at the County of Philadelphia, the said plaintiff, at the special instance and request of the said defendant bargained for and agreed to buy of the said defendant one hundred gross of boxes of Mrs. R. M. Hunter's Invisible Powder, upon the following terms, to wit: that such powder should be delivered by the said defendant to the said plaintiff at such time within one year from August 31, 1892, as delivery thereof should be requested by the said plaintiff, and that the said plaintiff should pay the said defendant for the said powder at the rate of twelve dollars per gross of boxes, with a discount of two per centum off of the said price for a payment upon the delivery of the said powder, and thereupon in consideration of the premises, and also in consideration that the said plaintiff, at the like spe-

Digitized by Google

cial instance and request of the said defendant, had then and there undertaken and promised the said defendant to take the said powder within the said year, and to pay the said defendant for the same at the said rate, the said defendant undertook and then and there promised the said plaintiff that she would deliver the said powder to the said plaintiff at the time and in the manner aforesaid.

"On the twenty-ninth day of August, 1893, within one year from the said August 31, 1892, at the county aforesaid, the said plaintiff requested the said defendant to make delivery of the said powder to it, the said plaintiff, and the said plaintiff was at the said time and until the commencement of this action, ready and willing to accept a delivery of said powder, and to pay the said defendant for the same, at the rate aforesaid, whereof the said defendant then and there had notice, but the said defendant, not regarding her said promise and undertaking, did not, nor would then, or at any time since, deliver the said powder to the said plaintiff, but on the contrary thereof the said defendant has hitherto wholly refused and still refuses so to do.

"On the said twenty-ninth day of August, 1893, at the county aforesaid, the market value of the said one hundred gross of boxes of the said powder was sixteen hundred and sixty-six dollars, and the price under the contract aforesaid was eleven hundred and seventy-six dollars, whereby the said plaintiff was damaged by the refusal of the said defendant to deliver the said powder as aforesaid to the amount of four hundred and ninety dollars.

"On the twenty-ninth day of September, 1892, at the county aforesaid, the said plaintiff, at the special instance and request of the said defendant bargained for and agreed to buy of the said defendant two hundred gross of boxes of Mrs. R. M. Hunter's Invisible Powder, upon the following terms, to wit: that one hundred gross of boxes of such powder should be delivered by the said defendant to the said plaintiff at once after the said purchase, and the remaining one hundred gross of boxes of such powder should be delivered by the said defendant to the said plaintiff on March 1, 1893, and that the said plaintiff should pay the said defendant for the said powder at the rate of eleven dollars and thirty-eight cents per gross, net cash, and thereupon in consideration of the premises and also in consideration that the said plaintiff, at the like special instance and request of the said defendant, had then and there undertaken and promised the said defendant to take the said powder at the said times, and to pay the said defendant for the same at the said rate, the said defendant undertook and then and there promised the said plaintiff that she would deliver the said powder to the said plaintiff at the times and in the manner aforesaid.

"At once after the making of the said contract, one hundred gross of boxes of said powder were delivered by the said defendant to the said plaintiff and accepted and paid for by the said plaintiff.

"On the said March 1, 1893, and until the commencement of this action, the said plaintiff was ready and willing to accept a delivery of the remaining one hundred gross of boxes of said powder bought by it as aforesaid, and to pay the said defendant for the same, at the rate aforesaid, whereof the said defendant then and there had notice, but the said defendant, not regarding her said promise and undertaking, did not nor would then, or at any time since, deliver the said one hundred gross of boxes of said powder to the said plaintiff, but on the contrary thereof the said defendant has hitherto wholly refused and still refuses so to do.

"On the said first day of March, 1893, at the county aforesaid, the market value of the said one hundred gross of boxes of the said powder was sixteen hundred and sixty-six dollars, and the price under the contract aforesaid was eleven hundred and thirty-eight dollars, whereby the said plaintiff was damaged by the refusal of the said defendant to deliver the said powder as aforesaid to the amount of five hundred and twenty-eight dollars.

"There is therefore now due and owing by the said defendant to the said plaintiff the sum of one thousand and eighteen dollars, with interest on $490 thereof from August 29, 1893, and on the balance thereof from March 1, 1893.

"Wherefore the said plaintiff brings this suit."

[Affidavit.]

Defendant's affidavit of defence was as follows:—

"Rebecca M. Smith, being duly sworn according to law, deposes and says that she is a married woman, and the defendant in the above case, and that she has a full, just and complete defence to the whole of the plaintiffs' claim of the following nature and character:—

"That on August 31, 1892, and September 29, 1892, the time of the making of the contracts set out in plaintiffs' statement there were two persons engaged in making 'R. M. Hunter's Invisible Powder,' viz, deponent and one Charles M. Hooper, each of whom was in that business as competitors as was well known to plaintiffs. On August 31, 1892, one L. E. Heyer, who was the purchasing agent of plaintiffs, and who was the only person with whom defendant had any dealing in relation to the subject matter of this suit, stated to defendant that plaintiffs desired to purchase from defendant one hundred

Digitized by Google

gross of boxes of said powder, but that said Charles M. Hooper had offered to sell the same to plaintiffs for $12 per gross and that plaintiffs would give defendant the order if she would sell them at the same price as said Hooper, to wit, $12 per gross. Believing that said statement was true, and in reliance thereupon, defendant made the contract of August 31, 1892, as sued upon. In point of fact said statement was false and untrue and was wholly a malicious lie of said Heyer intentionally and wickedly made for the purpose of cheating and defrauding defendant into selling said powder far below its market price.

"On September 29, 1892, when the second of said contracts was made, the same fraud and deception were practiced upon defendant by said Heyer. Deponent cannot say that the prior allegation of an offer by said Hooper to sell said powder at the reduced price was in terms repeated by said Heyer, but all that was said and done was said and done by both parties on the basis that that malicious lie was the truth, and said Heyer knew that defendant was acting in reliance thereupon and was deceived thereby. Said Heyer also then agreed with defendant that if she would sell said powder at said reduced price plaintiffs would not lower the price to consumers and would not interfere with defendant's other customers in any way. Yet after plaintiffs received the first one hundred gross thereof they at once began to cut the prices and to sell to other customers of defendant, thereby demoralizing the trade and seriously injuring her business to an extent beyond plaintiffs' claim in this case.

"Of the falsity of said representation made as aforesaid by said Heyer, defendant had no knowledge whatever, until some time after the last of said contracts was made and after the one hundred gross were delivered, when defendant at once elected to rescind the same and so notified plaintiffs. All of which facts deponent avers are true, and she expects to be able to prove them on the trial of the cause.

"And deponent further says she is advised by counsel and suggests to the Court that plaintiffs' statement is insufficient in law upon which to found a judgment for want of an affidavit or a sufficient affidavit of defence, and also that plaintiffs have not in and by said statement shown that they at any time made any endeavor to supply themselves with said powder to replace that which defendant refused to deliver, or that if they had it would have cost them the price alleged to be the market price in said statement, or that they have not purchased the same at a much less price, or that they have suffered anything more than nominal damages."

A rule for judgment for want of a sufficient affidavit of defence was made absolute, and judgment entered for $1067.59. Defendant appealed, assigning as error the action of the Court in entering judgment.

Alexander Simpson, Jr., (*A. Atwood Grace* with him), for appellant.

Plaintiffs' statement is not such a "concise statement" of his demand as required by the Procedure Act of 1887.

Barr *v.* McGary, 131 Pa. 401.

The statement is defective in that it does not aver that any sum is "justly" due from defendant to plaintiffs.

Act of May 25, 1887, P. L. 271.
Act of March 21, 1806, 4 Sm. L. 328.
Gould *v.* Gage, 118 Pa. 559.
Shallcross *v.* Kohl, 3 WEEKLY NOTES, 272.
Thompson *v.* White, 4 S & R. 135.
Proper *v.* Luce, 3 P. & W. 65.

The affidavit of defence calls attention to the defective character of the statement, as was declared to be the proper practice in

Heller *v.* Ins. Co., 151 Pa. 101.

Appellees cannot enforce an executory contract, the inducement whereof was a deliberate false statement of fact made by them.

Pasley *v.* Freeman, 3 T. R. 51 (2 Sm. L. C.)
Chandelor *v.* Lopus, 1 Sm. L. C. 322.
Derry *v.* Peek, L. R. 14 App. Cas. 359.

The test is: is the false statement on a matter of opinion or of a material fact.

Bispham's Equity, sec. 207.
Ives *v.* Carter, 24 Conn. 392.
McFadden *v* Robison, 35 Ind. 24.
Green *v.* Bryant, 2 Kelly (Ga.), 66.
Van Epps *v.* Harrison, 5 Hill (N. Y.), 63.
Sandford *v.* Handy, 23 Wend. 264.
McAleer *v.* Horsey, 35 Md. 439.
Somers *v.* Richards, 46 Vt. 170.
Page *v.* Parker, 43 N. H. 369.
Crosland *v.* Hall, 33 N. J. Eq. 111, and note.
Light *v.* Stœver, 12 S. & R. 431.
Gilbert *v.* Hoffman, 2 Watts, 66.
Fisher *v.* Worrall, 5 W. & S. 478.
Boyd's Ex'rs *v.* Browne, 6 Pa. 310.
Cornelius *v.* Molloy, 7 Id. 293.
Bokee *v.* Walker, 14 Id. 139.
Pennock *v.* Tilford, 17 Id. 456.
Harris *v.* Tyson, 24 Id. 347.
Lowry *v.* McLane, 3 Grant, 333
Bigler *v.* Flickinger, 55 Pa. 279.
McCall *v.* Davis, 56 Id. 431.
Harner *v.* Fisher, 58 Id. 453.
Holmes's App., 77 Id. 50.
Bower *v.* Fenn, 90 Id. 359.
Byrne *v* Stewart, 124 Id. 450.
Williams *v.* Kerr, 152 Id. 560.
Sloane *v.* Shiffer, 156 Id. 59.
Schofield *v.* Shiffer, Id. 65.
Boyd *v.* Shiffer, Id. 100.

Appellees will not be permitted to deny the materiality.

Pasley *v.* Freeman, 2 Sm. L. C. 75.

Digitized by Google

Chandelor *v.* Lopus, 1 Sm. L. C. 322.
Ellis *v.* Andrews, 56 N. Y. 83.
McAleer *v.* Horsey, 35 Md. 439.
Kennedy *v.* Panama Mail Co., L. R. 2 Q. B. 587.
Bower *v.* Fenn, 90 Pa. 359.
Gammell *v.* Johnson, 47 Ark. 335.
Spalding *v.* Hedges, 2 Pa. 240.
Redgrave *v.* Hurd, L. R. 20 Ch. Div. 2.

Appellant has a right to rescind because of the breach of contract by appellees to appellant's injury.

Williams *v.* Kerr, 152 Pa. 560.

Under the facts set out in the affidavit, appellees are not as a matter of law entitled to the full amount of their claim.

Bank of Montgomery *v.* Reese, 26 Pa. 143.
Kountz *v.* Kirkpatrick, 72 Id. 376.

James Collins Jones, (*Lewin W. Barringer* with him), for appellee.

The statement is good in form.

Newbold *v.* Pennock, 154 Pa. 591.
Blanchard *v.* Hunter, 7 Pa. C C. R. 552.

A party to a contract of sale cannot rescind because it was induced by false representations made by the other party as to the price that has been fixed upon the commodity in question by a previous bid, offer or sale.

2 Kent Comm. 486.
Humphrey *v.* Haskell, 7 Allen, 497.
Manning *v.* Albee, 11 Id. 520.
Hemmer *v.* Cooper, 8 Id. 334.
Mooney *v.* Miller, 102 Mass. 220
Cooper *v.* Lovering, 106 Id. 77.
Deming *v.* Darling, 148 Id. 504.
Page *v.* Parker, 43 N. H. 368.
Graffenstein *v.* Epstein, 23 Kan. 443.
Burns *v.* Mahannah, 39 Id. 87.
Vernon *v.* Keys, 12 East, 632.
Shœlkopf *v* Leonard, 8 Col. 159.
Wiest *v.* Garman, 4 Houst. (Del.) 119.
Davis *v.* Meeker, 5 Johns. 354.
Saunders *v.* Hatterman, 2 Ired. 32.
Cronk *v.* Cole, 10 Ind. 485.
Richardson *v.* Noble, 77 Me. 390.
Martin *v* Jordan, 60 Id. 531.
Holbrook *v.* Connor, 60 Id. 578.
Bishop *v.* Small, 63 Id. 12.
Bourn *v.* Davis, 76 Id. 223.
Kenner *v.* Harding, 85 Ill. 264.

Not to lower the price to consumers, or sell to appellant's customers was a mere promise, not a term of the contract.

Tiedeman on Sales, sec. 166.
Long *v.* Woodman, 58 Me. 49.
Com. *v.* Brenneman, 1 Rawle, 311.

If a part of the second contract, and if plaintiff violated it, this would not justify rescission by defendant.

Pordage *v.* Cole, 1 Saund. 319.

There is nothing in the affidavit of defence in this case from which it appears that the ordinary measure of damages should not be adopted. See—

McHose *v.* Fulmer, 73 Pa. 365.

March 11, 1895. MITCHELL, J. It is not worth while to enter into the elaborate discussions in the cases about the right of a vendor to praise his wares, and the insufficiency of general affirmations of value, and false representations, which the other party should have known better than to rely upon, to justify a rescission. In Graffenstein *v.* Epstein, 23 Kans. 443, it was held that a false and fraudulent representation as to the market price of a commodity, made by a purchaser who knew the price to a seller who did not, would not avoid the contract. The opinion of BREWER, J., contains as strong a presentation of that view as we have found anywhere, but even it puts the case on the absence of any confidential relation between the parties, or peculiar means of knowledge on the part of the purchaser, as the article, wool, was one of general commerce, whose market price was matter of public knowledge and could be ascertained by any one by reasonable effort and inquiry. We may concede all this, though no Pennsylvania case has been cited which goes so far, but what the defendant here sets up in her affidavit is not a mere opinion or even a false representation as to value, or market price, or other matter of general knowledge which the vendor was bound to know or to inquire about, but an explicit, circumstantial mis-statement of a fact conducing and intended to influence the vendor's action, and whose falsehood she could not reasonably detect. A very slight knowledge of the competition of business will suffice to show that one dealer may be willing to sell under the market price to gain a new customer, and the inducement to the other to do likewise to retain a customer in danger of going over to his rival. An explicit, positive, false statement by the purchaser, of such fact under such circumstances is fraud which will justify a rescission of the contract.

The other matters of defence as to breaches of agreement not to cut prices, etc., are not averred explicitly enough to be available in the affidavit. Whether they were conditions or inducements of the sale, or mere promises as to future action does not clearly appear.

The objections to the plaintiff's statement cannot be sustained. That it sets out the cause of action more formally and elaborately than is absolutely necessary under the Act of 1887, and in so doing uses some of the language of the time honored forms of declaration, is not a defect. The main requirement of the statement under that Act is to secure to the defendant clear and exact information as to what is claimed of

Digitized by Google

him. A common count in the old form, without a bill of particulars, would be demurrable for vagueness, but using the general form with the insertion of the exact dates, amounts and particulars of the contract sued on but with no irrelevant or impertinent matter, could hardly be objectionable for furnishing too much information instead of too little.

Judgment reversed and procedendo awarded.

J. D. B., Jr.

Oct. '95, 45, 46, 60 and 61. January 7, 1895.

Haught v. Irwin.
Bradley v. Irwin.

Appeal—Equity—Supersedeas—Receivers—Injunction—Act 14th February, 1866, P. L. 28—Practice—Attachment—Contempt.

An appeal from an interlocutory order of the Court in equity practice is not a supersedeas and when the jurisdiction of the Court attaches the orders of the Court are peremptory upon the party on whom they are made, and he must obey. And attachment for contempt will lie upon disobedience. The proper practice when a supersedeas is desired is to apply to the Supreme Court for a special order.

Pending disposition of an appeal from an interlocutory order it is proper for the Court in cases in which a receiver has been appointed to appoint a depository where all books and papers necessary for the receiver's compliance with the order of Court may be held and access given thereto to both parties subject to such restrictions as the Court may think best.

Schlecht's Appeal, 60 Pa. 172, followed.

Appeals of George M. Irwin from certain decrees of the Common Pleas No. 2, of Allegheny County, in enjoining appellant, his agents, etc., from disposing of any property he might own or control and appointing a receiver for appellant's business, entered on bills in equity wherein J. M. Haught and four others were plaintiffs and appellant defendant.

J. M. Haught and others filed a bill against George M. Irwin and others setting up that the defendants was carrying on a fraudulent brokerage business and had induced the plaintiffs to entrust money to them and prayed an account, and that the defendants, Irwin and others, having possession or control of the funds of the business be enjoined from converting or paying away or encumbering the same and that a receiver thereof be appointed. A preliminary injunction was granted and a receiver was appointed, and on his refusal to act a decree was made appointing another receiver.

A motion to vacate these decrees was refused by the Court. Irwin then took an appeal. The receiver then demanded from Irwin the property, and on his refusal to deliver the same a rule to show cause why appellant should not be attached for contempt made absolute, and Irwin was committed. He then took another appeal. The two appeals were heard together. The assignments of error embraced the decrees above referred to, the refusal to vacate them and the commitment of the appellant. The appellant was admitted to bail pending the appeal by special order made by Mr. Justice Dean, directing him to deposit all books and papers relating to the subject pending the disposition of the appeal with the Union Trust Company of Pittsburgh.

J. S. Ferguson, J. H. Reed and *D. J. Patterson*, (with them *E. G. Ferguson, P. C. Knox, John S. Robb, Sr.*, and *Thomas M. Marshall, Sr.*,) for appellant.

There can, we think, be no doubt that the business referred to in the bill was that of dealing in wagering contracts.

If this is so there can be no doubt that the Court ought not to have entertained the bill in question.

An agreement in the form of an executory contract "for the purchase and sale of property, but upon the understanding between the parties when the contract is made that the property is not to be delivered, but that one will pay and the other receive the difference between the contract price and the market price at the date of performance is a mere wager and void."

Irwin *v.* Williar, 110 U. S. 499.
North *v.* Phillips, 89 Pa. 250.
Kirkpatrick *v.* Bonsall, 72 Id. 155.
Brua's Appeal, 55 Id. 294.

A contract founded upon a transaction which is either *malum prohibitum* or *malum in se* cannot be enforced by an action of any kind.

Rhodes *v.* Sparks, 6 Pa. 473.
Hipple *v.* Rice, 28 Id. 406.
Fareira *v.* Gabell, 89 Id. 89.
Dickson *v.* Thomas, 97 Id. 278.

A Court of equity will not lend its aid to a party *sui juris* to recover the money he has invested and lost in stock gambling.

Smith *v.* Kammerer, 152 Pa. 98.
Stewart *v.* Parnell, 147 Id. 523.

Whether the parties with whom the plaintiffs and the other customers of the appellant dealt regarded the contracts as *bona fide* contracts for delivery or not is immaterial. It is enough that the plaintiffs themselves show that their business was illegal.

Higgins *v.* McCrea, 116 U. S. 671.

Moneys irrevocably set apart by both the plaintiffs and their agent, the defendant, for the

Digitized by Google

payment of damages upon contracts for the purchase of wheat and paid over by such agent in satisfaction of such damages, under the rules of the Board of Trade, cannot be recovered back by the plaintiff, under the circumstances of this case.

White *v.* Barber, 123 U. S. 392.

In Illinois, by statute, all contracts having their origin in gambling are void. . . . . Where parties engage in speculating upon the rise and fall in prices of property and in gambling in differences, with the understanding that there is to be no delivery of the property, but merely that the difference shall be paid according to the fluctuation of the market, the contract is a wager and . . . . void under the statutes of Illinois.

Pearce *v.* Rice, 142 U. S. 28.
Watte *v.* Costello, 40 Ill. App. 307.
Locke *v.* Towler, 41 Ill. App. 66.

No right of action can spring out of an illegal contract, and this rule applies not only when the contract is expressly illegal, but whenever it is opposed to public policy.

C. C. C. & I. R. Co. *v.* Closser, 126 Ind. 348.
Schmueckle *v.* Waters, 125 Id. 265.
Thorne *v.* Travelers Ins. Co., 80 Pa. 15.

Appellant cannot be compelled to strengthen the case against him by the production of his own books and papers.

Boyle *v.* Smithman, 146 Pa. 255.
Osborn *v.* Bank, 154 Id. 134.

D. B. Maxwell, M. A. Woodward and *H. L. Goehring,* (with them *George P. Hamilton*), for appellees.

The authorities cited in appellant's brief as to wagers on prices are good law, here and in Illinois, but are not applicable to the facts now before the Court. No authority is or could be cited for the positions that if, through Irwin, but ignorantly, plaintiffs "did engage in gambling transactions," the knowledge of Irwin was their knowledge as between him and them; and the proposition that they have the burden of proving their intention to observe the law, is in the teeth of the authorities in Pennsylvania and elsewhere.

McNaughton Co. *v.* Haldeman, 160 Pa. 144.
Peters *v.* Grim, 149 Id. 163.
8 Am. and Eng. Enc. Law, 1010, Notes.

There is nothing to show that plaintiff meant to enter into an illegal business and such a presumption cannot be set up by way of denial of the Court's jurisdiction.

Kirkpatrick *v.* Bonsall, 72 Pa. 155.

Even if the plaintiffs were all of them proved to have knowingly participated, or intended to participate, in an illegal transaction, the present suit is not to enforce any obligations of which such illegal transaction is the consideration, but it is in disaffirmance of it, and after all illegal dealings, if ever begun, were closed and ended.

Peters *v.* Grim, 149 Pa. 163.
Repplier *v.* Jacobs, Id. 167.
Brua's Appeal, 55 Id. 294.
North *v.* Phillips, 89 Id. 250.
Ruchizky *v.* DeHaven, 97 Id. 202.
Patterson's Appeal, 13 WEEKLY NOTES, 154.

The jurisdiction of a Court of equity over the subject of this suit is sustainable on each and all of the following grounds:

(*a*) Trust: the breach of a fiduciary duty assumed by defendant for his own advantage, closely analogous to, but of more stringent obligations than that owing by a general managing partner to special partners.

(*b*) Account and discovery, based upon the fiduciary relation—the absolute discretion and control exercised by defendant; the complicated nature of accounts of joint transactions, the inadequacy of all legal remedies.

(*c*) Injunction and a receiver, to restrain further breaches of trust, prevent acts prejudicial to plaintiffs' rights in the fund of which they are co-owners, and to take charge of and preserve it, or what may remain of it.

(*d*) The jurisdiction is further sustainable on the ground of multiplicity of suits and complicated accounts.

Brush Electric Co.'s Appeal, 114 Pa. 574.
Adams' Appeal, 113 Id. 449.
Drake *v.* Lacoe, 157 Id. 17.
Shillito *v.* Shillito, 160 Id. 167.

Contempt of Court is a substantive criminal offence and the power to punish it belongs to the Court in which it was committed.

Passmore Williamson's Case, 26 Pa. 9.

March 11, 1895. MITCHELL, J. The order appointing a temporary receiver was an adjunct to the preliminary injunction, and legally a part of it: Schlecht's Appeal, 60 Pa. 172. Both were interlocutory, and the right of appeal therefrom depended on the Act of 14th February, 1866, P. L. 28, which expressly provides that it shall not be a supersedeas. The receiver having made a demand for the appellant's books, pursuant to the order of Court, appellant refused to deliver them, and having taken an appeal, resisted obedience to the order on the ground that the Court was without jurisdiction to make or enforce it. Such claim cannot be maintained. It is true that where a Court is absolutely without jurisdiction of the subject matter, as if this bill had been filed in the Orphans' Court or the Oyer and Terminer, its orders and decrees are nullities and are not binding on anybody. But

Digitized by Google

where the Court has jurisdiction of the subject matter, it is not for any litigant party to say that it is wrongly exercised, and that he will not obey. It is his duty to obey, even though his contention may ultimately be successful. His proper remedy for any threatened injury, pending the appeal, is to apply to this Court for a special order of supersedeas.

It is argued with great earnestness that the bill sets out no case for jurisdiction in equity, because first, it is founded on wagering contracts, and secondly, because the parties complainant have no joint interest, and have their several remedies at law. The discussion of these points is premature. All that is before us now is the *prima facie* jurisdiction of the Court over the subject matter, and of that there can be no doubt. Appellant received the money of complainants for investment in specified ways, and with a duty to account. The bill charged that the money had not been so applied, and that the defendant had stopped payment and absconded. On this, the complainants were clearly entitled to discovery and account, and the jurisdiction of the Court attached for such purposes. It may be that the money having been applied in accordance with the contract of deposit, the defendant is not further liable, or it may be that the use contemplated was in wagering contracts, which are illegal, and will not support an action even by ignorant and misguided participants. These questions if in the case at all will arise on the final hearing. We express no opinion upon them now. So in regard to the joinder of numerous complainants having several interests, it is sufficient at present to say that the money of all these parties was to be used together by their common agent and trustee. Whose money was in fact so used, what profits or losses if any, were made, and in what proportions due to the different parties, were questions requiring a joint investigation, and for which separate actions at law afforded no adequate remedy. But as already said, these matters are presented prematurely. They will be discussed and decided when they come properly before us. They are touched upon now only to show that the Court in entertaining the bill and making its orders thereon, was not so outside of its jurisdiction, as to justify the appellant in treating its commands as nullities and refusing to obey them.

The terms of the injunction and appointment of the receiver on preliminary hearing were somewhat severe and drastic, but the defendant appeared to the learned Court as an absconder, and the need of such action urgent. We cannot say that its discretion was not properly exercised. The duty of the receiver is primarily to collect and hold the assets to await the final determination of the case. In so doing it is proper and perhaps necessary that he should have access to the books. But the books presumably contain other matters that are not relevant to the issues of the case. Disclosure of these might indirectly do serious injury to many interests not involved in the present contest, and not in fault in any way concerning it. Such interests are entitled to protection from unnecessary scrutiny, and especially from that impertinent intermeddling with people's private affairs which the public press so often seeks to excuse under the name of enterprise. The books are at present in the hands of a depositary, under the order of this Court attached to the allocatur of the appeal, and they are now turned over to the custody of the Court below for the purposes of this case. Both parties will be entitled to access to them under such regulations as the Court shall prescribe. The opinion of the learned Judge below indicates his care for the rights of the persons interested, and his view that no list of depositors should be published, and that the examination of the books should be strictly confined to the legitimate needs of the case. It would be well for the sake of caution that such restrictions should be formally incorporated in the orders made permitting access.

Order affirmed.

BRADLEY V. IRWIN.

March 11, 1895. MITCHELL, J. This case is ruled by Haught *v.* Irwin, opinion filed herewith, and for the reasons there given, the order is affirmed.

W. D. N.

July '94, 57. January 14, 1895.

Bailie's Appeal.

Equity—Responsive answer—Burden on plaintiff—Laches in making claim—Declarations and conduct.

Where the answer is responsive to the bill, the burden is upon the plaintiff of overcoming it by more than his own oath.

Appeal of Samuel Bailie, respondent, from the decree of the Common Pleas No. 4, of Philadelphia County, in a bill in equity filed by Hugh Bailie for an account of profits and decree for the payment of amount found to be due.

The facts are stated in the opinion of the Supreme Court. The court below confirmed the report of the master, Francis H. Thole, Esq.,

Digitized by Google

and entered a decree in favor of the plaintiff for the sum of $830.48 with costs. From this decree respondent appealed.

E. Hunn Hanson, (*John Sparhawk, Jr.*, with him), for appellant.

The issue was, when was the contract to end? The averment of the answer is responsive. It distinctly replied to the matter alleged in the bill, and fulfils the test that there would have been ground for exception had the answer been otherwise.

Eaton's Appeal, 66 Pa. 483.
Burke's Appeal, 99 Id. 350.

Its statements should prevail in determining the issue, unless they are overcome by the testimony of two witnesses or of one witness with corroborating circumstances the equivalent of another, or unless the testimony of respondent impeaches his answer.

William W. Ker, for appellee.

March 4, 1895. WILLIAMS, J. The prayer for an account in this case rested on a claim for services as a clerk in a grocery store at the rate of fifteen dollars per week, and a one-fourth part of the profits made by the store. The bill admitted payment at the rate demanded from October, 1887, to May, 1889, and at the rate of fifteen dollars per week from the third day of May 1889, to the eighteenth day of January, 1890, at which time the plaintiff voluntarily left his brother's employment: and asked that an account be taken of the profits made from May, 1889, to January, 1890, and that the defendant be required to pay over to him the one-fourth thereof. The answer admitted that a contract was made in October, 1887, as alleged, which was by its terms to continue until the next annual account of stock should be taken; that this took place in May, 1889, after which on account of the smallness of the profits, and of the return for the use of the capital employed, the share in the profits was no longer to be paid, but the plaintiff, so long as he chose to remain, was to receive only the weekly sum of fifteen dollars; that he remained on these terms until the eighteenth day of January, 1890, making no claim to share in the profits during, nor at the close of this part of his service, or until more than six months afterwards. This was responsive to the bill. It admitted the making of the contract in October, 1887, and payment in accordance with its terms as alleged by the plaintiff. It denied that the contract was to continue indefinitely, alleged that it was ended by mutual consent in May, 1889, and that the subsequent services of the plaintiff were rendered and were settled for at the rate of fifteen dollars per week.

The question of fact thus raised was whether the admitted contract remained in force after May, 1889. The bill asserted it. The answer distinctly denied it. Here was oath against oath, with the burden on the plaintiff of overcoming the answer. He was not corroborated, however, by any witness nor by any important circumstance. His declarations shown by Robinson and Palmer make it clear that he knew how his brother understood their relations after the stock taking. The further facts that with this knowledge he continued at work till 1890, making no claim to any other compensation than his weekly wages; that when he left he settled upon that basis; and that according to his own testimony he never spoke to his brother on the subject of his interest in the profits from the stock taking in May, 1889, till his letter written in July, 1890, six months after he left the store; are not consistent with his present allegation that he supposed himself entitled to share in the profits during his whole period of service.

On the other hand his declarations and his conduct are fairly corroborative of defendant. Upon the question of fact on which the case depended the plaintiff stood absolutely alone, while his declarations and his conduct tended to corroborate the testimony of the defendant. The fair preponderance of the evidence was against him, to say nothing of the effect of the answer, to overcome which the plaintiff required more than his own oath. The learned master seems to have lost sight of the effect of the answer, and to have reached the conclusion that it was not responsive and therefore not within the rule which put the burden on the plaintiff of overcoming it by more than his oath; and the defendant contradicted it by his own testimony, so as to destroy its value as answer.

We are wholly unable to understand the process by which these conclusions were reached. We can adopt neither of them. The answer is responsive so far as the only question in controversy is concerned. It denies distinctly that the contract covered any services after the stock taking in May, 1889. The defendant's testimony is in entire harmony with his answer, and what should be conclusive on the subject is that the plaintiff's declarations and conduct are not consistent with an honest belief on his part that his original contract continued in full force after May, 1889. If the conclusion of the master had rested only on his estimate of the credibility of the parties, we should be inclined to let them stand; but they do not. We can not adopt his construction of the answer, or of the testimony, and for this reason we are constrained to reject the conclusions he has reached in regard to their effect. The decree is reversed and the bill is dismissed, the plaintiff to pay the costs.

W. C. S.

Digitized by Google

July, '94, 124. January 21, 1895.

Davenport Company v. Pennsylvania Railroad Company.

Bill for discovery — Reports of defendant's agents—Privileged communications—Equity practice.

Reports made by the agents or employes of a railroad company to their superior officers for the express purpose of being submitted to counsel for the preparation of a defence to a pending action for damages are in effect made to counsel and are therefore entitled to protection as privileged communications.

The assertion that documents inquired for are of the above character is a good answer to a bill to compel their discovery, and the same objection to their production may be taken advantage of when set up in answer to interrogatories.

Appeal of J. Davenport, trading as Davenport Company, plaintiff, from the order of the Common Pleas No. 4, of Philadelphia County, dismissing exceptions to answers of the Pennsylvania Railroad Company, William H. Joyce, general freight agent, and F. D. Howell, freight claim agent, defendants, to interrogatories filed by plaintiff.

Plaintiff brought suit against defendant to recover damages sustained by alleged negligence of defendant in carrying fruit from Philadelphia to Altoona. In aid of the action plaintiff filed a bill of discovery alleging that certain official reports were furnished by certain agents or officers of defendant at Altoona to the main office of the company in Philadelphia, in which plaintiff had an interest, and to inspection of which he was entitled. Defendant demurred; the demurrer was overruled, and a decree *pro confesso* entered for want of an answer. Interrogatories were thereupon filed, inquiring whether or not it was true that the agent or agents of defendant furnished to the main officers of the corporation in Philadelphia in the ordinary course of his or their duty and for the information of the company certain official reports relating to the claim in suit, and whether or not any official or officials of defendant company or any officer or officers thereof furnished such reports; also inquiring in case the answer should be in the affirmative by whom and to whom the said report or reports were made and on what date or dates and requesting that copies of the said reports be attached to the answers. The defendant answered: "No—the reports in the said case made by agents, employés or officers to the defendants or to any of them, their agents or officers, on or about June 13, 1892, and thereafter, were not made in the ordinary course of the duty of the said agents, employés and officers, but all of said reports were made for the special and extraordinary reason and occasion of preparing to resist, deny and defend against the claim and demand made against the Pennsylvania Railroad Company by the plaintiff in the said action at law, by letter dated July 7, 1892, and with special reference to such litigation as it was anticipated might arise in consequence of said demand. Said reports were particularly prepared in order that if litigation should ensue they might be submitted to defendants' counsel, and the information set forth in the reports was so set forth, *inter alia*, for that purpose, and constitutes the defendants' instructions to its counsel. All the said reports were made subsequent to the receipt of the said letter and constitute the answer and defence of the defendants in the said action at law."

Exceptions were filed to these answers as insufficient. The exceptions were dismissed and this appeal taken by plaintiff, the dismissal of the exceptions being assigned as error.

Horace M. Rumsey, for appellant.

No answer was filed and it is submitted that the facts set forth in answer to the interrogatories could properly have been set up only in an answer to the bill. New matter cannot be set up by way of defence in answers to interrogatories.

The dates of the reports are not given, nor is it averred they were not prepared previous to July 7, 1892, in the ordinary course of duty.

Plaintiff's right to discovery is sustained by the following authorities:

19 Am. & Eng. Encyc. of Law, 244.
Woolley *v.* N. London Railway Co., L. R. 4, C. P. 602.
Cossey *v* Railway Co., Id. 5, C. P. 147.
M'Corquodale *v.* Bell, 1 C. P. Div. 471.
2 Taylor on Evidence, sec. 1795.

The extent of the rule of privileged communications is shown in—

Anderson *v.* Bank, 45 L. J. R. (Ch. Div.) (N. S.) 449.
Bustros *v.* White, 45 Id. (Q. B. D.) (N. S.) 642.
Friend *v.* Railway Co. 46 Id. (Q. B. D.) (N. S.) 696.

That it does not extend to a case like the present see—

Cook *v.* North Metropolitan Tramway Co., 6 L. T. (Q. B. D.) 22.
Bispham's Equity, sec. 563.
English *v.* Tottie, 45 L. J. R. (Q. B.) 138.

It is submitted that the answers should not be regarded as verity, but that the Court should *inspect* the documents, as was done in—

Woolley *v.* N. London Railway Co., L. R. 4, C. P. 611.
Fenner *v.* London & South Eastern Railway Co., 41 L. J. R., (Q. B.) (N. S.) 313.

John Hampton Barnes and *George Tucker Bispham*, for appellee, cited—

Digitized by Google

19 Am. & Eng. Encyc. of Law, 242.
Wharton on Evidence, sec. 743.
Pa. Co. *v.* P. G. & N. R. R., 48 Leg. Int. 146.
Cossey *v.* L. B. & S. C. Ry. Co. L. R. 5. C. P. 147.
Friend *v.* L. C. & D. Ry. Co., 46 L. R. J. (Ex. D.) (N. S.) 696.
Fenner *v.* L. S E. & Ry. Co., 41 L. J. R. (Q. B. D.) (N. S.) 313.
S. & V. Water Co. *v.* Quick, L. R. 3, Q. B. D. 315.
The Theodor Korner, L R. 3 Prob. Div. 162.
Collins *v.* L. G. O. Co., 68 L. T. R. (Q. B. D.) (N. S.) 831.

March 4, 1895. WILLIAMS, J. The plaintiff shipped fruit over the defendant's line of road from Philadelphia to Altoona in June, 1892. When it reached its destination it was decayed to such an extent as to occasion loss to the shipper. An action was brought against the defendant in September of the same year to recover in damages for the loss suffered. Pending this action the plaintiff filed his bill on the equity side of the Court for discovery in aid of the action at law. The specific discovery sought was of certain writings described in the bill as "official reports and communications made by the agent of the defendant at Altoona," in the course of the ordinary duties of such agent, to the main department in Philadelphia on and after the thirteenth day of June, 1892, for the information of the railroad company, "and without any reference to any litigation." A judgment *pro confesso* was obtained for want of an answer. Interrogatories were filed and answered. Two of these answers were excepted to, the exceptions dismissed by the learned Judge, and this appeal was then taken.

No question is raised except that of the sufficiency of the answers made to the second and third interrogatories. By these interrogatories the defendant was inquired of whether or not any officer, agent or employé of the railroad company at Altoona, on or about the thirteenth day of June, 1892, or afterwards, had furnished to the proper department of the company at Philadelphia in the ordinary course of duty, certain official reports relating to the plaintiff's claim, and directing that copies of such reports be attached to the answers. The answers are not a simple denial of the existence of such a report as is inquired after, but contain a statement of the general character of the report actually received. This report they allege was not made in the ordinary course of business, but for a special purpose, viz, to resist and defend against the claim which the plaintiff had made on the company by letter dated the seventh of July, 1892. That it was prepared after the receipt of the plaintiff's letter and as a statement of the defence of the railroad company to the claim set up against it by him, so that if suit was brought it might be placed in the hands of counsel to guide them in making defence. The objection made to these answers is that they set up new matter that should come into the case by answer to the bill. There can be no doubt that the facts stated would have made a good answer to the bill, but we think they are equally good as a reply to the interrogatories. If they are true, as for the purposes of this appeal they must be assumed to be, they amount to a denial of the possession of any communication or report such as the plaintiff alleges, and an assertion that the documents they have were prepared after the plaintiff's claim for damages was made, and for the special purpose of resisting it.

This brings the documents within the privilege accorded to communications made to counsel. It is true as appellant points out that they were not made directly to counsel but the answers allege they were made to the immediate superior of him who made them for the express purpose of being by him submitted to counsel. They were in effect made to counsel, for they were made for the use of counsel in resisting this particular claim and were transmitted to the proper officer, that he might deliver them to the attorney to whom the defence of the company might be committed.

It is very clear that such reports do not belong to the class of instruments of which discovery will be compelled by a chancellor, and the learned Judge of the Court below was right in dismissing the exceptions.

The decree appealed from is affirmed and the appellant directed to pay the costs of the appeal.

J. D. B., Jr.

Jan. '94, 448. January 9, 1895.

Tradesmen's Bank v. Indiana Bicycle Company.

Interpleader — Replevin — Warehouse receipts —Fieri facias.

If goods covered by a storage receipt which is not a valid warehouse receipt against other creditors, are hypothecated as collateral security for a loan and subsequently pass from the custody of the owner to that of another creditor of his, on the latter's promise not to interfere with him they cannot be taken in execution by a fieri facias on a judgment confessed to the second creditor.

Appeal of the Tradesmen's National Bank of Philadelphia, from the refusal of the Common Pleas No. 4, of Philadelphia County, to take off a non-suit entered in a feigned issue, wherein appellant had interpleaded with the Indiana Bicycle Company, to whom a judgment had been

Digitized by Google

confessed by T. Henry Sweeting and execution issued thereon.

On the trial the facts appeared as follows:—

The defendant in the execution, T. Henry Sweeting, upon September 19, 1891, was the owner of a bicycle store and warehouse at 639 Arch street. At that time he issued a storage receipt, certifying that he had received from the Tradesmen's National Bank bicycles and bicycle supplies to the amount of $3,500. This receipt (which was not a regular warehouse receipt, and in fact represented goods of Sweeting's which he meant to pledge to the bank, and not goods deposited by the bank), he deposited with the Tradesmen's Bank as collateral security for an obligation of suretyship which the bank then entered into for him. Subsequently Sweeting borrowed some $5,000 from the bank, and authorized them to hold this receipt as part collateral for the loan as well as for the protection of their bond of suretyship. While this receipt was outstanding Sweeting removed his store to 815 Arch street, and gave up his warehouse, but he removed the bicycles, etc., covered by the receipt to his new store, and came to the bank and changed his receipt, so that it certified that the bicycles, etc., were stored in his new place, 815 Arch street.

About July, 1892, Sweeting confessed judgment to numerous creditors, among them the defendant in this case. Executions were immediately issued against him, and all the goods in his store 815 Arch street were levied upon. The creditors then agreed among themselves to form a limited stock company, under the name of "The Phœnix Cycle Company," with Mr. Smith (the president of the Indiana Bicycle Company) as chairman, and agreed to sell all the goods under their executions and buy them in for the company, and to open a store at the same place, and in this way dispose of the bicycles and bicycle supplies thus acquired. This was done. All Sweeting's stock was sold, including those covered by the receipt, and bought in for the Phœnix Cycle Company, that had been in the meantime formed. The store at 815 Arch street was then opened and signs placed in front of the building, notifying the public that it was occupied by and the business conducted there by the Phœnix Cycle Company. Sweeting was engaged by the company as manager, but owned at that time nothing in the building.

Sweeting did not notify the bank that the goods covered by their receipt had been levied upon, but after the levy had been made he told Mr. Smith (who was not only chairman of the new Phœnix Cycle Company, but also president of the Indiana Bicycle Company, the present defendant, and a large creditor of Sweeting) that he had other liabilities, and that this warehouse receipt was outstanding, and asked permission to bring into the store of the Phœnix Cycle Company certain bicycles and bicycle supplies which he had in other places to meet this obligation. Mr. Smith replied, "As a creditor, I will not interfere with those." Sweeting then began to bring into the store bicycles and bicycle supplies. Before, however, he had gotten in goods to an amount large enough to meet this warehouse receipt, Mr. Smith, on behalf of his company, the Indiana Bicycle Company, issued an alias fi. fa., and levied upon them. The bank was then notified of this levy, and at once claimed the goods under their warehouse receipt. A non-suit was directed by the Court, and upon the subsequent refusal of the Court to take off this non-suit an appeal was taken, and the action of the Court assigned as error.

Charles Biddle, (*William Rudolph Smith* with him), for appellant.

Whether information was given by Sweeting to Smith as to the claim of appellant to the goods, and whether Smith promised not to levy on them were questions for the jury.

Widdall *v.* Garsed, 125 Pa. 358.
Brooks, Miller & Co. *v.* Bank, 16 WEEKLY NOTES 298.

When one comes into possession of personal property, those who deal with him on the credit of such property must inquire into the origin and nature of his possession, so as to know whether he is a purchaser or a bailee. When it is learned that he is a purchaser, his continued possession of the same goods affords a basis for the presumption of continued ownership, and this is a conclusive presumption in favor of bona fide purchasers and creditors.

Stephens *v.* Gifford, 137 Pa. 228.
Rohland *v.* Rooke, 127 Id. 139.

It is only necessary that the vendee should assume the control of the subject, so as reasonably to indicate to all concerned the fact of the change of ownership.

Garretson *v.* Hackenberg, 144 Pa. 113.
Crawford *v.* Davis, 99 Id. 579.
Smith *v.* Crisman, 91 Id. 428.

The law condemns apparent possession as owner without notice to the public.

Smith *v.* Crisman, 91 Pa. 428.
Craig's Appeal, 77 Id. 448.

The jury should pass upon the actual ownership.

Evans *v.* Scott, 89 Pa. 136.
Renninger *v.* Spatz, 128 Id. 524.

If we consider Sweeting in the light of a bailee, he comes within those cases where it has been decided a sale is good against creditors without delivery of possession, a symbolic de-

Digitized by Google

livery being all that is required, for the reason that the change of title does not leave in the bailee apparent ownership of the goods.

Linton *v.* Butz, 7 Barr., 89.
Woods *v.* Hull, 81 Pa. 451.
Stephens *v.* Gifford, 137 Id. 232.

J. Martin Rommel, for appellee.

March 11, 1895. MITCHELL, J. It must be conceded that the storage receipt was not under the evidence such a warehouse receipt as gave the plaintiff a complete title which could be asserted generally against a creditor levying on the goods. But this case depends on entirely different principles. The goods came within the grasp of the defendants in reliance on their promise not to levy upon them. As between the defendants and Sweeting their judgment debtor, this promise might be unavailing for want of consideration, his goods wherever found being answerable for their debt. But plaintiff had an equity in them, and if they had been delivered to it by Sweeting the bank would have had a valid lien on them which would have been good against defendants and all others. The goods were the property of Sweeting and were out of the reach, for the time at least, of the defendants, for they were held by other parties on consignments by Sweeting. The latter says distinctly in his testimony that he informed Mr. Smith, the president of defendant company, that he had these goods out on consignment and he would like to have them to meet his other liabilities, "to provide for the payment of the bank, or the meeting of this warehouse receipt, and Mr. Smith said he would not interfere with those things." Relying on this promise Sweeting brought the goods to the defendants' place and stored them there. It is a fair presumption that except for this promise Sweeting would have turned the goods over to the actual custody of the bank, which would have made its title good against everybody. But even without this presumption, the goods were brought to the defendants' knowledge and within their grasp, with notice that they were pledged to the bank and in reliance on the promise not to interfere with them. As against the bank, defendants are estopped from denying the sufficiency of the setting apart to the bank, and the validity of its title. To allow them to do so would be to allow them to profit by a breach of good faith to the prejudice of the plaintiff.

Judgment reversed and procedendo awarded.

W. D. N.

Oct. '94, 226. November 1, 1894.

Mentel v. Hippely.

Evidence—Offer of—Malicious prosecution—When it may be begun.

An offer of testimony may be explained, but it cannot be enlarged by a statement of its purposes.

In an action for damages for malicious prosecution an offer to show that the magistrate issued a warrant after a statement of the occurrences upon which a charge of larceny was based, does not raise the question whether the prosecution was instituted by the advice of the magistrate given and acted upon after full disclosure of all the facts. Nor can such an offer be helped by a statement of what was intended to be shown by such offer.

A suit for malicious prosecution may be begun after a hearing and discharge by a committing magistrate.

Appeal of Isaac Hippely, defendant, from the judgment of the Common Pleas No. 3, of Allegheny county, in an action brought by E. J. Mentel, to recover damages for an alleged malicious prosecution. On the trial, before McCLUNG, J., it appeared that the defendant made information against the plaintiff, charging him with larceny; that the latter was arrested and, at the hearing, was discharged.

Defendant was interrogated by his counsel as follows:—

"Now, Mr. Hippely, when you went down to Alderman McKelvey, I wish you would state whether you made a statement of the matter with respect to the taking of this keeper or lock from the door of the water closet and how the matter arose and all the matters connected therewith to the alderman before the information was made and state further whether after such statement was made by you he took this information."

Objected to as incompetent and irrelevant.

By Mr. Fitzsimmons: "This question is for the purpose of showing that there was no malice, but that the defendant laid all these matters with respect to the taking of this keeper or lock from the door of the water closet before the alderman, before he took the information and was advised to make that information."

By Mr. Patterson: "My objection is that it is incompetent and irrelevant."

Objection sustained. (First assignment of error.)

The plaintiff offered in evidence the information made by defendant. Objected to because no averment that the proceeding was at an end before suit brought. Objection overruled. (Second assignment of error.)

The Court left the question of probable cause to the jury.

Verdict for plaintiff for $500, and judgment thereon. Defendant appealed, assigning for error, *inter alia*, the above rulings on the evidence.

Digitized by Google

James Fitzsimmons, for appellant.

If a prosecutor acts upon the advice of a magistrate after a full and fair statement of facts, that is a defence.

Bernar *v.* Dunlap, 94 Pa. 329.
Brobst *v.* Ruff, 100 Id. 91.

The only way to prove the record was by calling the magistrate.

Spears *v.* Cross, 7 Port. 439.
Selwyn's Nisi Prius, 1073.

In all actions of malicious prosecution, it must be alleged and proven that the proceedings are at an end and fully determined.

Stephens on Malicious Prosecution, page 99 and notes.
Stewart *v.* Sonnenborn, 93 U. S. 187.
Gillespie *v.* Hudson, 11 Kan. 131.
Cloon *v.* Gerry, 13 Gray 202.
Bell *v.* Percy, 11 Ired., (N. C.,) 223.
Lowe *v.* Wartman, 1 Atlantic 490.
Emerson *v.* Cochran, 4 Id. 500.
R. R. Co. *v.* Hunt, 7 Id. 279.
Murphy *v.* Moore, 11 Id. 665.

An averment that plaintiff was released and discharged from imprisonment will not suffice.

Morgan *v.* Hughes, 2 T. R. 231.
2 Saunders on Pleading and Evidence, 190.
Sweet *v.* Shackelford, 1 N. & M. 36.
Teague *v.* Wilks, 3 McCord 461.
1 Brewster's Practice, 329.
Kirkpatrick *v.* Kirkpatrick, 39 Pa. 288.

J. Walter Day, (*D. F. Patterson* with him), for appellee.

The dismissal of the accused on a hearing before a magistrate is sufficient to support an action for malicious prosecution.

Zebley *v.* Storey, 117 Pa. 478.
Barhight *v.* Tammany, 158 Id. 545.
Beihoffer *v.* Loeffert, 159 Id. 374.
Hill *v.* Egan, 160 Id. 119.

Defendant will not be permitted to prove that he acted under the advice of a magistrate.

Brobst *v.* Ruff, 100 Pa. 91.

Proof of such advice will not be received as mitigation of damages.

Beihoffer *v.* Loeffert, 159 Pa. 374.

January 7, 1895. FELL, J. The offer of testimony, the rejection of which is the subject of the first assignment of error, went only to show that after a statement made by the plaintiff to the magistrate of the occurrences upon which the charge of larceny was based, that officer took the information and issued the warrant. It did not go to the extent of showing that the prosecution was commenced under the advice of the magistrate, and it was not helped by the statement of what was intended to be shown by it. An offer of testimony may be explained, but it cannot be enlarged by a statement of its purpose. It must stand or fall as made. The assignment therefore does not raise the question whether in an action for malicious prosecution it is competent to prove, as tending to rebut the presumption of malice, that the prosecution was instituted by the advice of a magistrate sought in good faith before the commencement of proceedings and given and acted upon after a full and frank disclosure of all the facts, and it is unnecessary now to consider it.

The fourth assignment is based upon the alleged insufficiency of the statement of the cause of action in that it "does not contain the averment that the proceedings before the alderman were fully ended and determined before the suit was brought." It is set out in the statement that the aldermen after hearing announced that the charge of larceny was not sustained, and that the plaintiff was publicly discharged from arrest. This averment we think sufficient to sustain the action. The discharge was the end of the prosecution as far as the defendant was concerned, and practically it was its end to all intents and purposes. The prosecution might be renewed, but this is true in the case where a bill of indictment had been ignored, or where the discharge has been made by a Judge after a hearing under a writ of habeas corpus. There are many cases in our reports founded upon prosecutions which ended by the ignoring of the indictments, and it was distinctly held in Zebley *v.* Storey, 117 Pa. 478, that the discharge of the plaintiff upon a writ of habeas corpus was such a final determination of the prosecution against him as would entitle him to maintain an action for malicious prosecution. It was said in that case, after quoting the ruling upon the question by Judge BELL at *nisi prius* reported in Charles *v.* Abell, Brightly, 131: "The practice of commencing suit for malicious prosecution after a hearing and discharge by a committing magistrate appears to have passed unchallenged in this State."

The judgment is affirmed.

W. M. S. Jr.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, APRIL 5, 1895.* [No. 8.

Supreme Court.

May '94, 31. May 30, 1894.

Commonwealth v. Pittsburgh & Western Railway Co.

Taxation—Corporations—Valuation of capital Stock—Act of June 8, 1891.

Under the Act of June 8, 1891, P. L. 229, the auditor-general and State treasurer cannot change the appraised value of stock of a corporation made under oath by the president and treasurer of the same, when their only basis for the change is that the net earnings represent, at 6 per cent. interest, a larger sum than that returned by the officers of the company.

Appeal of the Commonwealth from the judgment of the Common Pleas of Dauphin County, sustaining appeals from tax settlement.

The case was tried before SIMONTON, P. J., without a jury. The following is a copy of his opinion:—

"This is an appeal by the corporation defendant from the settlement of an account against it by the auditor-general and State treasurer for tax on capital stock for the year ending the first Monday of November, 1892, and it was tried by the Court without a jury under the Act of April 22, 1874.

"1. Defendant is, and was during the year 1892, a corporation of, and doing business in the State of Pennsylvania, having an authorized paid in capital stock of $12,000,000, divided into 240,000 shares of the par value of $50 each. Defendant's gross earnings during the tax year 1892 were $1,433,880.53, and its net earnings were $308,960.12. No dividend was declared by defendant, nor was any amount of profit added to surplus or sinking fund, during said tax year. There were no sales made of shares of defendant's capital stock between the first and fifteenth days of November, 1893, and the highest price of sale of stock during said tax year was $14, and the average price was $11.50. These facts are shown by the report made by defendant's president and treasurer, under sanction of the prescribed oath, as required by section four of the Act of 1891, (P. L. 229). Accompanying said report was an appraisement of said capital stock, made by said president and treasurer under oath, estimating and appraising its actual value in cash as follows: 100,000 shares preferred at $14 per share, and 140,000 shares common at $9 per share, amounting in all to $2,660,000.

"2. The auditor-general and State treasurer were not satisfied with and did not accept this appraisement; but as they understood to be their duty under the law, made an appraisement and fixed the value of said capital stock at $5,149,335.33. In making this appraisement they had before them no other evidence of its actual value than that contained in the report made by the officers of the corporation as above stated; and this amount was adopted by them as the value of the capital stock because it was the sum which at 6 per cent. would produce $308,960.12, the amount of net earnings shown by said report to have been made by defendant during said tax year. On this valuation, so made by the auditor-general and State treasurer, an account was settled against defendant for tax at the rate of five mills amounting to $25,746.68, from which settlement defendant duly appealed to this Court.

"3. The nature of the business in which defendant is, and was during said tax year, engaged, the date of its organization, the nature and amount of the tangible property and assets belonging to it, the amount of its receipts and expenditures annually from 1889 to 1893, and the amount of its bonded indebtedness, with other facts relative to the value of its capital stock, are fully set forth in an affidavit filed in this case and received on the trial in the nature of a deposition which is hereby referred to and, so far as it states matters of fact as distinguished from matters of opinion, is made part of this finding.

"4. No evidence has been produced on behalf of the Commonwealth tending to show that the financial standing of the corporation defendant was, between the first and fifteenth days of November, 1892, different from that reported, or the actual value of its capital stock greater than the amount at which it was appraised by defendant's president and secretary, and having in view all the evidence in the case we find as an inference of fact therefrom that its capital stock was not then of any greater value than that at which it was so appraised, viz, $2,660,000.

["The legal questions raised by the specifications of objections filed with the appeal have been recently determined in Commonwealth *v.* Sharon Coal Company, 23 June term, 1893, and Commonwealth *v.* Edgerton Coal Company, 21 June term, 1893, and need not be further discussed here; and the general principles on which the question of fact of the actual value in cash of the capital stock of a corporation is to be

Digitized by Google

determined are stated in the opinion recently filed in Commonwealth *v.* Delaware, Susquehanna and Schuylkill Railroad Company, 302, March term, 1893. A careful consideration of the facts of this case in the light of these principles has led us to the conclusion, as above stated, that the capital stock of the corporation defendant was reported and appraised by its president and treasurer at its actual value in cash, and that the Commonwealth is entitled to recover only the amount of tax at the rate of five mills on said appraised value] as follows:—

Appraised value of capital stock	$2,660,000
Tax, five mills	$13,300
Interest from June 26, 1893, to January 26, 1894, at 12 per cent. per annum	931
Attorney-general's commission at 5 per cent	665
Total	$14,896

"For which amount judgment is directed to be entered in favor of the Commonwealth and against defendant if exceptions be not filed within the time limited by law."

The Commonwealth filed an exception to the portion of the opinion above quoted in brackets, which the Court dismissed. This appeal was then taken, assigning for error this action of the Court.

W. U. Hensel, attorney-general, (*James A. Stranahan*, deputy attorney-general with him), for appellant.

Lyman D. Gilbert, (with him *John H. Weiss* and *Johns McCleaves*), for appellee.

March 4, 1895. PER CURIAM. This case presents about the same facts as were found in Commonwealth *v.* Edgerton Coal Company, No. 21 of June term, 1893, of same Court.

The capital stock of the company was $12,000,000; its net earnings for the year 1892 were $308,960.12. No dividend was declared for the year, nor were any additions made to sinking or surplus fund. The average price at which the stock had sold during the year, was $11.50 per share. The president and treasurer of the company under oath appraised the entire value of the stock at $2,660,000. The auditor-general and State treasurer not being satisfied with this, re-appraised it for taxation at $5,149,335.33. The only basis for thus raising the value was that 6 per cent. on this sum would produce the net earnings. The learned Court below, as in Commonwealth *v.* Edgerton Coal Company, *supra*, held this to be error, and adopted as the value for taxation, the appraised value returned by the officers.

We affirmed the judgment in the case mentioned, and see no reason, in affirming this judgment, to add anything to the reasons therein given.

The judgment is affirmed, and the appeal is dismissed at costs of appellant.

[See report of Commonwealth *v.* Edgerton Coal Company in 35 WEEKLY NOTES, 205.]

W. M. S., Jr.

July, '94, 146. February 1, 1895.

City to use of Kelley v. Bowman.

Claim for paving—Street railways—Special Act of June 9, 1857—Philadelphia city ordinances of July 7, 1857, and April 1, 1859—Affidavit of defence.

Upon the question of the sufficiency of an affidavit of defence to prevent judgment, the Court is not at liberty to regard any other matters than such as appear in the affidavit.

To a scire facias on a municipal claim for paving the street in front of defendant's lot, defendant filed an affidavit, setting forth that the street in question was occupied by the tracks of the Philadelphia & Delaware River Railroad Company, and that by the special Act of June 9, 1857, P. L. 802, and the ordinance of the city of Philadelphia passed July 7, 1857, the said company is required to be at the expense of paving the streets occupied by its tracks:

Held, that the affidavit made out an apparent non-liability of the defendant, and was sufficient to prevent the entry of judgment.

The ordinance of the City of Philadelphia approved April 1, 1859, and alleged to modify the ordinance of 1857, not appearing upon the record, was not considered by the Court.

Appeal of Fremont Bowman, defendant, from the judgment of the Common Pleas No. 4, of Philadelphia County, for plaintiff, the City of Philadelphia, to use of William Kelley, for want of a sufficient affidavit of defence.

This was a municipal claim for paving a portion of Kensington avenue in front of defendant's property. The street, while still unpaved, had been occupied by a double track railway of the Philadelphia & Delaware Railway Company, afterwards called the Frankford & Southwark Philadelphia City Passenger Railway Company. The defendant filed an affidavit alleging that by the charter of this company and an ordinance of the city of Philadelphia adopted July 7, 1857, the company was liable for the cost of this paving.

After argument the Court entered judgment for want of a sufficient affidavit of defence. Defendant appealed, assigning this action of the Court for error.

Frank P. Prichard, (*Wendell P. Bowman* with him), for appellant.

Digitized by Google

There is a technical objection to the judgment in the present case from the fact that the statute and ordinance set out in the affidavit present a complete defence. If, however, the Court will take judicial notice of the ordinance of April 1, 1859, complainant contends that the railroad company was not relieved by such ordinance. Examination of the charter shows that the company was given permission to occupy the streets, providing the consent of councils was given. Councils annexed a condition to their consent, viz: the ordinance of 1857, which required the companies to pave the streets.

Philadelphia *v.* Ridge Ave. Pass. Railway Co., 143 Pa. 444.
Philadelphia *v.* Spring Garden Market Company. 161 Id. 522.

The Act and the ordinance thus formed a contract between the city and the railway company, and the rights and the burdens of the public were determined by it. The municipality could not alter it. There is a distinction between this charter and such a charter as was involved in

Philadelphia *v.* Evans, 139 Pa. 483.

The ordinance of 1859 has no special reference to the Philadelphia & Delaware River Railway Company, and reasonable construction of it is that it applied to those cases (as in the case last cited), where the companies were subject to *regulation* by ordinance of councils.

John M. Ridings, for appellee.

The provisions of the charter of this company are in effect the same as in the case of

Philadelphia *v.* Evans, 139 Pa. 483.

All the questions arising in this case were decided in

Leake *v.* The City of Philadelphia, 150 Pa. 643.

February 18, 1895. GREEN, J. As this case raises only a question of the sufficiency of the affidavit of defence to prevent judgment, we are of course not at liberty to regard any other matters than such as appear in the affidavit. The action was a scire facias upon a municipal claim for paving the street in front of the defendant's lot. The defence was that a designated passenger railway company was legally bound to do the work for which the claim was made, and therefore the defendant was not liable. In the case of Philadelphia *v.* The Spring Garden Market Co., 161 Pa. 522, we held that where the Legislature has imposed upon a street railway company the obligation of paying for the original paving of a street, an abutting land owner can set up such legislative action as a defence to a suit brought by the city against himself to recover the cost of the original paving. Our Brother MITCHELL, delivering the opinion, said, "We see nothing to prevent the property holder from taking advantage of the provisions of the Act of 1864. That Act, it is true, is a charter, and in that sense a contract between the State and the company to which the property owner is not a party. But as was said by SHARSWOOD, J., in Penn. & Ohio Canal Co. *v.* Graham, 63 Pa. 290, 'the charter is indeed a contract imposing upon the corporation the burden of performing a certain duty to the public,' and in the present case the intent is clear to put on the railway company that portion of the public duty which relates to the paving of streets, and thereby to relieve the abutting property owner."

In the case at bar the affidavit of defence sets up the Act of June 9, 1857, P. L. 802, which is a supplement to the charter of the Philadelphia & Delaware River Railroad Company, which subjects that company to any ordinances passed by the city councils with reference to the grading, paving, repaving, etc., of the streets over which their railway is laid, and a proviso that the said streets shall be kept in repair by the railway company. The affidavit further asserts that the railway built by the said company is laid upon the street on which the defendant's property is situated, and further sets forth certain city ordinances which provide that all passenger railway companies within the city shall be at the entire cost and expense of maintaining, paving, repaving and repairing that may be necessary upon any road, street, avenue, or alley occupied by them. The Act of 1857 and the various ordinances of the city which are described in the affidavit of defence, make out an apparent nonliability of the defendant for the work claimed for in this action, and therefore it was error to enter judgment for want of a sufficient affidavit of defence. A discussion appears in the paper books upon the effect of another and later ordinance of the city upon the defendant's liability, but as that ordinance does not appear on the record, we can take no cognizance of it at this time.

A *prima facie* defence is set forth in the defendant's affidavit and therefore judgment must be deferred until a final hearing.

Judgment reversed and procedendo awarded.

J. D. B., Jr.

Digitized by Google

Oct. '94, 324. November 12, 1894.

In re Road in Ohio and Ross Townships.

Road law—Re-viewer—Petitioner—Practice.

The appointment of the original petitioner for a road as a re-viewer is an irregularity fatal to all subsequent proceedings.

Testimony taken on a general appeal from a report of viewers is no part of the record and the decision of the Court in a road case must be based upon the report of viewers, re-viewers or re-re-viewers.

Appeal of certain petitioners from the order of the Quarter Sessions of Allegheny County, confirming a report of viewers.

The facts as disclosed by the record are sufficiently stated in the opinion of the Supreme Court, *infra*. The Court confirmed a report of re-viewers and set aside reports of viewers and re-re-viewers. On appeal this action was assigned as error.

N. W. Shafer, for appellant.

R. B. Petty, for appellees.

January 7, 1895. STERRETT, C. J. Owing to illness of the county engineer, who by special law was both viewer and artist, the first order to view was duly extended and made returnable to June sessions, 1892, at which a report in favor of the proposed road was made, approved, and width of road fixed at thirty-three feet. At September sessions a petition in due form was presented and re-viewers were appointed, one of whom, John English, is admitted to be a signer of the original petition. Before said re-viewers reported, the appointment of Mr. English was specifically excepted to, but it does not appear that any action was taken thereon.

At December sessions, 1892, two of the re-viewers, one of whom was Mr. English, reported against the road, and their report was confirmed *nisi*. Re-re-viewers, subsequently appointed, reported in favor of the road. Exceptions to reports of viewers and re-re-viewers having been filed, a commissioner was appointed and a mass of testimony, covering twenty-two pages of the paper book, was taken, mainly on the necessity of the proposed road. Finally the Court sustained the exceptions, set aside the reports of the viewers and re-re-viewers, and confirmed the report of the re-viewers, saying: "We think the evidence does not show a necessity for a public road." This remark would appear to indicate that the learned Court's decision was based not upon the report of either viewers, re-viewers or re-re-viewers, but upon the mass of testimony taken on a sort of general appeal from the reports of viewers, etc. Strictly speaking, that testimony is no part of the record before us; nor do we think it was properly before the Court below on the question of necessity or non-necessity of the proposed road. That question should be determined in the duly appointed mode of proceeding, by views, re-views and in the discretion of the Court re-re-views.

But, aside from all other considerations, the appointment of Mr. English, one of the original petitioners for the road, as a re-viewer, was an irregularity that is fatal, at least to all proceedings subsequent to the presentation of the petition for appointment of re-viewers. In Road in Donegal, 4 Yeates 479, this Court reversed the proceedings, "as well because there had been no review, as that one of the petitioners for the road had been appointed a re-viewer," and said: "It is inconsistent with the first principles of justice that the same person should be both judge and party." To the same effect are Road in Radnor, 5 Binn. 612, and Road from McClaysburg, 4 S. & R. 200. In the former, the fact that a petitioner acted as a reviewer was declared "fatal to the proceeding"—"an irregularity that cannot be overlooked."

In this case, as we have seen, the proceedings, up to and including the presentation of the petition for the appointment of re-viewers, are regular; and hence there appears to be no necessity for setting them aside. When the record is returned to the Court below, proceedings may be resumed by appointing competent re-viewers on the petition duly presented for that purpose on September 8, 1892, and thence duly prosecuted to final decree.

It is therefore adjudged and decreed that all proceedings subsequent to the presentation of the petition for appointment of re-viewers, including the appointment of re-viewers erroneously made thereon, be reversed and set aside, and it is ordered that the record be remitted to the Court below for further proceedings in accordance with the foregoing opinion.

W. M. S., Jr.

July, '94, 210. January 23, 1895.

Mulholland v. Wood, Brown & Co.

Lien—"Clerk"—Wages—Judgment confessed—Act of May 12, 1891, P. L. 54.

A travelling salesman employed by a wholesale dry goods house and paid by commissions on sales is not a "clerk" under the terms of the Act of May 12, 1891, (P. L. 54), and therefore his commissions or compensation do not entitle him to a lien upon the property of the firm by which he is employed.

Appeal of Henry S. Grove, assignee of Wood, Brown & Co., garnishee, from the judgment of

Digitized by Google

the Common Pleas No. 3, of Philadelphia, entered on his answer to interrogatories filed in an attachment sur confessed judgment wherein John W. Mulholland was plaintiff and Wood, Brown & Co., defendants.

The facts of the case are sufficiently set forth in the opinion of the Court.

George L. Crawford, (with him *Henry C. Loughlin* and *John G. Johnson*), for appellant.

A "clerk" is "an assistant or a subordinate in the shop of a retail dealer."

Webster's Dictionary.

A salesman is not a "clerk."

Witmer *v.* Miller, 12 Pa. C. C. 363.

Kinley J. Tener, for appellee.

The commissions of a salesman are wages and not subject to attachment.

Hamberger *v.* Marcus, 157 Pa. 133.

March 4, 1895. FELL, J. The proceedings in this case were designed to raise the single question whether certain creditors of Wood, Brown & Co., are entitled under the provisions of the Act of May 12, 1891, to a preference for the amounts due them for wages. The garnishee is the assignee of the defendants for the benefit of their creditors, but as a decision of the question raised is desired by all parties in interest no objection has been made to the manner in which the plaintiff attempted to enforce the right claimed. The contract on which the claim is based is in writing as follows: "I, J. W. Mulholland, hereby engage with Mess. Wood, Brown & Co., of Phila., to sell goods giving my entire time and attention to their interests, and being at all times subject to the rules and regulations of the house on the following terms for the year 1893. House and Road Commission on all approved sales, I paying my own expenses. J. W. MULHOLLAND."

The part of the Act to be considered provides: "All moneys that may be due or hereafter become due for labor and services rendered by any minor or mechanic, servant girls at hotels, boarding houses, restaurants or in private familes, or any other servant and helper in and about said houses of entertainment and private families; porter, hostler or any other person employed in and about livery stables and hotels; laundrymen or washerwomen, seamster or seamstress employed by merchant tailors or by any other person; milliner, dressmaker, clothier, shirtmaker, or clerk employed in stores or elsewhere; hand laborer, including farm laborer or any other kind of laborer; printer, apprentice, and all other tradesmen hired for wages or salary from any person or persons—shall be preferred," etc.

Wood, Brown & Co. were wholesale dealers in dry goods. The plaintiff was to sell goods, paying his own expenses and receiving house and road commissions. His compensation was entirely by commissions on approved sales whether made upon the road or at the house by him, or by any one to customers whom he had secured. He was clearly a travelling salesman. It is claimed, however, that he is within the meaning of the Act as a "clerk employed in a store or elsewhere."

The Act of May 12, 1891, is an amendment of the Act of June 13, 1883, which was an amendment of the Act of April 9, 1872. Each successive Act enlarges the number of persons intended to be benefited. The first Act included but four classes, the second twenty-three, and the third twenty-five. Each Act includes clerks, and in the third all limitations as to the business of the employer and places of employment are removed as to them. In Sproul *v.* Murray, 156 Pa. 293, it was held that the Act of 1883 should receive an enlarged or remedial construction in ascertaining whether certain persons specifically named were within its provisions. The Act of 1872 limited the right of preference by naming the classes of employers whose property was subject to the right. The subsequent Act enlarged the class of employés, but not that of employers. It was held that the latter class was enlarged by necessary implication to correspond with the former. This construction gave effect to the obvious intent of the Legislature, and was necessary to make the Act sensible. The question now before us is whether the right has been conferred, and that is to be determined by the language of the statute. The original meaning of the word clerk has become so enlarged that in modern usage it may include a salesman in a retail store. It cannot, however, be extended to include one whose business is to travel and secure customers, and whose compensation is by commissions on sales effected by or through him. Such a person is not an assistant in the store or business of his employer. He is not employed to keep accounts or to assist in the store or elsewhere in the management of the business. At the time of the passage of the Act travelling salesmen were a well-known and distinct class of employés. If it was the intention to extend to them the preference given by the Act, it is to be presumed that they would have been included with the classes of persons named.

The judgment is reversed.

W. D. N.

Digitized by Google

Jan. '95, 99. March 6, 1895.

Commonwealth ex rel. Whitman et al. v. Charles H. Ramsay.

Certiorari—Contested elections—Review.

The writ of certiorari does nothing beyond producing the record of the Court below, and the merits of the case are not reviewable by the Supreme Court. The fact that the record shows certain interlocutory proceedings to be undisposed of, except as they are involved in the final decree, is not fatal to the regularity of the proceedings.

Poor District *v.* Poor District, 107 Pa. 301; France *v.* Ruddiman, 126 Id. 257, and Bank *v.* Earley, 113 Id. 477, followed.

Certiorari by Charles H. Ramsay to the decree of the Quarter Sessions of Berks County adjudging William A. Whitman to have been elected to the office of select councilman for the Thirteenth ward of the city of Reading. In the Court below a petition was filed setting forth that Charles H. Ramsay had been returned as elected select councilman for the Thirteenth ward of the city of Reading at an election held February 16, 1892, which return was false, the fact being that one William A. Whitman had received the plurality of the votes cast at the election for select councilman and was duly elected to the said office. Ramsay filed an answer and the case was referred to Henry A. Muhlenberg, Esq., as examiner, before whom testimony was taken. In the course of the proceedings certain of the petitioners made a motion for leave to withdraw. A motion was made to strike off the names of two of the petitioners and also a motion to quash the petition. These motions did not appear by the records to have been disposed of. The examiner filed a report that petitioner had received 308 legal votes and respondent 307. This report was affirmed by the Court and a decree entered that William A. Whitman was entitled to the office in question. Charles H. Ramsay took this appeal and assigned as error the confirmation of the report, the finding of the Court as to the qualification of certain electors, the failure to dispose of a motion for leave to certain petitioners to withdraw and one to quash the petition.

W. K. Stevens, (*George S. Graham* with him), for appellant.

Herbert R. Green, (*Henry D. Green* with him), for appellees.

The Court may not permit petitioners in a contested election case to withdraw.

Contested Election of J. L. Grim, 14 WEEKLY NOTES, 303.

No errors beyond those appearing in the record can be reviewed in an appeal on certiorari.

Chase *v.* Miller, 41 Pa. 403.

March 11, 1895. WILLIAMS, J. This is a certiorari and it brings up for review nothing but the record. The evidence heard and the opinion rendered by the Court below, it is well settled, form no part of the record and are not before us, although they are printed in the appellant's paper book and have aided us materially in understanding the position of the case. The record begins with the petition and the order of the Court for notice to the respondent, and it shows the procedure in the case down to the final decree. The petition of five of the persons who signed the original petition for leave to withdraw therefrom, the motion to strike off the names of two persons alleged not to be electors of the proper ward, and the motion to quash, appear on the record and are undisposed of except as the final decree may be said to involve their denial. The reasons why they were not disposed of do not appear on the record, nor are they made to appear by any evidence of a refusal by the learned Judge to hear them. Their disposition may not have been pressed so far we can know from what is before us, and the mere failure to make a disposition of them before proceeding to final hearing is not under such circumstances a fatal irregularity. Our attention was drawn upon the argument to the disposition alleged to have been made by the learned Judge of the votes of several persons who voted on opposite sides, and whose qualifications as found by him are printed in parallel columns.

We might be unable to see in some of these cases why upon the facts he has stated one vote was held to be legal and another to be illegal, if an appeal had been given in this class of cases and we were required to review them on their merits. But an appeal is not given. The merits are not before us. Upon this writ it is our duty to see that the successive steps taken in the investigation are in accordance with the statute that has prescribed them, but with the conclusions of the Court below or its reasons for adopting them we have no concern. In common law actions the evidence is no part of the record. If reduced to writing and placed on the files it does not thereby become a part of the record. France *v.* Ruddiman, 126 Pa. 257; Poor District *v.* Poor District, 107 Id. 301. In such actions facts may be put upon the record by the parties in a case stated, by the Court, by allowing a bill of exceptions, and by the jury by means of a special verdict. Bank *v.* Earley, 113 Pa. 477—but unless brought on the record in one of these ways they form no part of it. But in proceedings like that before us that are creatures of a statute and are provided for a specific purpose, we must look to the statute for the extent to which the judgment is reviewable. In this

Digitized by Google

case no form of review is provided. Our supervisory control is that only which may be exercised on certiorari; and that does not extend to a review of the questions decided. For this reason we must overrule the assignments of error. We affirm the judgment because upon the record before us we have no power of review.

W. D. N.

Jan. '94, 486. January 11, 1895.

Gilton v. Hestonville Pass. Ry. Co.

Passenger railways—Trespass—Negligence.

In an action of trespass against a street railway company, which is bound to keep the cartway "in good repair," it is the province of the jury to find whether had proper care been exercised by the company in keeping their tracks in good condition the plaintiff would have suffered injuries or not.

Appeal of Elwood S. Gilton, plaintiff, from the judgment of the Common Pleas No. 1, of Philadelphia, in refusing to take off a non-suit entered in an action of trespass against the Hestonville, Mantua and Fairmount Passenger Railway Company.

On the trial the following facts appeared from the evidence presented by the plaintiff: The plaintiff received injuries by being thrown from his wagon on the morning of June 16, 1889, by reason of a wheel being caught in an upturned end of a rail of appellee's road in Lancaster avenue near Fifty-second street, Philadelphia. The rail was much worn and had apparently been so for a long time. At the time of the accident no spikes were found and had they been found the rail was too much worn to have been bound by them to the "sleeper" or wooden tie upon which the rail was originally laid. The Court directed a non-suit to be entered on the ground that it did not appear that defendant had actual or constructive notice that the rail was in a defective state. The Court in banc subsequently refused to take off the non-suit. The plaintiff took this appeal and assigned as error the entry of and refusal to take off the non-suit.

John G. Johnson, for appellant.

1. The defendant was liable, without proof of length of time of continuance of the condition, for a defective rail which made the highway dangerous.

Penna. & O. Canal Co. *v.* Graham, 63 Pa. 297.
Fritsch *v.* Allegheny, 91 Id. 228.
Rapho *v.* Moore, 68 Id. 407.

2. There was evidence, both as to the condition of the rail itself, and of a general condition of non-repair, which should have been submitted to the jury, even though the defendant corporation was not liable saving for a failure to repair after lapse of a reasonable time.

Dillon on Municipal Corporations, 4th Ed. Vol. 2, p. 1298.
Elliott on Roads and Streets, 462.
Vanderslice *v.* Phila., 103 Pa. 107.
Kibele *v.* Phila., 105 Id. 44.
Bradwell *v.* P. & W. E. Pass. Ry. Co., 153 Id. 105.

Russell Duane, (*J. Bayard Henry* with him), for appellee.

Appellant by its charter is bound to keep the streets in which its tracks lie in "good repair."

Act April 6, 1859, Sec. 9, P. L. 389.

And such corporations are always bound so to do.

Thirteenth and Fifteenth Sts. Pass. Ry. Co. *v.* City, 13 Weekly Notes, 487.
City *v.* Ridge Ave. P. Ry. Co., 143 Pa. 444.
Shearman and Redfield on Negligence, Sec. 369.
Springer *v.* City of Phila., 12 Atl. 490.

But the company is not liable for an accident unless it had actual or constructive notice that its track was out of repair.

Otto Township *v.* Wolf, 106 Pa. 608.
Born *v.* Allegheny and Perrysville Plank Road Co., 101 Id. 334.
Oakland Ry. Co. *v.* Fielding, 48 Id. 320.
Goodnough *v.* Oshkosh, 24 Wis. 549.
Aylesworth *v.* R. R. Co., 30 Iowa, 459.
Case *v.* R. R. Co., 64 Id. 762.
Goodson *v.* City of Des Moines, 23 N. W. 655.
Burns *v.* City of Bradford, 137 Pa. 361.

March 4, 1895. Fell, J. The plaintiff was injured by being thrown from his wagon while driving on the tracks of the Hestonville, Mantua and Fairmount Passenger Railway Company, the corporation defendant. The accident was caused by the rim of the wheel of his wagon being caught by the end of a rail which had become worn and split. A non-suit was entered upon the ground that it did not appear that the defendant had notice, actual or constructive, of the defective condition of the rail. It was shown by the testimony that the car tracks for two squares from the place of the accident were in a condition dangerous to persons driving on the street because the rails were worn and many of them insecurely fastened or entirely loose; that the rail which caused the injury was so worn that it would not hold the spikes by which it had been fastened down, and that at one end it was split and the parts separated about an inch. The rail appeared to have been in this condition for some time, and the defects were apparent and would have been observed by anyone supervising the track.

After the accident this rail was found bent so that its end was two feet above the surface of the street. It did not clearly appear whether the rail had been bent by the wheel of the plaintiff's

Digitized by Google

wagon catching in the split end, or by a like preceding cause. Either conclusion might have been drawn by the jury, and it was unimportant which was reached. If the rail had become so worn that it was loose from the timbers to which it had been spiked, and its end so split that a wagon wheel would probably become wedged in it, the danger was as real, though not as manifest and imminent, as if its end was bent up. The proof was distinct that the rim of the wheel was caught in the end of the rail, and whether it was caught before or after the rail was bent went only to the degree of non-repair of which the defendant should be held to have had notice. If the rail was worn and loose and split it was an object of danger whether bent or not, and its becoming bent would naturally follow as the result of its condition. The defect in the rail did not occur suddenly or from an unusual or an accidental cause; it was the result of ordinary and long continued use, it was apparent and the danger from it probable.

Without holding the defendant to a higher duty than to make repairs after notice, either actual or constructive, of defects, there seems to be enough in the evidence to have carried the case to the jury. The duty of the defendant to keep the tracks in repair was clear and imperative. It was bound to know that use and that climatic influences would produce defects in the rails and it was bound to make such a continued inspection as would detect those which were apparent. The defects in the rail in question did not arise in a day, nor probably in a week or a month. The certainty that they would arise in time imposed the duty of continued vigilance.

The judgment is reversed and a procedendo awarded. W. D. N.

Jan., '95. February 19, 1895.

Evans v. Smith et al.

Will—Devise in fee simple—A direction to sell whatever of the estate the widow has not sold, not a restraint upon a fee simple previously devised to her.

Where a will contains an express devise in fee of all the testator's "estate both personal, real and mixed" and a subsequent clause as follows: "I give and bequeath to my three children R., M. and D., *the residue of my said estate after the death of my said wife*, and after the bequest to my said grandson H., to be divided into three shares," etc., the said clause is a gift, not of the residue of the testator's estate, but of the estate of the devisee unconsumed by her, and hence it cannot be considered as being intended to reduce her fee simple estate in the whole.

A direction to sell whatever of the estate the widow may not have sold or disposed of during her life is a recognition of her right to sell and dispose of the whole estate, and not a restraint upon her estate under the will.

Jauretche *v.* Proctor, 48 Pa. 466, followed.

Appeal of William E. Smith and Elizabeth Smith, his wife, and Benjamin Iliffe and Rachel A., his wife, defendants from the judgment in ejectment entered by the Common Pleas of Schuylkill County in an action by Henry Evans.

On the trial, before BECHTEL, J., the following facts appeared:

The premises in dispute were five lots and houses situated on North Second street in the Borough of Pottsville, Schuylkill County, Pennsylvania. They were the property of William Evans, who died seized thereof in 1877, having first made his last will and testament, under the terms of which both parties to the action claimed title, and wherein and whereby he provided as follows, *inter alia*: "Item. I give and bequeath unto my said beloved wife all my estate, both personal, real and mixed, in fee simple to own, use, enjoy and dispose of the same as she may deem proper and right, the same as I might or could do if living. Margaret shall have the household furniture.

"Item. I further hereby order and direct that whatever real estate that may not be sold or disposed of by my said wife, in her lifetime that the same shall as soon as can conveniently be done after her death, sold and converted into money by such administrators as is hereinbefore named.

"Item. I give and bequeath to my three children, Rachel, Margaret and David, the residue of my said estate after the death of my said wife, and after the bequest to my said grandson Henry Evans, to be divided into three shares, my two daughters shall share and share alike but my said son David shall have one hundred dollars more for his share than either of my said two daughters, and in case of death of either of my said three children, Rachel, Margaret and David, in default of heirs, then such share or shares shall go to the survivor or survivors of them, share and share alike, and in case either of my said three children shall die leaving lawful issue then the share of such deceased child shall go to such issue."

At the time of the death of the said William Evans, he left surviving him his wife, Elizabeth Evans, to whom were granted letters testamentary upon his estate, three children, David, Margaret and Rachel and a grandson, Henry Evans, the plaintiff in this suit, and the only son of a decesaed child, George Evans, for all of whom he made provision in his will. Elizabeth Evans enjoyed the profits of the estate during her life and died in 1880, intestate, leaving surviving her the three children and the grandson aforesaid.

Digitized by Google

The defendant, Elizabeth Smith, claimed title under the three children aforesaid, who at the death of their mother were appointed administrators d. b. n. c. t. a. of the estate of William Evans, their father, and who, as devisees in remainder after the death of their mother, sold the said real estate to her in 1889 and delivered to her good and sufficient deeds therefor. The plaintiff, Henry Evans, claimed title to the premises in controversy by virtue of the devise to his grandmother, Elizabeth Evans, in the above recited will; that, under the will of William Evans his grandmother took an absolute estate in fee simple, and as she died intestate and only left three children surviving and himself an only son of a deceased child, he became entitled to one-fourth of the real estate in question under the intestate laws as an heir of the said Elizabeth Evans, his grandmother.

The defendant to this suit, Elizabeth Smith, claimed that, under the will of William Evans, the wife was given an estate for life with power of disposing of so much thereof as might be necessary for her maintenance and support, and that whatever remained of the estate of William Evans vested in the three children under whom she claimed under the last clause of his will.

The Court directed a verdict for the plaintiff, but reserved the question whether or not under the will of William Evans a fee simple passed to Elizabeth Evans, the widow, and entered a rule to show cause why the judgment should not be entered in favor of the defendant *non obstante veredicto*, which the Court subsequently discharged and entered judgment upon the verdict, to which the defendant excepted and appealed.

The assignments of error were as follows:

1. The Court erred in charging the jury as follows:

"We apprehend that in the end it will become a question for the decision of our Supreme Court, and without going into the reasons that bring us to this conclusion, any further than we have already gone into them during this discussion and what we have said to counsel in your hearing, we say to you now it is our judgment that in view of the case as presented here you should render a verdict in favor of the plaintiff for the undivided one-fourth of the premises in controversy."

2. The Court erred in answering the first point of the plaintiff in the Court below, which point and answer are as follows: "That under all the evidence in the case the verdict must be for the plaintiff."

Answer. Plaintiff's points are affirmed.

3. The Court erred in answering the defendants' first point, which point and answer are as follows:

"That William Evans, the testator, by his will intended to give and did give to his wife, a life estate in his real property with power to sell and dispose of the same or any part thereof in her lifetime for her support and maintenance. That the real estate having been left at her death the same passed under said will to his son David and his daughters Margaret and Rachel under whom the defendant claims title by deeds of conveyance and the verdict must be for the defendants."

Answer. Defendants' point refused.

4. The Court erred in answering defendants' second point, which point and answer are as follows:

"Under all the evidence in the case the verdict of the jury must be for the defendants."

Answer. Defendants' point refused.

5. The Court erred in their opinion sustaining the verdict for the plaintiff in this case and discharging the rule to show cause why judgment should not be entered in favor of the defendants *non obstante veredicto* and directing judgment to be entered upon the verdict for the plaintiff.

This case was submitted by both sides on their paper books without argument by—

J. W. Ryon, for appellants.

J. W. Moyer and *James Ryon*, for appellee.

March 11, 1895. GREEN, J. We think it quite clear that every clause of this will which is supposed to limit or restrain the effect of the devise in fee simple to the wife of the testator, has been considered and adjudged in the numerous decisions we have heretofore made. In Jauretche *v.* Proctor, 48 Pa. 466, which is the leading case, the words of the third and fourth articles of the will, were much more restrictive than any of the words in the will we are considering. The words of the third article in that case were an absolute prohibition against any disposition of the estate by the devisee during her life. We held that it was only a restraint upon the power of alienation which was void as against the fee. The fourth article of that will was almost precisely the same as the residuary item in this. We held it to be a gift, not of the residue of the testator's estate, but of the estate of the devisee unconsumed by her, and hence it could not be considered as being intended to reduce her fee simple estate in the whole. The same is true of the third item of the present will. It is merely a direction to sell whatever of the estate she may not have sold or disposed of during her life. It is a recognition of her right to sell and dispose of the whole estate, and not a restraint upon her estate under the will. These are all the points of contest in this case, but these and a number of others, which have no existence here, have all been adjudged in favor of the estate of the devisee in the cases which have followed Jauretche

Digitized by Google

v. Proctor. It will only be necessary to indicate some of them by reference, to wit: Presbyterian Church *v.* Disbrow, 52 Pa. 219; Bowlby *v.* Thunder, 105 Pa. 173; Hopkins *v.* Glunt, 111 Pa. 287; McIntyre *v.* McIntyre, 123 Pa. 329; Good *v.* Fichthorn, 144 Pa. 287; Boyle *v.* Boyle, 152 Pa. 110, and Levy's Estate, 153 Pa. 174.

Judgment affirmed.

W. C. S.

Oct., '94, 286. October 8, 1894.

Commonwealth v. Bell.

Criminal law—Incestuous fornication—Evidence.

In a prosecution for incestuous fornication, it is competent for the Commonwealth to introduce evidence of prior illicit relations between the parties, although such evidence discloses other indictable offences of like nature which were barred by the statute of limitations.

Testimony that prosecutrix was forbidden to go to church and school, coupled with evidence tending to show that this was in furtherance of defendant's unlawful purpose is relevant in such action.

This Court will not reverse because an answer goes beyond the qualification of the Judge, when no motion is made to strike out the same.

It is not error that evidence admissible in chief and cumulative was received in rebuttal.

Appeal of William Bell from the judgment of the Quarter Sessions of Armstrong County.

Indictment for incestuous fornication, which was alleged to have taken place in September, 1892.

On the trial, before RAYBURN, J., the Commonwealth offered evidence that more than two years before the offence charged the defendant had illicit intercourse with his daughter, the prosecutrix, and that she had two children by him.

Defendant objected to testimony as to any transaction except those within two years last past.

The Court overruled the objection. (First assignment of error.)

The Commonwealth further offered to show that in 1890 defendant had tried to make the prosecutrix do various things to cause an abortion. Objected to. Objection overruled. (Fourth assignment of error.)

Prosecutrix was asked whether shortly after she had connection with her father, she had not told her brothers and sisters.

Objected to if such declarations were made more than two years prior to the bill of indictment and as incompetent.

Objection overruled and declarations admitted if made immediately after the commission of the alleged offence. (Fifth assignment of error.)

The witness then testified that she told her sister five or six months afterwards.

Prosecutrix was asked whether she did not, at her father's suggestion, tell her grandmother that another person was the father of the child. Objected to because defendant was not present. Objection overruled. (Sixth assignment of error.)

The prosecutrix having given her version of a quarrel between her father and herself on a certain day and defendant having denied the same and given a different version, prosecutrix was called in rebuttal to give further cumulative testimony, to support her version. Objected to as not rebuttal. Objection overruled. (Ninth assignment of error.)

Prosecutrix and other witnesses were called to show that defendant would not allow his daughter to go to school or church or to have visitors, and she testified that it was in order that he could accomplish his unlawful desires. Objected to. Objection overruled. (Second, third and eighth assignments of error.)

Defendant denied the commission of the crime and alleged that the information was made in order that his daughter could get possession of his property.

The question of guilt was submitted to the jury who found defendant guilty as indicted.

Defendant appealed, assigning for error the rulings in the evidence as above noted.

M. F. Leason and *W. D. Patton*, for appellant, cited:—

Goersen *v.* Commonwealth, 99 Pa. 338.
Swan *v.* Commonwealth, 104 Id. 218.
Hester *v.* Commonwealth, 85 Id. 139.
Zell *v.* Commonwealth, 94 Id. 258.

James H. McCain, (with him *H. N. Snyder*, district attorney, and *W. J. Christy*,) for appellee, cited:—

Vol. 10 Am. & Eng. Ency. of Law, 345.
3 Wharton's Criminal Law, sec. 2653.
Wharton's Criminal Evidence, sec. 446.

February 25, 1895. McCOLLUM, J. Seven of the nine specifications of error filed in this case really raise but one question, and that is whether in a prosecution for incestuous fornication it is competent for the Commonwealth to introduce evidence of illicit relations between the parties prior to the commission of the specific offence laid in the indictment. In Wharton on Criminal Evidence, section 35, it is said by the learned author that "in prosecutions for adultery, or for illicit intercourse of any class, evidence is admissible of sexual acts between the parties prior to, or when indicating continuous-

Digitized by Google

ness of illicit relations, even subsequent to the act specifically under trial." This is in accord with the rule as stated in Greenleaf on Evidence, Vol. 2, section 47, and in Am. and Eng. Ency. of Law, vol. 1, p. 214, and vol. 10, p. 344. Roscoe in his treatise on criminal evidence says the notion that acts of improper intimacy cannot be shown if they disclose other and distinct offences of the same nature as the one charged in the indictment, is exploded. To this point the language of the Court in State *v.* Markins, 95 Ind. 464, is so pertinent that we quote it: "It would be a singular rule that would admit evidence of lascivious conduct and yet exclude evidence of acts which of all the series supplies the strongest evidence that the crime charged was one likely to be committed. If the rule were that the State might show previous lascivious conduct, but must not show an act of sexual intercourse we should have the singular anomaly of a legal rule rejecting evidence simply because of its strength and importance." If an act is so remote in point of time from the act laid in the indictment that the statute of limitations would protect the participants in it in case of their prosecution for it, it is still admissible if it is one of a series of acts indicating continuousness of sexual intercourse: Greenleaf on Ev., vol. 2, sec. 47, and Am. and Eng. Ency. of Law, vol. 10, p. 344, and cases cited. The principles above stated are well sustained by the cases referred to as authority for them, and they are not in conflict with any rule established by the decisions of this Court. To the extent that our decisions throw light on the question we are considering they are in accord with these principles. Respublica *v.* Hevice *et al.*, 2 Yeates, 114, and Gardner *v.* Madeira, Id. 466. We conclude therefore that it was proper for the Commonwealth to introduce evidence of prior illicit relations between the parties although such evidence disclosed other indictable offences of like nature which were barred by the statute of limitations. This evidence was carefully restricted by the learned Court below to the purpose for which it was clearly admissible, and the correctness of the instructions in regard to it is not questioned by any specification of error. But it appears in the evidence descriptive of the incestuous relations between the parties that the defendant denied the prosecutrix the privilege of attending church and Sunday-school and of social intercourse with the young people of the neighborhood. While the existence of the fact thus disclosed was not disputed, the learned counsel for the defendant contend that it was irrelevant, and that its appearance in the case was prejudicial to their client. If it be conceded that it was immaterial as an independent fact having no relation to the alleged incestuous intercourse between the parties, it does not follow that it was so, under the circumstances shown in this case. According to the testimony of the prosecutrix the defendant based his denial of the privileges mentioned on his desire for sexual intercourse with her. In the light of this evidence it seems that the denial was prompted by his illicit passion and was intended to secure the gratification of it. Whether it be regarded as punishment for unwillingness to yield to every demand of his lust or as a method of increasing the opportunities for satisfaction of it, makes no difference, as in either case it was an act in furtherance of his incestuous purpose. In view of the prosecutrix's testimony in regard to the defendant's explanation of the act and the statement of his reasons for it, we cannot say that it was irrelevant.

There is no merit in the fifth specification of error. It is defective and misleading because it does not show all that was done under the ruling complained of. The prosecutrix was asked if she told her brothers and sisters about the offence charged in the indictment at the time of it, or immediately after its commission, and she replied that she did not, but added that she told her sisters about it five or six months afterwards. The Court refused to allow her to state what she said to them, because upon her own showing, it was not within the ruling which limited the evidence to what she said at the time or immediately after the offence was committed. No motion was made by defendant's counsel to strike out her answer or so much of it as was not strictly responsive to the question, nor was any suggestion made by them that it was in any degree prejudicial to their client. In fact such suggestion could not have been made with any show of reason for it. We conclude therefore that there is nothing in the fifth specification which calls for a reversal of the judgment.

The objection to the ruling complained of in the ninth specification of error is that the evidence offered was part of the Commonwealth's case in chief. This being so, the admission of it in rebuttal is not assignable in error: Finlay *v.* Stewart, 56 Pa. 183, and Brown *v.* Finney, 67 Id. 214.

The defendant ought not to object to what the prosecutrix said to her grandmother respecting the paternity of her second child. It was a declaration in support of his contention regarding its paternity, and it cannot well be claimed that he was injured by it.

Judgment affirmed. W. M. S., Jr.

Digitized by Google

Executive Department of Pennsylvania.

In re Sowego Water & Power Company.

In re Martic Water & Power Company.

In re Lower Chanceford Water & Power Company.

Applications for charter—Amended application—Statement of purpose, when too broad—Obstruction of public streams—Right of piscary.

It is not a valid ground for rejecting the advertised notices of an intended application for a charter that such notices contain more than the law would permit in the charter, provided they state enough to constitute notice of the object proposed. A restricted notice might be so regarded, but not a broad one.

When the application is materially changed a new notice will be required, but that a notice is too br ad is not a sufficient reason for rejecting it.

Upon application for the charter of certain companies for the purpose of supplying, storing and transporting water and water power for commercial and manufacturing purposes along the Susquehanna River, protests were filed by the commissioners of fisheries that the purposes of incorporation would injure the fishery rights:

Held, that the law may be at once invoked to prevent the wrongful exercise of power should the proposed companies step beyond their privileges, or trespass on the rights of the public or individuals, but that the Executive Department will not refuse a charter because a fear is expressed that the applicants contemplate doing something which is in violation of law, *ultra vires* and hurtful to the public.

Applications for charters of the Sowego Water & Power Company, the Martic Water & Power Company, and the Lower Chanceford Water & Power Company.

Sur protests of the Commissioners of Fisheries.

The facts are fully recited in the opinion, *infra*.

M. H. Houseman, for applicants.

William U. Hensel, for remonstrants.

March 14, 1895. THE SECRETARY OF THE COMMONWEALTH (HON. FRANK REEDER). On January 7, 1895, the application for charter of the "Sowego Water & Power Company" was received at this department, having for its purpose the supply of water to the public, or the supply, storage or transportation of water and water power for commercial and manufacturing purposes in the district comprised within the townships of Peach Bottom, Lower Chanceford, and Chanceford, York county, and Fulton, Drumore, Martic, and Conestoga townships, Lancaster county, all in the State of Pennsylvania.

On the same day this application was returned for modification in the statement of purpose, it being decided that in the form presented it contravened the ruling of the attorney-general, which held that there should be a singleness of purpose in an application for charter, and also the ruling of this department—that such an application could not cover more than a single district or municipality. Under this ruling and before any protest had been received, this application was amended by leaving out the objectionable territory and making it read for the township of Fulton, Lancaster county, Pa., and to such persons, partnerships and corporations residing therein or adjacent thereto as may desire the same, and by having the object restricted to the supply, storage or transportation of water and water power for commercial and manufacturing purposes in said district.

Protests were subsequently filed by the Pennsylvania Commissioners of Fisheries, and citizens of Lancaster and York counties, based mainly on the grounds that this company proposed to dam the Susquehanna River and thereby injure the fishing industry; that this charter should not be granted unless it contained a clause stipulating for the creation of fish-ways satisfactory to the Commissioners of Fisheries; that the granting of the charter would destroy annually immense quantities of shad and other anadromous fish, resulting from their being caught in the turbine wheels of the company; that such a grant would be without compensation to the State, and finally, that the application did not on its face state the real purpose of the intended corporation, which was to develop and create electrical power to be transmitted to Baltimore and other remote points.

On February 6, 1895, the applications for charters of the Martic and Lower Chanceford water and power companies were received, and which had for their object a similar purpose as that named in the application for charter of the Sowego Water and Power Company. The first of these applications named Martic township, Lancaster county, and the second one, Lower Chanceford, York county, as the district or locality to be covered by its charter.

The proofs of publication in the last two named applications correspond with the purposes named in the applications themselves, but the original proofs as made in the application for charter of the Sowego Water and Power Company were allowed to stand, re-advertisement not having been made, and they contain the objectionable matter above referred to, and

Digitized by Google

this fact naturally leads us to determine, first, whether or not these notices were sufficient to permit the granting of Letters Patent on the amended application, should it in other respects be found to be in form.

Section 3, of the Act of April 29, 1874, provides, that notice of the intention to apply for any such charter shall be inserted in two newspapers of general circulation printed in the proper county for three weeks, setting forth briefly the character and object of the corporation to be formed, and the intention to make application therefor. By a rule of this department said notice should also give the names of the five subscribers. The notices in question complied with this rule and were published for twenty-one (21) days in two newspapers of Lancaster and York counties respectively; they contained the material allegation that a charter was to be asked for, for the storage or transportation of water and water power for commercial and manufacturing purposes, in Fulton township, Lancaster county, and were effective in animating the present protests and bringing the interested parties here to protest against the charter.

Then, under the practice of this department in the past, these notices must be held to be sufficient. This practice rests upon the theory, that it is not a valid ground for rejecting such notices that they are alleged to contain more than the law would permit in the charter, provided they do state enough to constitute notice of the object proposed. A restricted notice might be so regarded, but not a broad one. Where the application is materially changed a new notice would be required, but that a notice is too broad is not a sufficient reason for rejecting it.

This then brings us to the question, whether or not these applications should be granted, and while no specific protest was filed against the applications of the Martic and Lower Chanceford companies, they will also be considered for the reasons above given.

Companies for the supply, storage or transportation of water and water power for commercial and manufacturing purposes, are authorized by the Act of May 16, 1889, P. L. 226. These applications are within this Act, and undoubtedly, in the absence of protest, would have been granted under section 3 of the Act of April 29, 1874, which provides, that on such certificate or charter being presented to the Governor, he shall examine the same, and if he find it to be in proper form and within the purposes named in the second class, he shall approve thereof.

These protests are entitled to be fully considered, and we will therefore take up the questions which they raise.

The Susquehanna River is a public highway, having been so declared by the Act of March 31, 1785. The obstruction of a navigable stream declared by law a public highway, is at common law a nuisance. This common law rule has been somewhat relaxed in this Commonwealth by the Act of March 23, 1803, P. L. . . . (4 Sm. L 20), which permits riparian owners on any navigable stream declared by law a public highway, except the rivers Delaware, Lehigh and Schuylkill, to erect dams for certain purposes, provided that the said erections shall not impede navigation nor prevent the fish from passing up the said streams. This Act imposes penalties for an abuse of the privileges it confers, and provides suitable and adequate remedies for individuals injured by an improper use of such privileges. While the Act of 1803, therefore, seems to authorize dams in the Susquehanna River, it only does so subject to the limitations and restrictions specifically expressed in the Act. Moreover, Section 11, Act April 28, 1873, P. L. 890, provides, that any person or persons, or corporations hereafter erecting or constructing any dam or dams in any of the rivers of the Commonwealth, or their tributaries, accessible to the shad or other migratory fishes, shall put in or upon the same suitable fish-ways or ladders under the direction and approval of the Fish Commission, without which every such dam shall be deemed a public nuisance and liable to be abated upon the information of any one complaining thereof.

In the case of Dugan *v.* Monongahela Bridge Company, 27 Pa. 303, Mr. Justice WOODWARD says, near the close of his opinion, "In pursuance of our Act of 23d March, 1803, relative to mill dams, in navigable streams, the defendant built a dam in a creek which had been declared a highway. The Act provided that the party erecting such dam, 'shall not obstruct or impede the navigation of such stream.' It was alleged that the dam had changed the natural flow of the water, and caused certain mounds and bars to be thrown up, whereby the natural channel was obstructed. The Court below put the cause on the point, whether the dam had been scientifically erected, and that if the bars were the necessary and inevitable effect of such erection, the plaintiff could not recover. In reversing this opinion, Judge ROGERS said, 'Where the injury arises from a bar which is the immediate effect of a dam erected in the bed of a river, I cannot bring myself to doubt that it is such an obstruction of the navigation as was in the view of the Legislature, and is embraced in the proviso.' "

So, too, it was decided that a manufacturing corporation of Massachusetts, chartered with authority to obstruct and maintain a dam across

Digitized by Google

a river, paying damages to the owners of fishing rights above, and whose charter did not exempt it from maintaining a dam without a fish-way, was held subject, under a law of that State which allowed the Legislature to amend, alter or repeal the Act of Incorporation, to construct such fish-ways in the dam as would be satisfactory to the commissioners appointed by the Legislature for the purpose of determining where suitable and sufficient fish-ways should be constructed. Holyoke Company *v.* Lyman, 15 Wallace, 500.

The law has hedged the right of piscary residing in the citizen and the public with the most ample and painstaking protection. If the proposed companies step beyond their privileges or trespass upon the rights of the public or individuals, the law may be at once invoked to prevent their wrongful exercise of power. The charters asked for, if granted, will not confer upon the new corporations power either to build dams within the Susquehanna River, or to destroy the fish of that stream. If they should seek to exercise any such power they would have to acquire it elsewhere than in this department, or under the laws regulating the formation of corporations. There is no law of the Commonwealth which authorizes the incorporation of any company for either purpose. The applications here do not have for their purpose the damming of the Susquehanna, or the destruction of its fish. The attorneys for the applicants, and some of the applicants themselves, disclaim any such intention, and, should such an attempt be made, the law is ample to prevent its uncompensated consummation. Bacon *v.* Arthur, 4 W. 437; Plumer *v.* Alexander, 12 Pa. 81; Dugan *v.* Monongahela Bridge Co., 27 Id. 303. Where the applications are in due form, and the purpose for which a charter is asked is within the terms of the corporation laws, it is asking too much of this department to refuse a charter because a fear is expressed that the applicants contemplate doing something which is in violation of law, *ultra vires* and hurtful to the public.

For these reasons, and after a careful consideration of the arguments made, I have decided that these three (3) charters should be granted. G. H. S.

Orphans' Court.

November 19, 1894.

Stauffer's Estate.

Decedent's estate—Partnership and individual creditors—Distribution—Partnership debt reduced to judgment.

Partnership creditors have no right to come against the separate estate of one of the partners until the separate creditors have been paid the principal of their debts in full, unless (if in Pennsylvania the rule is even to this extent qualified) there is no partnership property and no solvent surviving partner.

Partnership creditors after exhausting the fund in the lifetime of all the partners cannot come *pari passu* with separate creditors against the separate estate of one who subsequently dies. Rights of partnership creditors as against separate creditors are not affected or enlarged by the fact that a firm debt was reduced to judgment.

Sur exceptions to adjudication.

At the audit of the account of Susanna Stauffer and Florie Frank, executrices of the estate of Frank W. Stauffer, the decedent, the following facts appeared:

The testator died August 28, 1893. The estate proved insolvent. The decedent was formerly in partnership with Henry C. Stoughton, under the firm name of H. C. Stoughton & Co. This firm became involved in 1890, and made a settlement with its creditors at 75 per cent., payable in instalments. The firm was unable to keep up the payments, however, and afterwards made a second settlement by agreement dated April 20, 1891, under which the creditors agreed to accept 10 per cent. and release their claims. The firm transacted business for about a month after this and then came to an end without formal dissolution. After this decedent went into business in his own name.

The fund in the hands of the executors arose entirely from property belonging to the decedent personally. No partnership assets or interest in partnership assets appear in the inventory or account.

Before the auditing Judge (ASHMAN), a claim in $2,809.25 was presented by the administrator of John Stauffer, deceased, it being urged in the said administrators' behalf, that this debt was incurred by the decedent for his own use and not for the benefit of the firm of H. C. Stoughton & Co. There was testimony as to declarations by the testator in his lifetime that the promissory notes given to the claimant were for his (testator's) individual debt.

The auditing Judge admitted the claim finding as follows:— "It is clear that the decedent could not bind the firm by obligations issued

Digitized by Google

after dissolution except so far as they were given in extention or in liquidation of its existing debts. There is no proof, however, that the notes now claimed upon were in lieu of former ones, while there is proof of a positive character which goes to show that they were given and accepted on account of the personal indebtedness of the testator. The declaration of the decedent himself was to this effect. The character of the debt, as partnership or separate, is not necessarily determined by the form of the obligation which is given to secure it: Maffet & Rhoades *v.* Leuckel, 93 Pa. 468. And the presumption that the notes were for a firm debt because they were made in the firm name, while it would relieve both claimant and testator from the suspicion of fraud, cannot be accepted in the face of evidence which is strong enough to overthrow the presumption."

Before the auditing Judge, J. Wesley Supplee also presented a claim upon a judgment note executed by H. C. Stoughton and F. W. Stauffer, April 3, 1893, at one day, for $200, on which a payment of $100 had been made and J. W. Supplee & Co.'s claim on five promissory notes drawn by H. C. Stoughton & Co., in all for $1,064.09, the consideration of which was money loaned to the firm. It also appeared that the five notes were given in pursuance of the agreement already referred to and to which Supplee & Co. were a party, by which the creditors agreed to accept in full settlement 10 per cent. in one month, 10 per cent. in three months, 10 per cent. in five months, etc., and which was superseded by a later agreement declaring that 20 per cent. having been paid, that would release on payment of an additional 10 per cent. if made before June 1, 1891. It also appeared that in signing the compromise agreement Supplee & Co. expressly admitted the receipt of two instalments amounting to $387.16, but they seem never to have been paid the third instalment. The auditing Judge also found that hence they were not bound by the covenant to release and admitted their claim for the balance, $677.53, but postponed its payment to the individual debts and to be made *pro rata* with the partnership claims, out of any residue which may remain with the accountant after satisfying the individual indebtedness of the decedent.

The auditing Judge also allowed a claim of Albert I. Keen, based upon a judgment obtained in the Common Pleas December, 1892, which is sufficiently referred to in the opinion of the Court, *infra*.

Exceptions to these findings were duly filed in behalf of J. Wesley Supplee and J. Wesley Supplee & Co., all to the effect that there was error in the holding that the promissory notes presented by the administrator of John Stauffer, deceased, and signed H. C. Stoughton & Co., represented an individual indebtedness of the decedent.

A. I. Phillips, *R. T. Boswell* and *W. C. Hannis*, for the exceptions.

A. C. Snyder, for the accountants.

December 1, 1894. PENROSE, J. We think the distribution in this case was made upon correct principles. Partnership creditors have no right to come against the separate estate of one of the partners until his separate creditors have been paid the principal of their debts in full, unless (if in Pennsylvania the rule is even to this extent qualified) there is no partnership property, no matter of how little value, and no solvent surviving partner. There was no proof that both did not exist in the present case. There certainly is a surviving partner; and this, in itself, has been held sufficient to exclude the joint creditors from competing with the separate creditors, even though such surviving partner be insolvent, provided he has not been declared bankrupt (*Ex parte* Janson, 3 Madd. 229). And there certainly was also, at one time, a partnership fund, out of which partnership creditors, including those who now except to the adjudication, received at least 20 per cent. of their claims. There is no authority, at least we have been referred to none, for the proposition that partnership creditors after exhausting the fund in the lifetime of all the partners, may come, *pari passu* with separate creditors, against the separate estate of one who subsequently dies.

It is conceded that the debt of the creditor by whom claim was made upon a note given in the name of the firm, was the separate debt of the decedent; but it did not follow from that fact alone that the creditor was party to a fraud against the firm, and, for that reason, should not be permitted to recover on the note against the real debtor. Fraud is not to be presumed. The note appears to have been given shortly after the dissolution of the firm, of which there was no public notice; and it may well be that the creditor supposed he was dealing with the firm. That he subsequently was made aware of the true state of affairs and that he regarded the decedent, by whom the note was given, as his only debtor, is indicated, to some extent at least, by the fact that no claim upon it appears ever to have been made against the former partner.

The attention of the auditing Judge does not seem to have been called to the fact that the debt of $124.51, for which judgment was obtained in the Common Pleas, was a debt of the partnership. The fact that a judgment has

Digitized by Google

been obtained upon a firm debt, under which execution may be levied upon either partnership property or the property of a partner, has no effect in changing or enlarging the rights of partnership creditors as against separate creditors (Lindley on Part., *1014.) This debt must, therefore, be excluded from the list of separate claims, and transferred to that of partnership creditors.

The adjudication, thus modified, is confirmed absolutely, and the exceptions, so far as they relate to anything beyond this, dismissed.

Counsel will prepare the necessary decree.

W. L. S.

January, 1895, 168.

Schmidt's Estate.

Suit by creditor of decedent in C. P.—Judgment against executor or administrator—Petition and answer—Hearing on, answer to be taken as verity.

The creditor of a decedent may sue in the Common Pleas; and the judgment thus obtained against the executor or administrator will not only continue the lien, but be *prima facie* evidence of the debt as against heirs or devisees, and impose upon them the duty of disproving it.

The validity of such judgment cannot be impeached collaterally except on the ground of fraud.

Petition to vacate order of sale, and answer.

Henry Schmidt, son, an heir and administrator d. b. n. c. t. a. of decedent had obtained, upon petition, an order to sell certain real estate of decedent to obtain funds necessary to pay certain debts due by the estate. The principal item was a judgment obtained in the Common Pleas against the estate, by Henry Schmidt, personally, on a note given him by decedent for various loans, amounting in all to $10,000.

The petition to vacate the order of sale denies that the debts were due by the estate but were obligations entered into by the widow of the decedent, in her lifetime. The petitioner is a daughter of decedent.

William Gorman, for petitioner.

Francis S. Cantrell, for respondent.

March 2, 1895. PENROSE, J. That a creditor of a decedent may sue in the Common Pleas, and that his judgment thus obtained against the executor or administrator will not only continue the lien, but be *prima facie* evidence of the debt as against heirs or devisees, and impose upon them the duty of disproving it, is well settled: Sergeant *v.* Ewing, 12 Casey, 156. The validity of the judgment cannot be impeached collaterally except on the ground of fraud; and if, in the present case, we accept the loose allegations of the petition that the petitioner believes and expects to prove that the judgments "are not debts due by the decedent but obligations entered into" by the executrix, who was also tenant for life, as a sufficient averment of fraud—though the word itself is not used, they are fully met by the statements in the answer, which as the case comes before us, must be accepted as verity.

That the plaintiff in the judgments, who is also a co-devisee with the petitioner, has been "in receipt of all the rents of the real estate" since the death of the executrix—the tenant for life, is manifestly immaterial, even if the fact were not denied, as it is, by the answer.

The petition to vacate the order of sale is dismissed.

F. B. N.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, APRIL 12, 1895.* [No. 9.

Supreme Court.

July, '94, 139. February 6, 1895.

Pennsylvania Railroad Company v. Montgomery County Passenger Railway Company.

Act of May 14, 1889—Street passenger railways—County roads—Consent of local authorities — Passenger railway passing through more than one township.

The general passenger railway Act of May 14, 1889, contemplates only railways within a city, and does not authorize the construction of electric railways to be run over country roads and connect one city or town with another.

Land condemned for a country road has imposed upon it no other servitude than that of passage, the laying of tracks upon it is the imposition of a new servitude; it is otherwise in the case of land taken for city streets.

Township authorities can permit an entry upon the public roads only so far as the public is concerned, but have no power to bind private property or subject it to a servitude for the benefit of any person or corporation other than the township and the public it represents. The carriage of passengers through the township on their journey from one city or borough to another is in no sense a township purpose.

A street railway has no right to build any portion of its road before it has acquired the right to complete it. If the proposed line passes through a city, borough or township intermediate the termini, and that city, borough or township refuses its consent to the construction of the road the power to build the road described in the application and charter cannot be exercised.

A street passenger railway company does not possess the right of eminent domain.

Appeal of the Pennsylvania Railroad Company, plaintiff, from the decree of the Common Pleas of Montgomery County, in a suit in equity in which the Montgomery County Passenger Railway Company was defendant.

The plaintiff filed a bill setting forth (Pars. 1, 2, 3,) that it was a railroad corporation and by virtue of its powers had constructed and continued to operate a branch railroad leading from its main line at Glen Loch in the County of Chester through the County of Montgomery to the county line between the counties of Bucks and Montgomery, known as the Trenton Cut-off; (4), that it owned in fee simple certain land in Upper Merion Township, Montgomery County, subject to a certain township road known as the Schuylkill River Road, and that over said road it had constructed an iron bridge for the sole passage of its cars and so as not to impede the public travel; (5), that on June 30, 1893, the defendant was chartered under the Act of Assembly of May 14, 1889, for the purpose of constructing, maintaining and operating a street railway for public use upon certain streets in the Boroughs of Bridgeport, West Conshohocken and Conshohocken, and upon certain public roads in the Townships of Upper Merion and Whitemarsh, Montgomery County; (7), that the said route passed over the land of the plaintiff under said bridge and for a distance of two miles through a rural region; that said Act of Assembly did not contemplate the building of passenger railways on public roads outside of cities and boroughs in the manner proposed, and that the said defendant had no legal authority to build its said railway on the line designated and prescribed by its charter; (8), that defendant had no right under its charter to build passenger railways elsewhere than on streets, and that said Act of Assembly is unconstitutional; (9), that the fee in the said public road being in the owner, the appellant, the public had the mere right of passage, and the owner had the use of the land for his own purpose in any way not inconsistent with the public easement, and was not required to make the land subject to additional and different burdens of a railway not contemplated when the land was appropriated for a public road, and when the defendant proposed to occupy said road for its purpose it was a taking of the plaintiff's land within the meaning of the constitutional provision requiring just compensation to be made for property taken, injured or destroyed, and therefore the said defendant had no legal power or authority to construct or maintain its railway without the permission of appellant, to the injury of appellant, it not having been granted the power to exercise the right of eminent domain by the Legislature of the Commonwealth of Pennsylvania; (11), that under the provision of the Act of Assembly approved June 19, 1871, entitled, "An Act relating to legal proceedings by or against corporations," it was the duty of the Court to examine, inquire and assertain whether the defendant corporation does in fact possess the right or franchise to do the act from which the injury to the appellant's rights and franchise will result.

And prayed an injunction preliminary until hearing, and perpetual thereafter, restraining the appellee from constructing its railway on the lands of the plaintiff in Upper Merion Township, or upon the township road; that the Court should

Digitized by Google

inquire whether the appellee possesses the right or franchise it claimed; and other relief.

The answer admitted paragraphs 1, 2, 3, 5 and 6 and answered paragraphs 4, 7, 8, 9 and 11, as follows:

(4) This defendant is not informed what land the said plaintiff owns in Upper Merion Township, Montgomery County; but avers that the said plaintiff is not the owner in fee of the bed of the township road known as the Schuylkill River road, over which the said plaintiffs have constructed a bridge in such a way as not to impede the passage of the accustomed travel along the same, and the said plaintiff has no rights whatever in the bed of the said Schuylkill River road to interfere with its use by the public.

(7) The defendant is a street passenger railway company within the meaning of the Act of Assembly under which it was incorporated, and the said Act of Assembly and the Constitution of Pennsylvania contemplate the construction and operation of street passenger railways in cities, boroughs and townships; and that it has full legal authority to construct and operate its said railway on the line designated and prescribed by its charter. That the said defendant is authorized by the Act of Assembly, and is permitted and has obtained the special consent of the supervisors of said Township of Upper Merion, to construct their railroad upon the route set forth in their charter; and that the proposed and designated line of defendant's railway passes over no land of the plaintiff's, nor does it interfere with any right whatever belonging to it. The route passes through Upper Merion Township, on the Schuylkill River road, to the Borough of West Conshohocken, through a well settled portion of the township, on a public road outside of the Borough of Bridgeport, over which said public road defendants are authorized by law and permission of the said supervisors to construct their railway.

(8) True it is that the Act of May 14, 1889, under which the defendant is incorporated, is entitled, "An Act to provide for the incorporation and government of street railway companies in this Commonwealth." The defendant denies all the other allegations set forth in paragraph eight of plaintiff's bill. The said Act does authorize the defendant to construct their railway upon the route authorized by their charter, and the permission of the local authorities of the townships and boroughs through which said railway passes. And the said Act is constitutional.

(9) The defendant suggests that the ninth paragraph in said bill is not drawn in accordance with the rules of equity practice, and is not required to answer it; but it denies the correctness of the allegations and legal conclusions therein set forth.

(11) The defendant denies that said plaintiff has any rights upon said Schuylkill River road which will be injured by the defendant's railway. The defendant possesses the unquestionable right to construct and operate its railway on the Schuylkill River road. Under the Act of Assembly of June 19, 1871, P. L. 1361, the Court may inquire whether the defendant does in fact possess its rights and franchises, but it is also the duty of the Court to inquire whether the plaintiff has any such rights as are claimed in the bill.

The case was referred to Charles Hunsicker, Esq., as master, before whom it was found, *inter alia*, that the charter of the plaintiff indicated a location and intention to construct its railway through five separate townships or boroughs, viz: Bridgeport, Upper Merion, West Conshohocken, Conshohocken and Whitemarsh; that the consent of Upper Merion to the location, construction and operation of the plaintiff's road had been obtained; that of West Conshohocken and Whitemarsh had not been obtained. The master recommended a decree for a perpetual injunction as prayed in the bill. This report was overruled by the Court, WEAND, J., delivering the opinion, and the plaintiff's bill was dismissed. The plaintiff took this appeal and assigned as error, *inter alia*—

Fourth. The fact that the appellant was the owner in fee of the land adjacent to and underlying the township road over which the appellee seeks to construct its railroad being admitted, the Court found that the appellant was not entitled to compensation for the additional burden placed upon the fee of the appellant underlying said township road by the construction and operation of an electric railway thereover.

Fifth. It being conceded that the appellant was the owner of the fee underlying the township road on which the appellee proposed to construct its railway, the Court erred in finding that the appellee without the grant of the power of eminent domain was entitled to enter upon the fee of the appellant and construct its railway without obtaining the consent of the appellant as owner of such fee.

Sixth. The Court erred in finding that the Act of May 14, 1889, entitled "An Act to provide for the incorporation and government of street railway companies in this Commonwealth" under which Act the appellee was chartered, authorized it to construct an electric railway on township roads admittedly not streets, because: (*a*) The title does not refer to anything but streets. (*b*) The body of the Act does not clearly and plainly include township roads. (*c*) If the body of the Act did include township roads the Act in that particular would be void because such purpose was not clearly expressed in the title of the Act.

Digitized by Google

Seventh. The Court erred in holding that the adjoining and underlying landowner upon a country road had the same and no other rights than those which pertain to an adjoining owner upon a street in a thickly populated city.

Eighth. The Court erred in holding that the said Act of Assembly of May 14, 1889, contemplates the chartering of one company to build a road in more than one municipality.

Ninth. The Court erred in finding that the appellee was authorized by its charter to construct its proposed road over the premises of the appellant, although the master had found as a fact, and the Court did not overrule or controvert such finding, that the charter of the appellee company indicated a location and the appellee proposed to construct its railway in and through five (5) separate local municipalities. Because of this fact the Court should have held the appellee's charter to have been invalid.

Tenth. It being found as a fact by the master and conceded by the Court that the appellee had only procured the consent of one of the five municipalities through which it proposed to construct its railway, the Court erred in holding that the appellee was authorized to construct over the land of this appellant because its land was located within the assenting municipality.

Chas. H. Stinson and *David W. Sellers*, (with them *C. Henry Stinson* and *William F. Solly*), for appellant.

The appropriation of land for a public road imposes upon it only the servitude of a roadway which shall be at all times free and open to the public as a highway. Any other use is the imposition of a burden which is a taking within Art. XVI. sec. 8, of the Constitution, for which compensation is required.

Mifflin *v.* Railroad Co., 4 Harris, 182.
Arthur Chambers *v.* Daniel Furry *et al.*, 1 Yeates, 167.
A. Kirk Lewis *v.* Thomas Jones *et al.*, 1 Barr, 336.
Chess *v.* Manown, 3 Watts, 219.
Phillips *v.* Dunkirk, Warren & Pittsburgh R. R. Co., 78 Pa. 177.
Lance's Appeal, 55 Id. 16.
Jones *v.* Erie & Wyoming Valley R. R. Co., 151 Id. 30.
Junction R. R. *v.* Boyd, 8 Phila. R., 224.
Trustees, etc, *v.* Auburn & Rochester R. R. Co., 3 Hill, 567.
Williams *v.* N. Y. Cent. R. R. Co., 16 N. Y., 97.
Mahon *v.* N. Y. Cent. R. R. Co., 24 Id. 658.
Bloomfield & Rochester Gas Co. *v.* Calkins, 62 Id. 386.
Inhabitants of Springfield *v.* Connecticut River R. R. Co., 4 Cush. 63.

The title of the Act of Assembly of May 14, 1889, under which the appellee claims its right to build its electric railway, does not refer to anything but *streets*, and does not include township roads, and in the body of the Act the words used are "streets" and "highways," and in no place in said Act is the word "road" used.

The signification of the word "street" is well defined. "A street is a road or public way in a city, town or village."

Elliot on Roads and Streets, p. 5, 12, citing
Brace *v.* N. Y. Cent. R. R. Co., 27 N. Y. 269.
State *v.* Moriarty, 74 Ind. 104.
Heiple *v.* East Portland, 13 Ore. 97.
Perrin *v.* N. Y. Cent. R. R. Co., 36 N. Y. 120.

There is a great difference between the streets of a city, town or village and a country road.

2 Dillon, Munic. Corp. sec. 688, note 1, and cases cited.
Cincinnati *v.* White, 6 Peters, 431.
Sterling's Appeal, 111 Pa. 37.
Moyamensing Avenue, 4 S. & R. 105.
Sharrett's Road, 8 Pa. 89.
Osage Street, 90 Id. 117.
McDavitt *v.* Peoples' Nat. Gas Co., 160 Id. 367.
Indianapolis *v.* Croas, 7 Ind. 9.
Lafayette *v.* Jenners, 10 Id. 74.
Clark *v.* Commonwealth, 14 Bush 166.

The Act, therefore, refers only to the streets and highways of a city, town or village, it gives no authority to construct a railway over country roads.

If it attempts to do so it is unconstitutional. Its title is an Act to incorporate street passenger railway companies.

In Booth on Street Railways, section 1, street railways are defined as those which are constructed on streets. A company to build a railway upon a township road is not a *street* passenger railway company. So far as it authorizes township roads to be used it misleads, and is bad. Of course the title need not be an index of contents, but the subject must be clearly expressed in the title.

The subject of building passenger railways on township roads is not at all expressed in the title of an Act providing for the "incorporation of street passenger railways." The two things are entirely different. *Expressio unius est exclusio alterius.*

There is no analogy between these Acts and the railroad Act of 1868 or the General Corporation Act of 1874.

The title here is not in general terms at all. It is restricted to a particular kind of railways, having a clear signification.

Dorsey's Appeal, 72 Pa. 192.
Union Passenger Railway Company's Appeal, 81 * Id. 91.
Beckert *v.* Allegheny, 85 Id. 191.
Road in Phœnixville, 109 Id. 44.
Rogers *v.* Improvement Co., 109 Id. 109.
In re Carbondale and Turnpike Road, 22 WEEKLY NOTES, 105.

The Act does not contemplate the chartering

Digitized by Google

of one company to build its road in more than one municipality.

1. Throughout the entire Act it is, "the local authorities of the city," etc., *not the local authorities of the cities*, etc., which is the form which would have been used had the Legislature intended that one company was to be chartered to extend through more than one municipality. 2. It is a railway confined to highways. 3. It has no power of eminent domain. 4. It contemplates a circuit. 5. Section 12 provides that every company shall maintain an office *where* said railroad is located. 6. Section 14 provides for completing the circuit. 7. Section 15 provides for the consent of the local authorities and a continuous route. 8. Section 16 shows that a location within one city, borough or township was contemplated.

The Act must contemplate the building of a road in only one local jurisdiction, that is in one city, one borough or one township, for if not limited to one jurisdiction it has no limit, and can extend from one end of the State to the other. The Legislature did not intend any such power should be given to a "street railway," for if it had that intention, it would have clearly set it forth, as it did in the Act of 1868 in relation to railroads, which specifically authorizes the incorporation of a company to build from one point in the State to any other part in the State.

Until the consent of the authorities of each one of the municipalities through which the projected road is to pass, it can do nothing legally by way of construction.

In re Kings County Elevated R. R. Co., 105 N. Y. 97.
Rochester Electric Ry. Co. *v.* Wilkins, 123 Id. 361.

N. H. Larzelere and *John G. Johnson*, (with them *Jas. B. Holland*), for appellee.

The owner of lands bounding on a public highway has no right to compensation because of the construction thereon of an electric railway. The appellant had no greater right to compensation than it would have possessed had its land been located on a street of a borough.

Every use may be made of a street or a highway, which could have been contemplated originally. Where land is taken for a highway, full compensation is made to the owner. This includes compensation for any use to which, thereafter, it may properly be put.

McDavitt *v.* Peoples' Nat. Gas. Co., 160 Pa. 367.
Rafferty *v.* Central Traction Co., 147 Id. 590.

The Act of 1889 includes country roads as well as streets. The argument of the appellant in this respect would cover turnpikes as well as roads, nevertheless, section 17 of the Act provides that, "Any passenger railway incorporated under this Act shall have, and is hereby granted, power, by its officers and servants, to ascertain and define such route as they may deem expedient, over, upon and along any *turnpike* or *turnpikes*, not however exceeding sufficient width for two tracks," etc.

The appellant claims that the title of the Act of 1889, viz: "An Act to provide for the incorporation and government of street railway companies in this Commonwealth," discloses no purpose to permit the organization of a company to build upon a country road.

The Act of 1889 was intended to legalize incorporations which had been held to be improper because of the unconstitutionality, *inter alia*, of the Act of 1878, which was entitled "An Act to provide for the incorporation of street railway companies in cities of the third, fourth and fifth classes and in the boroughs and townships in this Commonwealth."

By the General Railway Act of 1868, it was provided:—

This Act shall not be so construed as to authorize the formation of street passenger railway companies to construct passenger railways under or by virtue of its provisions in any city or borough in this Commonwealth.

By the Constitution it was provided:—

No street passenger railway shall be constructed within the limits of any city, borough or township, without the consent of its local authorities.

Can there be any reasonable doubt as to the fact of disclosure, by the title of this Act, of a purpose to organize street passenger railway companies to do all that such companies, as the same were ordinarily understood to exist, might do? The Constitution itself contemplated the consent of "township authorities" to the construction of a "street passenger railway company." How could there be such a construction in a township, saving upon an ordinary country road? By "street passenger railway company" was meant, a company authorized to construct its road, not by virtue of an exercise of the right of eminent domain, upon its own right of way; but upon the public highways. Could anyone have been deceived by the title of this Act into a belief that it did not accomplish the purpose of prior Acts which had failed, *i. e.*, legalize the incorporation of companies authorized to locate railways upon streets—"streets" being understood in the broadest sense?

The Act of 1889 does not restrict a street railway company organized thereunder, to the construction of its road in only one township, borough or municipality.

A township may be so situated that another may be inserted into it like a wedge. Must it be deprived of railway facilities unless the impossible contingency will occur of *two* compan-

Digitized by Google

ies, neither with sufficient business, being organized? Must the travel between two boroughs be left without railway service because of a short intervening space located in another township?

It is the right of a passenger railway company organized under the Act of 1889 for the construction of a road extending through more than one municipality, borough or township, to construct such road in parts, as the same from time to time shall be authorized to be constructed by the local authorities immediately concerned.

A railway cannot be constructed in a moment. In its directors, is reposed the discretion as to the method of construction, subject to the duty expressed by the statute, to commence, and to complete, within a specified time. Had no consent of local authorities been required by the Constitution, or by the Act of 1889, would it have been competent for a land owner to interfere with the construction of the road at one point, because the whole was not in process of simultaneous construction? Does the requirement of consent amount to more than a making illegal, of a construction in those parts in which the requisite consent has not been given? Does it in any way affect an authorized construction?

An abutting land owner has no right, where the construction of the railway is with the consent of the authorities of the locality in which it is being laid, to object to such construction because the consent of the authorities of other localities, through which the same runs, has not been obtained.

Phila. & Grays Ferry Pass. Ry. Co.'s Appeal, 102 Pa. 123.
Market Co. *v.* Phila. Terminal R. R. Co., 142 Id. 593.
Junction Pass. Ry. *v.* Williamsport Pass. Ry., 154 Id. 116.
National Docks R. R. Co. *v.* Central R. R. Co, 32 N. J. Eq. 760.

A Court of equity will not grant an injunction where to do so will be by indirection declaring the forfeiture of a charter.

Ottaquechee Woolen Co. *v.* Moses Newton *et al*, 57 Vt. 451.

March 25, 1895. WILLIAMS, J. Our system of street passenger railways had its origin in the days of special legislation. Each company then had its own Act of incorporation in which its route was described and its powers defined. These companies were confined to the cities and large towns of the State, and their cars were moved by horse power, and were a substitute for the omnibus and other vehicles devoted to the carriage of passengers which had been previously in common use. After the adoption of the new Constitution the practice of separate legislation for each company became impracticable, and in 1878 a general law was passed providing for the organization of street railway companies for the purpose of "constructing, maintaining and operating a street railway for public use in the conveyance of passengers." No power of eminent domain was conferred on these companies, but the several provisions of the Act show that such railways were to be constructed upon the streets, conforming to the grade of the streets, and subject to the regulation of the municipal authorities. The Act of 1876 gave to street railway companies in cities of the first class the right to "use other than animal power" in the movement of their cars. The Act of May, 1878, conferred the like right upon street railway companies in cities of the second and third classes. The general law further provided that any company organized under its provisions should maintain an office for the transaction of its business "in the city" where its railway was located. All these provisions show that the street railways contemplated by the general Act of 1878 were intended for the accommodation of the crowded streets of cities and for no other purpose. The present general law relating to these corporations was passed in 1889. It was intended to bring together the valuable provisions of several Acts of Assembly into one comprehensive statute, and to make some changes that experience had shown to be desirable. It authorized the incorporation of five or more persons for the purpose of "constructing, maintaining and operating a street railway on any street or highway upon which no track is laid or authorized to be laid" under existing charters, with the privilege of occupying "any street" . . . . by any power other than by locomotive. It required the route to be set out in the application for incorporation stating the streets and highways upon which it was to be built, and showing "the circuit of the route, the amount of the capital stock of the company," and other particulars. It required all companies incorporated under its provisions to maintain an office where the railroad was located. Section 15, provided that "no street passenger railway shall be constructed by any company incorporated under this Act within the limits of any city, borough or townships without the consent of the local authorities thereof, nor shall any street passenger railway be incorporated hereunder which shall not have a continuous route from the beginning to the end, forming a complete circuit with its own track, excepting the five hundred feet to be used under section fourteen hereof."

From these provisions we think it is apparent that the attempt now being made to convert these city conveniences into long lines of transportation connecting widely separated cities and towns by electric railways traversing country roads, was not anticipated or provided for by the Legislature. The failure to confer upon these

Digitized by Google

companies the power of eminent domain would, if it stood alone, be sufficient to justify this conclusion. The land taken for streets in cities and boroughs is in the exclusive possession of the municipality, which may use the foot-way as well as the cartway for any urban servitude without further compensation to the lot owners: Provost *v.* The Water Company, 162 Pa. 275; Reading *v.* Davis, 153 Id. 360; McDevitt *v.* The Gas Company, 160 Id. 367. Nor does the construction of a street passenger railway upon the surface of the street impose any additional servitude upon the property fronting on the street so occupied: Rafferty *v.* The Traction Company, 147 Pa. 549. But the easement acquired by the public by proceedings under the road laws is an easement for passage only. The owner is entitled to the possession of his land for all other purposes. We held, therefore, in Sterling's Appeal, 111 Pa. 35, that the occupancy of a country road by a pipe line imposed an additional servitude upon the farm owner, while in McDevitt *v.* The Gas Company, *supra*, we held that a pipe line, laid within the limits of the street by authority of the city did not impose any additional servitude on the lot owner.

The reason for the distinction is fully stated in the opinion in the latter case. The same distinction exists, and for the same reasons, between urban and suburban property as to the right of corporations to occupy a highway for a street passenger railway. This, as will be seen by the cases cited above, is an urban servitude to which suburban property has not been subjected by law up to this time. The consent of township authorities justifies an entry upon the public road so far as the public is concerned, but the supervisors of the townships have no power to bind private property or subject it to a servitude for the benefit of any person or corporation other than the township and the public it represents. The carriage of passengers through the township on their journey from one city or borough to another by rail is in no sense a township purpose; and whether these passengers make their journey in cars drawn by a locomotive over a steam railroad, or in those propelled by electricity over tracks laid upon the highways, is immaterial both to tax payers and to land owners along the route travelled except as the adoption of one or the other of these modes of transportation may affect the township roads or the private property of citizens. When the supervisors give their consent to the occupation of the township roads by a street railway they speak as the representatives of those who build, and those who use the roads, but not as the representatives of the private property over which the roads pass. The street railway companies can not reach the property owners either through "the local authorities" or by the right of eminent domain, as the law now stands; and it is not easy to see how such a company can protect itself in the use of country roads except by contract with every owner of property along the roads they wish to occupy.

The trouble is that the supposed needs of the country have outgrown its legislation, and an effort is now being made to adapt street railways to purposes for which they were never intended, and for which the existing legislation relating to them was not framed.

Cities and boroughs possess the necessary power over their streets to enable them to authorize their use by a street railway. Townships do not possess municipal powers, and under existing laws their control over the public roads is limited. But in this connection another interesting question suggests itself. How is the assent of "the local authorities" to be obtained in any given case, and what is the proper evidence that it has been given? The township books in the custody of the town clerk are the records of the township and should afford evidence of the action taken by the supervisors in all matters of public importance. A paper in the pocket of a contractor or of some officer of a corporation is not the proper evidence of action by the township, or the school district. The action needed is not that of the individuals who compose the board, but of the official body. Thus it was held that a contract signed by the members of the school board separately did not bind the district. The best evidence of their official action was their minutes kept by the secretary: Wachob *v.* Bingham School District, 8 Phila. 568. For the same reason a contract signed by the president and secretary was held to be invalid. It had not been acted upon by the board when in session: School District *v.* Padden, 89 Pa. 395. One supervisor may bind the township by an act that is ministerial in its character: Dull *v.* Ridgway, 9 Pa. 272; Pottsville *v.* Norwegian Township, 14 Id. 543. Not so, however, when the act is one that requires deliberation and the exercise of judgment: Cooper *v.* Lampeter Township, 8 Watts, 125; Township *v.* Gibboney, 94 Pa. 534; Township *v.* Parson, 105 Id. 360. In such cases the supervisors must be together and their action must be taken in their official character, and should appear upon the township book kept by the town elerk. If not so taken it does not bind the township, and has no validity whatever. The supervisors should consider and deliberate upon any application made to them for leave to occupy any of the township roads with a street railway. If they decide to grant the application upon certain terms and conditions as to the manner and extent of the occupancy permitted and the extent of repairs to be required, these terms should appear in the record of the

Digitized by Google

meeting as well as the consent; and a contract that does not rest on such official action properly taken by the proper officers is utterly worthless.

But we know as matter of current history that street railways have been projected, and actually constructed, and are now in operation, over country roads where no legal consent has been obtained, and where no attention has been paid to the rights of property holders. Such railways can not now be torn up or enjoined either by the township officers or at the instance of land owners along their routes. Where such enterprises have been allowed to proceed and the expenditure of large sums of money has been permitted, it would be inequitable to correct at this time what was a mutual mistake under the influence of which these enterprises have been pushed to completion; but it would seem desirable that such charters should not be granted in future until the Legislature has made such provision for the assessment of damages to property as shall protect the owners from the additional servitude which the construction of electric railways does certainly impose upon all adjoining owners outside of municipal boundaries.

At present an action at law is the only remedy within the reach of an injured person who has suffered a railway to be built across his land without objection; but equity will interpose to protect him if he comes in proper time, by enjoining the construction until his damages have been paid or secured to his satisfaction.

The only remaining question raised in this case is over the right of a street railway to build any part of its line before it has the right to complete it. A steam railroad may enter upon any part of its line and commence building subject only to its duty to complete the line in accordance with its charter. The reason of this is that it is clothed with the power of eminent domain and may enter and appropriate land regardless of the will of the owner. A street railway company, as we have seen, does not possess the power of eminent domain. It can not build under its charter alone. It must have the consent of the proper municipal or local authorities or it can not move. If the proposed line passes through a city, borough or township intermediate the termini, and that city, borough or township refuses its permission, the power to build the road described in the application and charter can not be exercised. It must be possible for the company to complete its line before it has a right as against any city, borough or township into which its line extends, to begin work. It is not possible for such company to complete its line without the consent of the local authorities of the districts through which it passes; and where this is refnsed in one or more of the municipal or quasi municipal divisions through which its line runs, the building of its proposed road under its charter is an impossibility. Let us suppose, for purposes of illustration, a charter to authorize the construction of a street railway from —a— through certain roads in —b—, —c— and —d— to the city of —E—; and that consent has been obtained from the local authorities of —a—, of —c— and of —E— but refused by the local authorities of —b— and —d—. The proposed line is thereby cut up into three wholly unconnected pieces. It is very clear that under a charter authorizing the building of a line of road from —a— to —E— the company could not lawfully build three distinct local roads, viz: one in —a—, another in —c—, and the third in —E—. The consent given by "a" to the construction of the line of road authorized by the charter would not estop the local authorities from objecting to the construction of a local road within its own limits. When confronted with its own consent "a" could well reply "the road to which consent was given is not the road you are now building, for the building of that road has become impossible by the action of the authorities of —b— and —d—."

The learned Judge of the Court below said in the conclusion of his opinion, "corporations of this character are multiplying rapidly and we may assume they are demanded by the public." This isa strong reason for meeting the questions involved in this case squarely, that the legislation needed to protect property owners against this class of corporations may be had, at the same time that the powers necessary to convert what was intended as an urban convenience into a general mode of transportation are considered and conferred by the law makers.

In this case the defendant's line of so-called street railway extends through two boroughs, two townships and over one county bridge over the Schuylkill river. The line and circuit of its road over the several highways to be occupied is fully set forth in its charter.

The consent of the local authorities of West Conshohocken Borough and of Whitemarsh Township were refused, that of Upper Merion Township was given, that of the Borough of Conshohocken was given and has since been withdrawn. Under such circumstances the building of the line of street railway described in, and authorized by the charter is impossible, and the company has no right to proceed. The conclusions of the learned master were correctly drawn and the decree recommended by him should have been made. The decree appealed from is now reversed and the record remitted with direction to the Court below to make the decree recommended by the master awarding the injunction prayed for. The costs of this appeal to be paid by the appellee. H. B.

Digitized by Google

Jan. '95, 220. February 20, 1895.

Lehigh Coal and Navigation Co. v. The Inter-County Street Railway Co.

Street passenger railway company—Act of May 14, 1889—Act of June 12, 1893, P. L. 459—Maintenance of public roads—Injunction—Bribing local authorities.

One who has by contract with a township, under authority of the Act of June 12, 1893, undertaken the making and repair of all the public roads within the limits of the township, has the right to object to the introduction or maintenance of any obstruction to the public travel thereon which may increase the burden of repair and add to the difficulty of suitable supervision.

The consent of a supervisor to the occupation or use of a township road, when obtained by bribery, will not bind the township or amount to a giving of consent by it.

Where a passenger railway company, authorized to build a continuous road through several townships, provided the assent of the local authorities to the construction of the road be obtained, fails to obtain the assent of one, it may be restrained by injunction from beginning the construction of its road, even in a township whose authorities have given consent; such an injunction is not "a practical repeal of the charter," it merely restrains the company from exercising its rights under the charter until it has complied with the condition precedent contained therein.

Appeal of the Lehigh Coal and Navigation Company, plaintiff, from the decree of the Common Pleas of Schuylkill County in a suit in which the Inter-County Street Railway Company was defendant. The plaintiff filed a bill setting out that it was the owner of property in Rahn township, Schuylkill County, valued for purposes of taxation at $987,575, the entire taxable property in the township being $1,204,905; that in carrying on its extensive coal operations in said district it required the continuous use of the public road therein, leading from the borough of Tamaqua to the borough of Lansford, and owned, subject to the public easement, the land over which that road passes and, practically, all the land abutting thereon on either side; that in February, 1894, it entered into the contract with the said township, provided for by the Act of June 12, 1893, whereby the complainant was bound to make and repair the roads of said township and save the township harmless from all damages from non or defective performance of the contract. That the Tamaqua and Lansford Street Railway Company, incorporated November 2, 1894, to construct and operate a street railway in Tamaqua through Rahn township to Lansford, had applied to and obtained from the local authorities of Rahn township, on the 9th day of May, 1894, their consent to the construction and operation by the said company of its street railway, on the public road in said township, leading from Tamaqua to Lansford, and had proceeded to construct its street railway on said public road, and, at the time of filing the bill, had graded about two miles of its passenger railway thereon; that the Inter-County Street Railway Company, defendant, incorporated 27 April, 1894, under the Act of 14 May, 1889, for the purpose of building and operating a street railway between Tamaqua and Lansford, through Rahn township, had, prior to May 9, 1894, applied to Morris Coll, supervisor of Rahn township, for his consent to the building and operation of a street railway by the Inter-County Company on the same public road in said township, leading from Tamaqua to Lansford; that Coll, at first refusing, subsequently agreed to give consent, in consideration of a contract from the Inter-County Company to employ him, said Coll, and his son, as long as he, the said Coll, should live; that a contract in writing was entered into by said Inter-County Company with said Coll, stipulating to give him and his son such employment, and that thereupon the written consent of said Coll, as supervisor of said township, was delivered to said Inter-County Company, on the 9th of May, 1894, but after the execution and delivery of the consent of the local authorities of Rahn township, to the building and operating by the Tamaqua and Lansford Company of its road on the same highway; that the consent obtained by the Inter-County Company was without the knowledge or approval of the township auditors and given without consultation with the duly appointed counsel of the township; that the consent given to the Tamaqua and Lansford Company was obtained at a meeting of the supervisor and a majority of the auditors of the township, at which the counsel of the township was present, and after Coll, the supervisor, had explained the corrupt agreement he proposed to carry out with the Inter-County Company, and had been informed that such a corrupt agreement would not be binding on the township; that, July 30, 1894, the Inter-County Company had begun to dig up said public road for the purpose of constructing a street railway thereon, thereby making the road inconvenient and unsafe for travel, and requiring the outlay, by the complainant, of a large sum of money to repair said road, under its contract with the township, and that neither the Inter-County Company nor its stockholders were able to respond in damages; that the complainant had called on Coll, the supervisor, to protect the township from such illegal intrusion of the Inter-County Company on said highway, but Coll refused to act, unless the complainant would agree to do for him and his son what the Inter-County Company had agreed to do.

The bill prayed an injunction, preliminary

Digitized by Google

until hearing and perpetual thereafter, restraining the Inter-County Company from further interfering with that public road, and a mandatory injunction requiring the Inter-County Company to put the public road in the same condition it was in, when the Inter-County Company began to construct its street railway thereon.

The answer admitted the value of the taxable property of complainant in Rahn township and and also the total value of the taxable property in said township as stated in the bill of complaint; asserted that, if complainant had made a contract with Rahn township under the provisions of the Act of 12 June, 1893, the complainant was not bound thereby, because the Act referred to was unconstitutional; alleged that the consent given by the supervisor and auditors to the Tamaqua and Lansford Street Railway Company, May 9, 1894, was void against the Inter-County Company, because subsequent in time to a right of way over the public road in question, given by Coll, supervisor of said township, to said Inter-County Company; admitted the commencement by the Tamaqua and Lansford Company of the construction of its street railway on the public road in Rahn township; the agreement of the Inter-County Company with Coll, supervisor, to give him and his son employment, if he would grant that company the right of way over the public road in question, but alleged that such employment was only to be given in the event of Coll or his son being discharged from the employ of the complainant, because of signing such right of way, and the answer further alleged that the agreement of the Inter-County Company to employ Coll and his son was asked for and given after Coll had given the right of way for the Inter-County Company; denied that any corrupt or illegal means were used by the Inter-County Company in procuring the right of way in question, from Coll, supervisor; admitted that the consent from Coll, supervisor, to the Inter-County Company was obtained without the knowledge or consent of the township auditors and without consultation with the duly appointed counsel of the township, alleging that neither was necessary in granting the consent referred to; alleged that the consent of the local authorities, executed and delivered to the Tamaqua and Lansford Company on the 9th of May, 1894, was executed and delivered by said Coll, supervisor of Rahn township, under duress upon misrepresentations, by coercion and under undue influence, brought to bear upon him by the persons present at the time, and that he was compelled and fraudulently advised to sign said paper; the specifications of these charges as set out in the answer being: That F. G. Farquhar, who it was alleged was acting as attorney for complainants, pretended to read from a book and informed Coll that unless he signed the consent for the Tamaqua and Lansford Company, he, Coll, would be put to the penitentiary, that Coll, being alone in said room with said Farquhar, and attempting to leave it was prevented by said Farquhar and told by him, that he, Coll, could not leave the room until he had signed that paper; that soon after the other parties, viz.: Henry Poh and Henry Kennedy, the two township auditors, Thomas F. McLaughlin, one of the bosses of complainant, W. D. Zehner, its superintendent, and F. P. Spiese, president of the Tamaqua and Lansford Company, came back into the room. That, thereupon, Coll was promised a written agreement from the complainant, guaranteeing him and his son continuous employment if he signed the paper as requested, whereupon Coll did sign it.

The answer admitted that the Inter-County Company did, on the 30th of July, 1894, enter upon the public road in question to construct a street railway thereon, denied that its operations make the road unsafe or inconvenient for travel, or that the respondent company is unable to answer in damages.

PERSHING, P. J., granted a preliminary injunction, but on motion and after hearing, dissolved it, delivering the following opinion:

"The first section of the Act of June 12, 1893, P. L. 459, provides, that any 'one or more taxpayers of any township or road district may acquire the right to furnish all the materials and labor necessary for opening, making, amending and repairing the public highways and bridges of said township or road district, etc.'

"The Lehigh Coal and Navigation Company, complainant, is a taxpayer in the township of Rahn, and acquired this right over the highways of said township by a contract entered into with the supervisor in February, 1894.

"The Inter-County Street Railway Company was incorporated under the Act of May 14, 1889, P. L. 211, providing 'for the incorporation and government of street railway companies in this Commonwealth.' Section 15 of this Act is as follows: 'No street passenger railway shall be constructed by any company incorporated under this Act within the limits of any city, borough or township without the consent of the local authorities thereof,' etc. This is a repetition of the language of sec. 10, Art. 17 of the Constitution. Without this consent a company incorporated under the Act of 1889, has no right, present or prospective, to occupy streets for railway purposes: Larimer and L. St. Ry. Co. *v.* Larimer St. Ry. Co., 137 Pa. 533.

"The right of way through Rahn township

Digitized by Google

was obtained by the Inter-County Railway Company, the respondent, by a written agreement entered into with Morris Coll, the supervisor of said township, on the 2nd day of May, 1894. Under a local statute this township elects but one supervisor.

"The bill charges, par. 9, that on the 30th of July last, the Inter-County Railway Company, by its officers, employés, etc., entered upon said public road in Rahn township leading from the borough of Tamaqua to the borough of Lansford (in Carbon County) 'and are now engaged in grading the same for the purpose of constructing, maintaining and operating on and over the same an electric street passenger railway, ... and in grading for its line it is digging up said public road and occupying so much of it as to make it inconvenient and unsafe for travel, and causing such injury to said road as will cost a large sum in order to repair and amend it, which cost will have to be borne by this company in pursuance of its said contract with said township.' This is the extent of any alleged damage done to the complainant. Nowhere in the bill is special injury charged. The bill of complaint, in the fourth paragraph, sets forth, that the Tamaqua and Lansford Street Railway Company was duly incorporated under the Act of 1889, on the 2nd day of November, 1891, with power to construct a street railway through Rahn township to Lansford, and that the right of way through said township was granted said company by the local authorities on May 9, 1894. It is further charged that the prior right of way granted to the Inter-County Railway Company was obtained by the bribery of the supervisor and was therefore void. The substance of the evidence on this point is this: When the Inter-County Railway Company made application to Morris Coll, supervisor, for the right of way, he expressed a fear that he and his son would be discharged from the employ of the Lehigh Coal and Navigation Company, if he complied with the request. To induce him to sign the right of way, the company, through its president, secretary and treasurer, executed a written agreement in which it was stipulated, that should Coll and his son be discharged from the service of the Lehigh Coal and Navigation Company, in consequence of his granting the right of way requested by the Inter-County Railway Company, he and his son should be taken into the employment of said company, Morris Coll to be paid $1.50 per day 'for the rest of his natural life, when work starts on the construction of the said electric railway.' Coll is now 74 years of age. The son was to receive 75 cents per day till such time as his services could be used in some capacity at wages commensurate with their value.

"On the other hand the Inter-County Railway Company alleges that the signature of Morris Coll as supervisor was obtained to the right of way granted to the Lansford and Tamaqua Railway Company, by means of intimidation and threats of a criminal prosecution. Whether the means resorted to by one side would constitute bribery, and if so, how far it would affect the grant made to the Inter-County Company, and whether on the other side the grant was obtained through coercion, we will not at this stage of the case undertake to discuss. We doubt whether these questions are properly before us. These and other matters of fact must be disposed of in some proceeding between the parties directly interested. The Tamaqua and Lansford Railway Company is not a party to this litigation; it has made no complaint that the Inter-County Railway Company has in any way done it injury or trespassed upon its corporate rights, or that it has the prior right. The only question before us is, has the complainant sustained the allegations of the bill? It is not charged that the work done by the Inter-County people is unnecessary for the construction of its railway. The evidence shows that no more obstruction of the highway has resulted than is usual, if not inevitable, in the use of a road for such a purpose. It also shows the care taken to avoid accidents by the stationing of watchmen and the use of lights, and the contract of the company to restore the road to safe condition, and also to indemnify the township against loss.

"The complainant's prayers for relief are very broad. They are as follows:

"First. That the said Inter-County Street Railway Company, its officers, agents, contractors and employés, may be restrained by an injunction, preliminary until hearing and perpetual thereafter, from constructing, maintaining or operating a street railway on or over the public road in Rahn township, leading from the borough of Tamaqua to the borough of Lansford, or from entering upon or further interfering with said public road for that purpose.

"Second. That said respondent company may be ordered and directed by this Court to remove all obstructions from said public road and place the same in as good condition as it was in, on and before the 30th day of July, 1894, when said respondent company entered upon and began the construction thereon of a street railway.

"A decree which would embody these prayers would practically be a repeal of respondent's charter, which can be done alone by the Legislature, or a judicial forfeiture of its franchises, which can only be done by the intervention of the Commonwealth through the attorney-general.

"An ordinance granting a franchise to occupy

Digitized by Google

and use public streets has the force and effect of a statute, and for a violation of the provisions of the ordinance an action in quo warranto may be maintained in the name of the State to forfeit the charter. The proceeding must be a direct one against the corporation: Lejee *v.* Continental Pass. Ry. Co., 10 Phila. 362; Booth on Electric Railways, sections 7 and 49.

"In a proceeding in equity, in which the State is not a party, the Court ought not to render a judgment which would, in effect, revoke the charter.

"If the charter is inoperative because it describes a route not authorized by the Act of 1889, that question can most effectively be determined in another form of proceeding: Junction P. Ry. *v.* Williamsport P. Ry., 154 Pa. 130.

"This is so well settled that it is unnecessary to quote other authorities.

"And now August 25th, 1894, the preliminary injunction is dissolved."

The case proceeded to final hearing before BECHTEL and WEIDMAN, JJ., on the same evidence which had been before the President Judge. The Court dismissed the bill. The plaintiff took this appeal.

Fergus G. Farquhar and *John W. Ryon*, (with them *George M. Roads*), for appellant.

The plaintiff suffers special damage (1) as an abutting owner.

R. R. Co.'s Appeal, 115 Pa. 514.
Sterling's Appeal, 111 Id. 35.
Edgewood R. R. Co.'s Appeal, 79 Id. 257.

(2). Because it had undertaken the care of the road entered upon—by a contract authorized by Act of June 12, 1893, P. L. 451. The plaintiff therefore has a standing in equity, it is only doing what the township or its executive officer should have done.

Commissioners *v.* Long, 2 Pars. Eq. 143.

The fraud of the supervisor justifies the interposition of equity to prevent the effect of his corrupt bargain.

1 White & Tudor, Lead. Cas. in Eq. 629.
Bispham's Princip. of Eq., sec. 229.

J. O. Ulrich and *James Ryon*, (with them *Lewin W. Barringer*), for appellee

The relation between the complainants and the township of Rahn, by virtue of complainants' contract to repair the public roads, is contractual; and hence the complainants are liable only by the terms of their contract and to no one except the township.

Jones on Neg. of Municipal Corporations, page 334, pl. 171.
Buffalo *v.* Holloway, 7 N. Y. 493.
Sherman & Redfield on Neg., P. 183, page 105.
Robbins *v.* Chicago, 4 Wall. 657.

The township of Rahn cannot recover from the complainant for damages caused exclusively by the act of township or persons or corporations acting under the authority of the township.

Where a public officer neglects keeping the highway in repair the municipality which he represents must answer for it.

Township of Newlin *v.* Davis, 77 Pa. 317.

The roads are the roads of the township, and the means employed by it for the construction can make no difference as to the responsibility for their character. For whether constructed by contractor or supervisor, they are constructed for the township, and if the roads are unsafe the township is liable.

Township *v.* Scholly, 84 Pa. 141.

The use of the public highway for purposes of street railways is not the imposition of additional servitude and does not entitle the abutting land owner along the highway to compensation for such use.

Rafferty *v.* Central Traction Co., 147 Pa. 590.
Lockhart *v.* Craig St. Ry. Co., 139 Id. 419.

The learned Court below found as a fact that the complainant had shown no special damage to entitle it to sustain the bill, and also held that to grant the prayer of the bill would operate as a repeal of appellee's charter, and this finding is, we think, strictly in accord with the facts. This Court held in Sparhawk *v.* Union Pass. Ry. Co., 54 Pa. 401, that (1) "A party cannot vindicate others' rights by process in his own name, nor employ civil process to punish wrongs to the public." (2) "When equity intervenes to restrain acts prejudicial to the interests of the community, it must be by the attorney-general." (3) "Private parties can invoke the chancery powers of the courts only for redress of private injuries done or threatened." (13) "Equity will not restrain an act which is illegal merely." (17) "To make out a case of special injury to property from nuisance, something materially affecting its capacity for ordinary use and enjoyment must be shown." (19) "Chancery will not enjoin acts for which damages may not be recovered at law." These legal propositions are sustained by the following among many other cases.

R. R. Co. *v.* Stump, 8 G. & J. 479.
R. R. Co. *v.* Prudden, 20 N. J. Eq. 530.
Canal Co. *v.* Graham, 63 Pa. 290.
Rafferty *v.* Central Ry. Co., 147 Id. 579.
Larimer Ry. Co. *v.* R. R. Co., 137 Id. 547.
Cox's Appeal, 10 WEEKLY NOTES, 552.
Cox's Appeal, 11 Id. 571.
Union St. Ry. *v.* North Side Elec. Ry., 154 Pa. 422.

The alleged bribery consists in a separate agreement not in any way connected with the

Digitized by Google

agreement giving the appellee the right of way. It was not necessary for appellee to disclose this agreement to make out or establish its case. The test whether a demand connected with illegal transactions is capable of being enforced by law is whether the plaintiff requires the aid of the illegal transaction to establish his case.

Swan *v.* Scott, 11 S. & R. 164.
Johnson *v.* Hulings, 103 Pa. 504.

The township is not complaining—the fraud is set up by a stranger who has failed to show any special damage.

March 25, 1895. WILLIAMS, J. Most of the questions involved in this appeal have been considered and determined in Penna. Schuylkill Valley Railroad *v.* Montgomery County Street Railway Company, just decided. Some questions peculiar to this case remain to be considered and to these alone we now direct our attention. The first of these relates to the status of the corporation plaintiff. The contract between the plaintiff and the township of Rahn by which the plaintiff undertook the making and repair of all the public roads in the township, was made under the authority of the Act of 12th June, 1893, the constitutionality of which has been affirmed by this Court. This contract transfers the burden of making and repairing all the public roads in the township, from the township and its officers, to the company; and it invests the company with the right to object to the introduction or maintenance of any obstruction to the public travel thereon which may increase the burden of repair or add to the difficulty of suitable supervision.

The plaintiff does stand therefore in a position towards the township of Rahn and towards the travelling public which enables it to be heard upon the questions raised in this case in substantially the same way as the township itself would be entitled if it was plaintiff in the bill now before us. The second question is over the validity of the consent given on behalf of the township by Coll in consideration of the agreement of the defendant to provide employment for him during the balance of his natural life, and for his son also, at an agreed price per day. This agreement was not between the township and the railway company, but between Coll as an individual and the company, by which the company undertook to pay the individual for his action as an officer. The plain import of the agreement was this: if the supervisor of Rahn township would give consent on behalf of the township to the occupancy of its public roads by the defendant's street railway, then the company would pay the man who held the office the price he demanded for his official action. The privilege bargained for came from the township. The price of the privilege went to the man who held the office that enabled him to control the privilege.

We have no inclination to enter upon an argument for the purpose of proving what is perfectly obvious on a simple statement of the facts, viz.: that this was a very plain case of bribing a public officer. A consent so obtained, if otherwise valid, could confer no rights on those who bought it. The contract which was given for it was as utterly worthless as the consent. Neither the buyer nor the seller took anything by their bargain, nor did the township, against whom both seller and buyer were contriving, lose anything by the transaction. Its consent has not been given, and cannot be obtained in the way in which the paper, called a consent in this case, was secured. The last question peculiar to this case is whether the granting of an injunction "would work a practical repeal of the defendant's charter"? We do not see how it could work any such result. The charter authorized the building of a line of street railway through several townships and boroughs. The general law, however, made the consent of the local authorities a condition precedent to the right to construct the line or circuit of railway. Before the company can rightfully insist on its right to build under its charter it must secure the consent, not of one of the boroughs or townships, but of all of them. Without such consent it cannot build the line authorized by the charter, and it has no right to build any other. If a line of street railway is projected to connect three adjacent districts, a, b and c, and a charter obtained describing the circuit to be built, the first thing to be done under the charter is to secure the requisite consent in each of the districts. The borough b. is applied to and it gives consent to the construction of the proposed circuit, but a. and c. refuse. What then is the situation? The consent of b. relates to the line of street railway authorized by the charter. That can not now be built. The consent is therefore inoperative. If then the company undertakes to build a local road in b. without a new charter and a new consent, the municipality may well object that its consent is being used for a purpose not contemplated when it was granted, and within neither its letter or its spirit. If the company persists, notwithstanding, in its effort to build and operate a railway within the limits of b. only, and the Court on application of the municipal authorities should restrain such construction by injunction, this would not work a practical repeal of the charter of the company, but restrain its action so as to keep it within the limits authorized by the charter. The trouble such companies encounter grows out of the circumstance that they consult their chartered

Digitized by Google

rights less than their pecuniary interests. For these reasons as well as for those stated in the Schuylkill Valley Railroad Company *v.* The Montgomery County Street Railway referred to above, the decree appealed from is now reversed. The record is remitted to the Court below, not for further hearing, but with the direction that the injunction be restored and made perpetual.

H. B.

[See preceding case.]

Jan. '95, 183. February 20, 1895.

Township of Rahn v. The Tamaqua and Lansford Street Railway Company.

Street railways—Bribery, etc.—Pennsylvania Railroad v. Montgomery County Street Railway, supra, p. 153; Tamaqua and Lansford Street Railway Company, infra, p. 166, followed.

Per WILLIAMS, J. "That a street railway may like a steam railway locate its route not for the accommodation of local travel along the highways but to reduce time and distance for passengers travelling from city to city or town to town across the country is a proposition not to be entertained. It involves a perversion of the character and object of street railways."

Appeal of the Tamaqua and Lansford Street Railway Company, defendant, from a decree of the Common Pleas of Schuylkill County, enjoining said defendant, at the suit of the Township of Rahn, plaintiff, from constructing, maintaining, or operating a street railway on or over the public road in Rahn township.

The facts of this case are the same as those in Tamaqua and Lansford Street Railway Company *v.* Inter-County Street Railway Company.

George M. Roads and *John W. Ryon*, (with them *Fergus G. Farquhar*), for appellant.

James Ryon, *Lewin W. Barringer* and *J. O. Ulrich*, for appellee, were not heard.

March 25, 1895. WILLIAMS, J. The questions raised by this appeal have just been decided. The invalidity of the alleged consent signed by Morris Coll, supervisor, was decided in a case in which the present defendant was plaintiff, and the Inter-County Street Railway Company defendant.

The necessity resting upon the company to put itself in position to build its railway upon the circuit described in its application and charter before it can insist on occupying the highways of any one of the cities, boroughs or townships through which its circuit passes was distinctly held in Pennsylvania Schuylkill Valley Railway Company *v.* Montgomery County Street Railway. The importance of that holding is made perfectly apparent by the facts of this case. The defendant had not obtained the consent of the borough in which its road began, nor of that in which it ended, nor of all the districts intermediate. The construction of its circuit was absolutely impossible while this state of things lasted; and it had no right as against a township or borough that had given a valid consent to the building of the railway described in the charter, to enter upon its highways until it was in a position to do that which its charter required. This was the law prior to the Act of 1889 under which the defendant was incorporated: Commonwealth *v.* Railroad Co., 27 Pa. 339. If that was doubtful it was made the law as to all street railways by the provisions of that Act. The learned Judge suggests a question of grave importance that does not seem to be raised by the assignments. He says, "It does not appear to be denied that the defendants have located their railway only in part upon the street or highway, and the balance over the lands of private persons who have given their consent. How far this is lawful under their charter it is not necessary here to decide." This mode of location shows how determined is the attempt to use our street railway legislation for a purpose never contemplated by the lawmakers. Street railways are railways on and along the streets of a city or town. They must conform to the grades of the streets they occupy. They may diverge for a short distance where the conformation of the surface or the position of streams make it necessary in order to avoid discomfort or danger to the travelling public, but that a street railway may, like a steam railway, locate its route not for the accommodation of local travel along the highways, but to reduce time and distance for passengers travelling from city to city or town to town across the country is a proposition not to be entertained. It involves a perversion of the character and object of street railways. This is *obiter dictum*, but the subject is so intimately related to the questions under discussion in these cases and is of such importance both to the railroads and the people of the State, that the writer feels justified in calling the attention of the other departments of the government to it in this manner. Applications for charters should be, as we have no doubt they are, carefully examined; but attention has not heretofore been called to this subject, and its importance has therefore not been recognized.

If it is desirable to introduce a new kind of railroad transportation for long distances, it should be provided for by suitable legislation so that all parties to be affected may be able to understand their rights and adjust themselves to the situation in which such legislation may place them. Whether such a new system is needed,

Digitized by Google

and if needed, under what sort of regulations it shall be introduced, are legislative questions. The exposition of such laws as we have relating to the construction, maintenance and operation of street railways is all that concerns the Courts.

The decree is affirmed. The appellants to pay the costs of this appeal. H. B.

Jan. '95, 260. February 20, 1895.

The Tamaqua and Lansford Street Railway Company v. The Inter-County Street Railway Company.

Street passenger railways—Assent to occupation of roads by—Extortion of consent by duress or bribery.

The consent, given by a supervisor that a road may be occupied by a street passenger railway company, if obtained by intimidation or bribery is not an official act and is not binding upon the township.

Where in a suit between two rival claimants of the right to occupy a road for railway purposes an injunction has been granted, such injunction will not be dissolved when it appears that the defendant had no right to occupy the road, although it appear that the plaintiff has no greater right than the defendant.

Appeal of the Inter-County Street Railway Company, defendant, from the decree of the Court of Common Pleas of Schuylkill County, in a suit in which the Tamaqua and Lansford Street Passenger Railway Company was plaintiff.

The facts appear by the opinion of the Court, delivered by WEIDMAN, J., as follows:—

"The parties here are rival claimants of the exclusive right to construct an electric railway under the Act of 1889 (P. L. 211), from Tamaqua to Lansford, over the same highway in Rahn Township. And the pleadings require final determination of their rights upon the voluminous evidence filed.

"Complainants were incorporated under the Act of 1889 on November 2, 1891, and on May 9, 1894, obtained from the township supervisor and the three township auditors a written agreement giving their consent to the use of the highway for the purposes of their charter as follows: 'To lay down, construct and establish a street railway track, or tracks, with such sidings and turnouts as may be necessary, on, over and along the public road in Rahn township, leading from the borough of Tamaqua, Schuylkill county, to the borough of Lansford, Carbon county.' Having, soon after obtaining their consent, located their line, they began the work of construction near Tamaqua and had graded about four miles of their line on this highway, or alongside of it, when on July 30, 1894, the defendants began to assert their adverse claim to the same highway and to interfere with them in the exercise of their right. This Court is asked to restrain the defendants from constructing, maintaining or operating a street railway on, or over said road, or from entering thereon, or further interfering with said road for that purpose, or from in any wise interfering with the grading or other work of complainants on said road.

"Defendants are incorporated under the Act of 1889, by a charter dated April 27, 1894, and claim the consent of the supervisor, dated May 1, 1894, asserting that their right was first obtained, and the power of the supervisor was exhausted under the Act of 1889, before he granted consent to the complainants on May 9. Complainants deny that any consent was granted or delivered to the defendants until 7 P. M. of May 9, *i. e.*, about three hours after the supervisor had delivered his consent in writing to the complainants. Each impeaches the validity of the 'consent' of the supervisor obtained by the other, complainants alleging that the defendants obtained their 'consent' or right from him by bribery, and defendants alleging that complainants obtained their agreement from him by fraud and intimidation.

"It is clear from the 15th section of the Act of 1889 that neither could acquire any rights upon this road without the consent of the 'local authorities,' and it has been said by our Supreme Court, in Larrimer, etc., Street Railway Company *v.* Larrimer Street Railway Company, 137 Pa. 533, that 'such consent is a condition precedent, and without it a company incorporated under the Act of 1889 would have no right, present or prospective, to occupy a road,' etc.

"To repel the assertion that they procured the consent of the supervisor by bribery, defendants have put in evidence their contract with him, and have called as witnesses all of the persons who were concerned in procuring it. The contract is in writing, dated May 2, 1894. It stipulates that 'in consideration' of Morris Coll's 'signing the rights of way for the building of an electric railway, in and upon the highways of Rahn township, to give employment' to him 'at a salary of $1.50 per day for the rest of his natural life when work starts on the construction of said electric railway.' 'Should he at once be discharged by the Lehigh Coal and Navigation Company from his present employment, for the signing of the said paper he shall immediately be entered on the pay-roll of the said Inter-County Electric Railway at $1.25 per day, and shall be paid until such time as said company' can use his services in some capacity on or about their road. Further, that if his son should be discharged by reason of the signing of this right of way, that the son should be paid 75 cents per

Digitized by Google

day until such time as defendants can use the son 'in some capacity of the road,' at wages commensurate with his services, and that the son shall have the privilege of working for them on the construction of the road as soon as ground is broken and work started, at wages commensurate with his services; and should defendants sell to another corporation, a clause shall be inserted in the bill of sale that Coll must be given employment during his natural life.

"An abbreviated statement of the testimony of witnesses on this subject follows, viz:—

"Charles E. Hague, president of defendant company, says that the consent of the supervisor was obtained on May 2. Morris Coll, supervisor:—was elected in February, 1894, signed the contract in evidence; cannot read or write; 74 years old, worked for Lehigh Coal and Navigation Company since 1852. When defendants' agents called to ask for the right of way he told them that his employer had cautioned him not to grant the right of way without notice to him, and that he feared that if he did it they would discharge him. 'Then they asked me what wages was Zehner giving me, and I says, a dollar a day, and they asked (I reckon it was Mr. Riebe, he says) if I got that from the others would not I take it. I says, no; I would not. "How much would you take?" says he. "I would take a dollar and a half," says I. "Will you sign it?" says he. Says I, no; not till I see somebody who knows more about law than I did.' . . . . 'Asked them to come back next night. They came the next night, three of them; asked if I would sign the right of way. Says I, yes; if I would go before Johnny Boyle; but, says I, I want one dollar and a half per day, the same thing, and they do not object or nothing.' Then signed it. They had no writing, except what Johnnie Boyle wrote, and he had that when they called.

"Q. What did you tell them you wanted in order to give the license?

"A. I told him I wanted one dollar and a half a day, and they did not object a bit; they said they would give me that. Boyle was to keep the writing until he would get things right, and he kept it three or four days. He regarded the agreement as his private property.

"Herman Riebe, director of defendant company, at first visit to Coll, said that Zehner did not want him to sign and might discharge him. Witness told him to consider carefully, and asked him whether he could not work at something else. He said he didn't know at what. Then asked him whether he couldn't work on this railway if it was built—watchman, or grease cars. He thought he could. Then told him that if he was discharged we would give him work; or if he was not discharged we would give him work. He wanted to know whether witness would make himself personally responsible for getting him work. 'So finally we agreed that he could work on the road if we built the road if he was discharged, and if he was not discharged.' Agreed on one dollar and a half per day. He wanted it in writing from the company; agreement in writing was given him maybe a week later, but the right of way was signed then. Boyle held the contract for right of way, and when the contract for Coll came Boyle delivered it up; this was the understanding.

"H. E. Mandeville, director of defendant company, with F. P. Krebs and Herman Riebe, went to Coll's home; told him that our company had a charter to build a road, and that he could grant the right of way. He declined to grant it that night because Mr. Zehner had instructed him not to sign any paper until after consulting him; asked whether, after seeing Zehner, he would still refuse, he said 'that that would depend.' This was followed by a general conversation, in which Riebe advised him to consult his friends, and that they would come another time for his answer. Coll named two days after, but they went back May 1, when Coll said that it might be all right; he didn't know about signing; he might be discharged. Then asked him what he was getting a day, and he said one dollar. He was then asked whether, if he got one dollar from some other company 'he would give his services,' and he replied that he would not. Then asked him what he could do on an electric road. He asked, and we told him, what we had to do, and we asked him what he would work for. He then said his son would be discharged, too, and we asked how much his boy got, and he answered fifty cents about, and 'the boy must have seventy-five cents a day, and he said under those circumstances that he had been advised that he could sign a right of way if we would agree to it, and he asked that Mr. Riebe be personally responsible—that is, for his labor.' Riebe hesitated; Boyle was present, and after general conversation it was agreed that if the company would send a written agreement over the corporate seal of the company that would answer the same purpose, and Boyle advised him that it would. 'Then the question came up. He said that was all right, but we might give him a job to-day and maybe the next day, or the week after he would not have a job, . . . and he said that he wanted a long job, and it was fixed up then that he should have one dollar and fifty cents as long as he lived. As he was an old man he was not likely to live long. He tried to make the same settlement for his son, but we said we could not do that; that he could only retain the job as long as he did the work; as long as he was fit to do it; would be discharged for incompet-

Digitized by Google

ency at any time. Coll then signed the right of way and we wanted it. He said, no; he would not give it to us, and put it in the possession of Mr. Boyle, and on receipt of an agreement from the company from Philadelphia he would turn over their right of way.' On May 3 received word from the company that they had sent the agreement to Boyle, and witness notified Boyle of the fact and told him that if it was in accordance with what he had dictated to Coll then he should deliver to Riebe the right of way. First agreement was returned as not suiting Boyle; then the agreement was sent which is in evidence.

"F. P. Krebs was present at Coll's as attorney for defendant company on April 30. 'We asked him whether he would sign the right of way through Rahn township, he being the supervisor. He did not know what to do at first; did not talk very much; was very reticent and seemed to think that he did not have the authority. So I assured him as an attorney, that he had the authority, and it rested in him solely. He said nothing at the time, but said that he had been threatened with a discharge when he took the office if he signed any paper whatever. I told him that I thought Mr. Zehner was too much of a man to allow his venom to carry him that far, and spoke in that way, and then branched off on to other subjects, and he finally said he would not like to say without considering the matter.' He thought he could give his answer on Wednesday. Riebe advised him to consult his best friend; that we didn't want to deceive an old man. Didn't want him to consult Lehigh Coal and Navigation Co. officials. He said he could rely upon Squire Boyle. That was satisfactory to us. On Wednesday Coll told me he was willing to sign it. Witness went for Squire Boyle and Coll signed the agreement in his presence. Coll's employment was to last as long as he lived. Boyle was to hold the paper he signed until these conditions were arranged by a paper from Philadelphia. Coll wouldn't allow the delivery until his points were covered by a written agreement, and that was carried out. Don't want to say that this condition was the moving cause. These conditions were an after consideration.

"John R. Boyle, justice of the peace, that on April 30, or May 1, Riebe asked him if he would not go with him to Coal Dale to see Coll; that he wanted him to sign a right of way. Didn't go with him, but agreed to come later. Krebs came after him. Mandeville asked Coll to sign the right of way. Coll said if he did he would probably be discharged. Mandeville said that they would fix that all right. They would give him work. Coll said he might be discharged next day and then there would be no work. Mandeville then agreed that they would give him a written agreement that if he was discharged they would give him $1.25 per day until the work started, and $1.50 when the operations began. He then spoke of his boy, and they agreed to give him 75 cents a day from date of discharge, and put him on the work when it started. Krebs had the agreement there about the right of way, and witness was to hold it until the agreement came back. Coll wanted it signed by the officers of the company. I took it home and kept it there. The first agreement from Philadelphia was defective in not stating, 'if he was not discharged.' 'Just said $1.25 if discharged, and not discharged, nothing mentioned at all. I told Mr. Coll if he was going to depend on that agreement it would not be what he was expecting. "Well," he says, "I will not take it." So I sent it back to Philadelphia.' In two or three days Riebe brought another paper, which he read to Coll. 'I told Mr. Coll 'It will be all right, what you agreed for, and it is now for you to say whether I shall give up the paper. He took it and told me to give the right of way to Mr. Riebe and I gave it to him.' This was 7 P. M., May 9. 'The only thing makes me think it was the 9th of May, there was so much talk that day about old man Coll going to Tamaqua to sign for the Tamaqua and Lansford Company. I kind of thought then it was funny he would take this agreement after signing for the Tamaqua and Lansford.'

"Whether the signing of consent to the defendants by Coll on May 2, 1894, was on a paper prepared before that date, executed and delivered then to Boyle, to be held by him until the agreement in evidence was satisfactory to Coll, and then delivered by him to Riebe for defendants (as seems to have been testified), or whether the agreement in evidence, and above described, was the only evidence of Coll's consent given to the defendant company seems to be immaterial; for the reason that the evidence clearly shows that both Coll and the defendants clearly understood that until the consideration personal to the supervisor was secured by a written agreement, the consent was not to be operative. When the first agreement was condemned by Coll as not providing for him if he was not discharged, and the defendants at once executed another agreement covering Coll's claim as it had been understood between them, it became manifest that Coll was not disposed to treat their personal consideration as an 'after consideration,' as construed by Mr. Krebs, but as an essential consideration without which they could not receive the evidence of his consent. So also the agreement in evidence, 'Witnesseth, that the said party of the first part do hereby promise and agree that *in consideration of the said party of*

Digitized by Google

the second part signing the rights of way for the building of an electric railway in and upon the highways of Rahn township,' to give employment to Coll, etc. My conclusion is that this agreement was not delivered until 7 P. M. of May 9th. The copy of the agreement appearing on the record does not show that it was signed by Coll; so that unless there was another paper evidencing agreement, such consent must be inferred from his acceptance of their agreement, or rest upon a parol consent. That he did consent finally on May 9th there is no dispute. Ought such a contract, or such a consent, to stand? Complainants have proved that the contract of consent was made by the supervisor alone, and without making a record of it upon the township books, and without consulting with the auditors or having their consent. They have not furnished the Court with any statute or decision which tends to show that the auditors have any share in the responsibilities of the supervisor for the care or condition of the roads, and, as it is conceded that the law as to Rahn township only requires one supervisor, there is no force in the objection that in this respect he was not the 'local authority,' whose consent the Act of 1889 requires.

"There is, however, fatal force in their objection that the contract of consent was founded upon an immoral, if not a criminal, consideration. From Grant *v.* Erie, 69 Pa. 422; Dechert *v.* Commonwealth, 113 Pa. 229; Raudenbusch's Petition, 120 Pa. 328, we are asked to infer that we have no jurisdiction to inquire into this question. Grant *v.* Erie decided that where an Act of Assembly empowered a city to build a sufficient number of reservoirs to supply water in case of fire, and the council constructed them but allowed one to get out of repair so that it would not hold water, the owner of a near-by property destroyed by fire could not recover against the city, alleging that the loss occurred by reason of the fact that by this negligence of the city no water could be obtained; that it was discretionary with the city to construct the reservoirs, and they were not liable. Dechert *v.* Commonwealth decides that the city controller of Philadelphia has a judicial discretion as to whether he will or will not countersign a warrant; that mandamus may be awarded in such a case to set public officers in motion as to acts and duties necessarily calling for the exercise of their discretion, but will not control or interfere with the exercise of that discretion or dictate what the decision shall be. Raudenbusch's Petition decides that the Supreme Court will not review the manner in which the lower Courts have exercised their discretion in granting or refusing retail liquor licenses. I do not regard these cases as precedents to guide the case before the Court in which the natural, and as it seems to me the irresistible inference, from undisputed facts, is that the supervisor refused to deliver his contract of consent to these defendants except at the price of a consideration, payable to himself and not to the public whose rights he was thus selling; a consideration not in good faith solely providing against his discharge for doing his duty, but a consideration providing for himself in case he was not discharged. He was dealing with a discretion vested in him as a public officer for the public benefit as if it was his private property which he could sell for his personal profit. No argument is required to show that a consent thus obtained has no warrant in the Act of 1889, in moral and public policy. 'In general, if any part of the entire consideration for a promise, or any part of an entire promise, be illegal, whether by statute or common law, the whole contract is void. Indeed the Courts go far in refusing to found any rights upon wrong-doing.' Parsons on Contracts, 5th ed. (p. 456). 'If any part of a consideration is illegal the whole consideration is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise another which is legal.' Id. 457. See also Filson's Trustees *v.* Himes, 5 Pa. 452; Clippinger *v.* Hepbaugh, 5 W. & S. 315; Bredin's Appeal, 92 Pa. 241. This supervisor refused to grant his consent upon the agreement providing for his employment in case of his discharge, and only delivered it when insured that he would be employed for life at increased wages whether discharged or not. A grant founded upon such a consideration is not to be sustained, and must be declared void.

"Defendants argue that, in any view, this Court has no power to adjudicate the questions raised here—

"1. Because the 'consent' claimed by the complainants was procured from the supervisor by fraud, misrepresentations, threats and coercion.

"2. Because complainants have forfeited their charter rights, under the Act of 1883, by failing to construct their road within two years from the date of their charter.

"Because a rival claimant corporation, being a street railway company, has no status in such a case to attack defendant's rights.

"On the subject of the first exception Morris Coll is the only witness who testified directly in support of the charges. He says that he worked for the Lehigh Coal and Navigation Company from 1852 to about May 1, 1894. Worked for $1.00 a day until he was elected supervisor. 'And when they found I was wanting to get a little money they reduced me to 85 cents.' McLaughlin did. There was only $250 in the

Digitized by Google

supervisorship—that I got from Zehner last May. Granted the right of way to the Inter-County people. Next who come was the Lehigh Company, I guess. Tom McLaughlin 'told me I was to go to Tamaqua with the auditors, and I asked what for. He said he didn't know. Come over on 2 P. M. train, and Zehner, McLaughlin and Lawyer Farquhar were there, and Spiese and the auditors, Poh and Kennedy. When he come into the room at Tamaqua the first thing Zehner says, he told me that I should come up to his house before I sign any paper that came across me. Did I promise you? says I. You did, says he. No, I did not, says I. And then the lawyer drawed the paper out and wanted me to sign it. Says I, What is it? The right of way of the Lehigh Company, says he. I said I would not sign it. Says I, I signed it already and I might be punished if I did it again. Then he read out of the book that I could sign it for the other company and nothing be done to me. I did not bother that, and then he read out of his book again that I had crime enough done to go to the penitentiary.' Then Spiese said, 'Never mind the penitentiary; but you have crime enough done to go to Pottsville jail. Well, I would not sign then for them. Then I seen Mr. Kennedy and Mr. Zehner go into a vacant room, and Zehner come out and Kennedy called me in. He says, "I call you in as a friend; if you do not sign the paper, Mr. Zehner is going to send for a constable to send you to Pottsville." "I don't care," says I. "To hell with you and Billie Zehner," says I, and I walked away and left Kennedy there.' He went into the room, sat awhile, then got up. Zehner asked where I was going. Said I was going out and would be in again. Went out, and McLaughlin was at my heels. Stepped aside to avoid him, but he stopped outside. When he came out, walked to him and made an excuse about getting onions to get away from him. McLaughlin said that I couldn't get away from them until this thing was settled. Then he went out and sat on the steps, and he was coaxing. 'And then I says, I will tell you what I will do, Tom. If you get *a signment* from Billie Zehner and President Leisenring as I have from the other company, I will sign, and Tom gave me his hand in mine and says that was all right, and he called Zehner and Zehner says that would be all right and then I went and signed the paper.' Mr. Farquhar and witness were sitting alone in the room. Farquhar was writing. Witness got up to go out. Stood at the door. 'Where are you going?' says he. 'I am going out,' says I. 'You won't go out,' says he, standing up, 'till this case be settled.' Witness sat down. Nobody in the room but the two at the time. Ten minutes after the rest went out. At other times, Tom McLaughlin, James Mulhearn, Father Murphy, wanted me to give up the Inter-County papers. Father Murphy twice. The second time with the Nesquehoning priest. Told him that Zehner would never see sight of them. They had no papers with them for witness to sign. McLaughlin said that Zehner and the Nesquehoning priest wanted to see him in the office—Zehner's—but he refused to go.

"Then, Friday evening after Paddy Boner, who was on his bond as supervisor, told witness that he was black-listed. 'I am black-listed,' he says. 'If you don't go with me in front of Zehner I don't get no work.' 'All right, my boy,' I says, 'I did not do nothing that I am afraid to meet Zehner or any other man, and I will go up with you as soon as I get a cup of coffee, etc.' They went up and Zehner came in and said, 'You are here and it was hard to take you.' 'Well,' says I, 'I am here now and, Mr. Zehner, before the question goes any further, what depredation did I do on the country that a man was black-listed on me?' Zehner said, 'I never done it; I never discharged Paddy Boner through you or anybody else in my life.' I said, Well, there is you and Boner face to face now; whichever of you is telling lies I don't know.' Says Paddy, 'The boss told me; I never told the boss or no other man to do it,' says he. Zehner said, 'That ain't what I want you altogether for; I want you and Boner to come with me to Pottsville to sign a bill I have there.' 'Now, by God,' says I, 'I will never go with you.' He said, 'What is that?' I said, 'I will never go with you because the last *signment* you promised me you did not keep, and I am done with you.' He said, 'I give you Mr. Boner here as bail that you will get any signment you want after this law suit is over.' Boner said, 'I will go all I am worth on your bail.' 'Paddy,' says I, 'you need not, for I would not take either you or Mr. Zehner as bail.' Witness left them and when he got home found Father Murphy and the Nesquehoning priest there, and wanted him to sign some paper; he refused; an altercation followed about Zehner; told Zehner at meeting on May 9th at Tamaqua that when he told him that it was all right he meant that it was all right for himself, not for Zehner. Farquhar said that he wanted me to sign for an electric road; when witness refused, Farquhar said that witness had done enough swindling to put him in the penitentiary. Then Spiese started in and said that they would put him in the Pottsville jail; they then went out and left Farquhar and witness alone for fifteen minutes. When Kennedy threatened that Zehner would arrest him he was not afraid; was afraid of McLaughlin that he would call a constable; but was willing to sign if Zehner made

Digitized by Google

the same terms as defendants; Tamaqua and Lansford Company was not mentioned; it was the Lehigh Coal and Navigation Company; none of them asked him for his agreement with the Inter-County Company until two weeks after that; never told any one about that paper; Father Murphy wanted that paper; that was witness's private paper and nobody else's business.

"According to this story Mr. Farquhar, attorney for complainants, requested him to sign a right of way and he objected that if he did he might be punished, because he had already signed such an agreement for the defendants; and that Mr. Farquhar then read out of a book to him to show that that would not prevent him from signing the second paper. He says that he didn't bother with that, and then Farquhar read out of his book again that he had committed crime enough to go to the penitentiary. Then Spiese told him that he had done enough to go to jail; that he wouldn't sign for them. Then Kennedy and Zehner consulted in private, and Kennedy came to him and told him that if he didn't sign that paper Zehner would send for a constable to take him to jail. He told them to go to hell; at one time he and Farquhar were alone in the room and he got up to go out, when Farquhar got up and told him that he couldn't go out until he signed. He went out ten minutes after that, but when McLaughlin followed him, he tried to gêt away from him, but could not, and then McLaughlin told him that he couldn't get away until this thing was settled. Then he and McLaughlin went back to the stairs leading up to the room where they had been before and sat there, and McLaughlin was "coaxing," and he then said he would sign if Zehner would give him the same agreement that the Inter-County Company had made, and they agreed to it and then he signed. The only time when he was afraid, according to his statement, was when McLaughlin threatened to get the constable; but he did not leave the room when Farquhar threatened him. The interviews further testified to, that is, the visits of the priests and the call with Boner upon Zehner relate to subsequent efforts to get from him the agreement that he had made with the Inter-County Company and to get his assistance in the present suit when the bill was to be filed.

"Accepting Coll's own statement, he persisted in his refusal to sign the agreement until Zehner and McLaughlin promised him the same terms as the Inter-County Company had agreed to; then he went into the room where the conference had been previously held, and signed the paper. Besides this, all the others present, except Mr. Farquhar, were examined; they all deny that any promises or threats were made at any time during the two hours at Tamaqua whilst this negotiation was going on. One or two of the witnesses denied them all of the time from the beginning of the negotiation to the end. Others say that they were in the room all of the time, and that Farquhar was not alone with Coll at any time from the beginning of the negotiation to the end. Zehner and McLaughlin deny distinctly that they made any promises to Coll in consideration of his signing, and assert that, on the contrary, they distinctly told him that such promises would be illegal, and that they could not do it. Upon this showing it would be unreasonable to say that the testimony of Morris Coll should prevail against the testimony of the other witnesses not impeached, except by the conflicting testimony of Morris Coll, and that a fair inference from this record is that this contract was procured by fraud or coercion. It is true that the testimony also shows that he was dealing with men who were high in authority in the company in which he had been in humble service, who had loaned, or advanced, his pay to him, as a supervisor, before it was due, on his promise that he would not grant this particular right of way without letting them know in advance, and who were known to him, probably, as opposed to the building of any railroad there. Who had by threats and persuasion prevented the earlier building of complainants' road, and were now allied with complainants to secure the privileges because a rival had come upon the field. Still the testimony in reference to what occurred at the time when the contract was executed seems to warrant the conclusion that the representation and threats, combined with the surroundings above alluded to, did not move him until Zehner and McLaughlin agreed to do as well for him as the Inter-County Company. Nor can the fact be lost sight of that the influences of his employers might have led to his yielding to their persuasion, as complainants' witnesses say that it did. Where the evidence is directly conflicting, as it is in this case, we have no other guide to a conclusion than the seeming preponderance and tested by that the evidence does not seem to warrant the setting aside of the formal contract executed by the supervisor.

"In view, however, of the views expressed today in an opinion filed in No. 2, November term, 1894, Rahn Township *v.* The Tamaqua and Lansford Street Railway Company, it is not important whether this is a just view of the evidence on this subject or not; for in that case the conclusion is reached that upon other grounds this company must be enjoined from constructing their railway under their agreement with the supervisor.

"The *second* objection is based on the Act of 1883 (P. L. 123) sec. 5: 'That any corporation

Digitized by Google

of the second class, created under the provisions of the Act to which this is a supplement, or any of its supplements, that shall not within two years from the date of its letters patent proceed in good faith to organize and to do the things contemplated by its charter, and have paid up at least one-fourth of its capital, shall be held and deemed to have forfeited its charter, and the attorney-general shall, on the application of any citizen, take the proper legal steps to forfeit and vacate its said charter, etc.'

"This, by its terms, applies to such corporations as are created under the Act of 1874, or any of its supplements. There is nothing in the Act of 1889 which indicates that it was enacted as a supplement to that Act. Even assuming that it does apply to the Act of 1889, the Act contemplates that the enforcement of the forfeiture shall be by 'proper legal steps' through the attorney-general. And that such a forfeiture cannot be adjudged in a collateral proceeding, such as this, is well settled. Man., etc., of C. & K. T. R. Co. *v.* McConaby, 16 S. & R. 140; Commonwealth *v.* The Erie & N. E. R. Co., 27 Pa. 339; Clark *v.* The Birmingham and P. B. Co., 41 Id. 147. See also Larrimer & L. St. R. Co. *v.* Larrimer St. R. Co., 137 Id. 533; Lejee *v.* The Continental R. Co., 2 WEEKLY NOTES, 170; Collins *v.* N. E. R. Co., 2 Dist. Reps. 417, which hold that the Act of 1871 confers no jurisdiction in favor of a private party to enjoin a public nuisance. And if the grant of the right of way to defendants over this road is invalid as above decided then there could be no private damage to the defendants which would justify an interference with complainants on their application. If they were complainants their contention would not avail them; much less should it avail them as a defence. Western Pa. R. Co.'s Appl., 104 Pa. 406; Union St. R. Co. *v.* Hazleton Railway, 154 Id. 422.

"The *third* objection is disposed of by our Supreme Court in Germantown Pass. R. Co. *v.* Citizens' Pass. R. Co., 151 Pa. 138, which decides that under the Act of 1871 a street railway has a standing as a complainant in a bill in equity to restrain another company from unlawfully laying tracks in a street already occupied by the complainant.

"And now, November 26, 1894, it is adjudged and decreed that the said The Inter-County Street Railway Company, its officers, agents, contractors and employés, be restrained by injunction to issue forthwith from constructing, maintaining or operating a street railway on or over the public road in Rahn township, leading from the borough of Tamaqua to the borough of Lansford, and from entering upon or further interfering with said public road for that purpose."

The defendant took this appeal, and assigned error, *inter alia*, as follows:—

5. The Court erred in finding the fact that the consent given by the supervisor to the Tamaqua and Lansford Street Railroad Company was not void, and declared the law thereon as follows: "When the evidence is directly conflicting, as it is in this case, we have no other guide to a conclusion than the seeming preponderance, and tested by that the evidence does not seem to warrant the setting aside of the formal contract executed by the supervisor."

J. O. Ulrich and *James Ryon*, (with them *Lewin W. Barringer*), for appellant.

Fergus G. Farquhar and *John W. Ryon*, (with them *George M. Roads*), for appellee.

March 25, 1895. WILLIAMS, J. The question raised by the first, second, third and fourth assignments of error has just been decided in the Lehigh Coal and Navigation Company *v.* The Inter-County Street Railway Company. It is not necessary to repeat what is there said. We have no doubt that the consent obtained from Coll was invalid for the reason stated by the learned Judge of the Court below, and for the further reason stated in the Pennsylvania Schuylkill Valley Railroad Company *v.* The Montgomery County Street Railway Company, also decided at the present term. It was the action of an individual upon a consideration moving to him as an individual, and not the action of an officer, appearing upon the records of the township where the evidence of official action should appear.

The fifth assignment is sustained. When a corporation comes into a Court of equity claiming rights against the public, under an agreement purporting to be executed by township officers, the agreement should be conscionable, and it should have been obtained by fair and conscionable methods. The learned Judge found the evidence relating to the execution of the consent by Coll to the Tamaqua and Lansford Company to be directly conflicting, and he adopted the rule of law saying, "We have no other guide than the seeming preponderance" of the testimony, and, testing the validity of the alleged consent of the local authorities of Rahn Township by what seemed to him to be the preponderance of a mass of contradictory testimony, he sustained the validity of the consent. We find no fault with the view of the learned Judge as to the existence of a "seeming preponderance," but we can not agree that the chancellor was bound by it. On the contrary, we hold that the alleged consent was ineffective for two reasons: First, it was extorted from the individual who held the office of supervisor by methods that a Court of equity can not approve, and it ought not

Digitized by Google

in fairness towards the citizens and taxpayers of the township to be held binding upon them for this reason if for no other. But, second, another and a sufficient reason is found in the fact that the giving of the alleged consent was not an official act. The time, the place, the occasion, were of the appointment of the company and for their benefit. The action was not taken at a meeting of the supervisors, regular or special. It was not entered upon the books of the township in the possession of the town clerk. No record of any sort was made of what was done because no official action was taken. A frightened man executed a paper adding his official title to his name, but this did not make it the official action of the supervisors. This was a subject for deliberation, a subject of importance, not to the man but to the township whose officer he was, and the action should have been taken upon an intelligent consideration of the interests of the township and regularly entered on the proper township book. The evidence of such an official act should not rest upon a piece of paper in the pocket of a private individual who may not be a citizen of the township or within reach of its taxpayers.

But this conclusion does not require us to reverse the decree. The defendant is absolutely without authority to occupy the township roads and the injunction was properly ordered. The plaintiff held a charter which the Commonwealth had not disturbed and which conferred a right, *prima facie*, to secure consent and proceed with the building of its roads if the township and the property holders were willing. This consent it claimed to have. It had a right to be heard therefore upon the validity of the consent of the township set up by the defendant in opposition to that held by itself. Both grants could not stand. Each contended that the grant to the other was bad. Both were right.

The fact that neither company has a valid consent from the township to occupy the public roads under the papers now before us, is no reason why the injunction ordered in this case should not stand.

The decree is affirmed. The costs to be paid by the appellant. H. B.

[See preceding cases.]

Jan. '95, 365. March 7, 1895.

County of Berks v. Reading City Passenger Railway Company and Reading Traction Company.

Passenger railway companies—Act of May 14, 1889, section 20, P. L. 211—Injunction—County bridge—Control of by county commissioners.

The Act of May 14, 1889, P. L. 211, establishes a new and complete system for the organization and government of street railway companies in the State and is the only general law in force on the subject.

The 20th section of the Act of May 14, 1889, enables all street railway companies, whether organized under invalid acts or organized under valid special acts, to bring themselves within the Act of 1889 and become entitled to the franchises conferred by said Act.

A county bridge is within the control of the county commissioners and cannot be occupied without their consent, but that consent cannot be arbitrarily withheld.

If a street railway company seeks the use of a county bridge for its purposes, it is the duty of the commissioners to refuse permission for such use if it will jeopardize the travelling public using it in the ordinary manner, but if it can be made safe for use both by the public and the railway, it is the duty of the commissioners to consider what is necessary for that purpose and in what way it can best be accomplished.

A street railway company obtained permission to use a bridge, before anything was done in consequence of the permission it was withdrawn and the company notified of the withdrawal; the company seized the bridge by night; it appeared that the strength of the bridge was not sufficient for the railway without some changes:

Held, that for these reasons the company should be enjoined from placing its railway upon the bridge.

Appeal of the Reading City Passenger Railway Company and the Reading Traction Company, defendants, from the decree of the Common Pleas of Berks County, enjoining them, at the suit of the County of Berks, from constructing or completing an electric railway over a certain bridge and commanding them to remove from said bridge the rails or tracks already laid thereon.

The facts of this case sufficiently appear in the opinion, *infra*.

Richmond L. Jones, (*C. H. Schaeffer* with him), for appellants.

The defendants were properly within the Act of 1889, although they had been legally organized under other statutes, they had authority by the 20th section of the Act of 1889 to come within its terms. The Act embraces all companies "heretofore existing under color of any charter or letters patent," etc. "Color" does not necessarily refer to a bad title, but to a *prima facie* one, good or bad.

St. Louis *v.* Gorman, 29 Mo. 593.
Bernal *v.* Gleim, 33 Cal. 668.

Digitized by Google

The bridge is a public highway and the construction of a street railway over it is consistent with the purpose for which it was erected.

Pittsb. & West End Railway Co. *v.* Point Bridge Co., 165 Pa. 37.

William J. Rourke, (with him *W. Oscar Miller*, county solicitor, and *Harvey F. Heinly*), for appellee.

March 25, 1895. WILLIAMS, J. We are satisfied with the decree appealed from in this case, but we are not satisfied with all the reasons given for it by the learned Judge of the Court below. The findings of fact show that the Reading Clty Passenger Railway Company and the Penn Street Passenger Railway Company were incorporated in 1873 by a special Act of Assembly for each, in which the route to be occupied was plainly and specifically described. Each company entered upon the route assigned it. In 1893, the Penn Street Company was merged in the Reading City Company, so that the latter became the owner and operator of both routes. But the Harrisburg bridge over the Schuylkill river at Reading was not included in the route of either company, and under the charters of 1873, the Reading City Company had no means of extending its lines upon and over the bridge. In December, 1893, it accepted the provisions of the Act of 1889, and a new charter was issued to it under section 20 of that Act. The first important question is, therefore, over the effect of this action. The learned Judge held it to be an idle ceremony which gave to the company none of the powers conferred upon companies incorporated under the provisions of that Act, and for the reason that as the company was lawfully organized under a valid Act of Assembly, it was not within the letter or the spirit of the provisions contained in said section. It is clear that the Act of 1889 was intended to provide a new and complete system for the organization and government of street railway companies in this State. After its approval by the Governor it became the only general law in force upon the subject, so that all companies thereafter organized would have exact uniformity of powers, privileges and duties. At the end of this comprehensive system, we find the provision now to be interpreted. It declares that all companies theretofore incorporated under the Act of 1878 (which had been held to be unconstitutional) and under the Act of 1879 (which was subject to the same objection) and "any street passenger railway company heretofore existing under color of any charter or letters patent of the Commonwealth, upon accepting the provisions of this Act in writing under the seal of the corporation, filed in the office of the secretary of the Commonwealth, shall thereupon become and be a body corporate hereunder, and shall be entitled to and have possession of, all the privileges, franchises and powers conferred by this Act upon corporations to be created under this Act . . . . and the Governor shall forthwith cause new letters patent under this Act to issue to such corporation under the same name as the company had in the charter under which it was originally incorporated." We are of opinion that this provision was intended to afford, first, a way for companies organized under laws that were invalid, to secure a lawful, corporate character; and next, to open the way for companies legally organized under special Acts of Assembly to lay off their special belongings and put on the uniform dress which the body of the statute had so carefully provided for the class of corporations to which they belonged.

The words "under color of" in the sentence that reads "any street passenger railway company heretofore existing under color of any charter or letters patent" were not happily chosen. They often mean what the learned Judge held them to mean in this case, that the authority "under color" of which a thing is done is assumed or defective. But their meaning like that of all words not purely technical must depend on the connection in which they stand, and the fixed character of the things to which they relate. In this provision the companies organized under defective laws had already been provided for. There were no "heretofore existing" companies left to be taken into account except such as had been organized under charters resting on special Acts of Assembly like those under which the Reading City Company was at that time acting. These charters and letters patent were valid, but they left the companies holding them to stand outside the class created by the Act of 1889, and outside the operation of general laws to be thereafter passed applicable to the class. The legislative intent was to reduce so far as possible the number of outstanding special charters and bring the entire street passenger railway business as rapidly as possible under the same system of management and control. To this end it was necessary to provide a way for existing street railway companies to surrender their special charters and secure new ones resting on the new general law. The words "under color of" must, in the connection in which they stand in the 20th section of the Act of 1889, be read as equivalent to the words "under authority of." This is necessary to give effect to the legislative intent, and to open the way for any and all companies existing under charters or letters patent issued previously to the passage of the Act,

Digitized by Google

to come in under its provisions and avail themselves of its benefits. The Reading City Railway Company by its surrender of its old charter and acceptance of the Act of 1889, acquired in the language of this section, the rights and powers of "a body corporate hereunder," and became entitled to "all the privileges, franchises and powers conferred by this Act upon corporations to be created under this Act, and all the properties, rights and privileges belonging to such corporation theretofore acquired by gift, grant, conveyance, municipal ordinance, assignment or otherwise." In other words, it ceased to stand alone upon its special Act of Assembly, and passed with all its belongings under the general law.

Let us now, conceding the right of this company to extend its lines within the meaning of the Act of 1889, inquire into its right to occupy the Harrisburg bridge. This bridge belongs to the county of Berks and is under the control of the county commissioners. It cannot be occupied without their consent, but that consent cannot be arbitrarily withheld. It is in an important sense a part of the highway and its ownership by the county can not be made use of to block the course of improvements or to extort unreasonable concessions. The county is liable to the public for its safe condition, and the commissioners have a right to consider its strength, and to refuse to permit its use in a manner that would jeopardize the travelling public using it in the ordinary manner. But if it can be made safe for use both by the public and the street railway company, the duty of the commissioners is to consider what is necessary for that purpose and in what way it can best be accomplished. The cost of the work found to be necessary, as well as the cost of repairs, they may require the company to pay or secure as a condition of its occupancy of the bridge. In this case the company applied to the county commissioners, and in December, 1893, obtained a contract from them for the occupancy of the Harrisburg bridge with their railway. We have examined this contract. It may be that it is somewhat improvident, but we are clear that it is not so grossly so as to justify the Court in pronouncing it absolutely void for that reason. The county commissioners, however, for some reason refused to be bound by it, and of this the railway company had actual notice. Nothing had been done under it by the company up to the time that its officers were made fully aware of the refusal of the commissioners to abide by it or to permit them to occupy the bridge. Under such circumstances if they regarded the contract as binding upon the county, the Courts were open to them and it was their duty to settle the extent of their rights in an orderly manner. It seems doubtful upon the evidence now before us relating to the strength of the bridge and its inability to stand the increased burden to be put upon it, whether a court of equity would have enforced this contract without imposing additional terms. The company probably entertained the same view of the situation. It accordingly decided to shove by the Courts, seize the bridge, and attempt to defend under its contract. This it did in the night time and with a strong hand. This is a method of asserting property rights that Courts do not favor. It is a race against the law which it is rarely, if ever, worth the while to run, and which if won, can not often yield the winner any substantial advantage. This Court has frequently condemned this disorderly and dangerous practice. One of its most recent utterances can be found in Easton Passenger Railway Co. *v.* Easton Borough, 133 Pa. 505.

The injunction was properly issued in this case because the seizure of the bridge was without the consent of the county commissioners and after notice that their consent had been withdrawn; and because upon the evidence before us we cannot enforce the contract under which the company seeks to justify its entry upon the bridge. The strength of the structure does not seem to be sufficient to bear the additional burden without some changes or repairs. The decree is affirmed. The costs of the appeal to be paid by the appellant. H. B.

COUNTY OF BERKS *v.* READING CITY PASSENGER RAILWAY CO. AND READING TRACTION CO.

Motion to modify decree, etc.

April 8, 1895. WILLIAMS, J. We were at first inclined to refuse this application, and to look upon the ill-considered reply of the county commissioners to the letter of the defendants asking them to determine what ought to be done in order to render the county bridge in question sufficiently strong to justify its use by their tracks, as the hasty expression of a litigant that the sober second thought would qualify in a proper manner. The answer now filed in this Court shows that our confidence was not well founded and leads us all to conclude that some modification of our decree should now be made. This bridge, as we said in the opinion disposing of the appeal in this case, is a part of the highway for purposes of passage. The county owns it, not as a house or a farm is ordinarily held, for the benefit of the owner, but for the convenience and comfort of the travelling public. Because of the cost of its original construction, and of its maintenance, the burden of such construction and maintenance is lifted from the local sub-division

Digitized by Google

of the county in which it is situated and placed on the county at large. The county thus becomes liable for its proper construction and its safety as a part of the highway. In consequence of the duty so cast upon the county it is clothed with the powers necessary to enable it to regulate the public use of the bridge so far as its own protection and the safety of those using it may require. The county cannot close it against the public, as an owner might shut up his house. It is bound to keep it open and in good repair. The proper local and municipal authorities within whose jurisdiction this part of the highway is located have given their consent to its occupancy by the defendant's railway, as we understand the facts. The question then arises, can the county which is a trustee for the public, and not an owner in its own right, arbitrarily refuse the use of the bridge for purposes which the proper local authorities have regularly authorized? There can be but one answer to this question. The control of the county relates to the structure, not to the highway. If the structure is insufficient to support the increased and lawfully authorized use of the highway of which it is a part, it is the duty of the county commissioners to say so, and to determine what ought to be done to strengthen and prepare the structure to meet the demands that will be made upon it. They may also within any reasonable limits regulate the manner of its use, and provide for its repair and a proper compensation by way of rental. Beyond this their power of control cannot be exercised to defeat the purposes of the local authorities who control the highway. The line that divides the respective provinces of the county and the municipality as far as this subject is concerned is easy to trace and hard to mistake.

We shall amend our decree by adding the following paragraph to the end thereof:

And now, 8th of April, 1895, it is further ordered, adjudged and decreed that the record be remitted to the Court below with directions to appoint, on the petition of the defendants, a competent engineer to examine the bridge described in the bill and report in writing to the said Court its general condition and the extent of the repairs or supports that may be necessary to prepare it to support safely the defendants' street railway and its traffic in addition to the ordinary public travel. After the report of the engineer has been made the defendants may apply to the Court for the dissolution of the injunction so far as to permit them to enter upon the bridge with their employés, and, under the general supervision of the county commissioners, make the changes and repairs found by the Court on the report of the engineer to be necessary. When these are completed and that fact is made to appear to the satisfaction of the Court below, the injunction heretofore directed will be dissolved upon the giving by the defendants of a bond in the sum of five thousand dollars with surety to be approved by the Court, conditioned that the defendants will faithfully observe and abide by the terms and conditions relating to the manner of the use of said bridge by them, the repairs thereof, and the payment of rent therefor, which may have been or may thereafter be agreed upon by the parties, or, in the absence of an agreement, may be determined upon by the Court.

The costs of this motion to be paid by the County of Berks. H. B.

Jan., '95, 358. March 14, 1895.

Thomas v. The Inter-County Street Railway Company.

Abutting owner — Highway — Street railway company—Bribery—Ordinance obtained by.

An abutting owner has such an interest in the highway that he may maintain a bill for an injunction against its obstruction by a mere wrong-doer.

Larimer Railway Co. *v.* Railway Co., 137 Pa. 533, explained and the proposition contained in the head note declared broader than the point decided.

Sparhawk *v.* Union Ry. Co., 54 Pa. 401; Lockhart *v.* Craig St. Ry. Co., 139 Id. 419, distinguished.

It is bribery, in effect, to secure the action of a public official by the promise of a reward to him as an individual, and a Court of equity will not recognize a contract so obtained. This rule applies in the case of a borough ordinance.

Appeal of the Inter-County Street Railway Company, defendant, from the decree of the Common Pleas of Carbon County, enjoining said company, at the suit of William D. Thomas, from constructing a street railway on Ridge street in the Borough of Lansford.

The bill alleged that plaintiff owned lots in the borough of Lansford, abutting on Ridge street, that defendant under color of its charter and of an ordinance of the borough council of Lansford, entered on Ridge street, and began building a street railway; that the ordinance was procured by bribery and corruption, and the offer or promise of money, employment or some other thing of value to influence the members of said council who voted for the same, in violation of the Act of April 29, 1874, P. L. 115; that the defendant according to said ordinance should give a $15,000 bond, with surety to be approved by the town council to secure the borough against all damages that might be sustained dur-

Digitized by Google

ing the construction of said railway; that complainant was informed and believed that no such bond was given, but that said company defendant had proceeded with the construction of its road, without filing said bond, and is therefore without legal authority upon said street; that complainant, therefore, showing that he was an abutting owner of property on said street, and that the said Inter-County Street Railway Company was committing a nuisance thereon, prejudicial to his private rights as such property owner, prayed that the defendant be restrained from constructing a street railway. The defendant's answer admitted that the complainant was an abutting owner; set up that he had no standing in Court unless he proved special damage; that the company defendant was incorporated under Act of May 14, 1889, and entered upon Ridge street in Lansford, by virtue of the ordinance enacted by said borough, on the 2d day of July, 1894; denied that said ordinance was enacted by corrupt means; and averred that the allegation in the bill that the defendant was to file a $15,000 bond was incorrect and misleading; that the ordinance required two bonds, each in the sum of $15,000, both of which had been filed with the town council.

A preliminary injunction was obtained which after a hearing on bill, answer and evidence, the Court continued, CRAIG, P. J., delivering the following opinion:

"And now, October 18, 1894, this case came on to be heard on bill and answer, and testimony duly taken in open Court. By the evidence enough has been shown, in the opinion of the Court, to require the continuance of the injunction until further order. A discussion of the matter at this time is not in place, as the case will doubtless be further proceeded in, and further evidence be introduced. However, there is sufficient evidence to hold, for present purposes, that the defendant improperly influenced the act of granting consent to the laying of the tracks upon the streets of the borough of Lansford. This is emphasized by the fact that, after the holding out by the defendant of the exceptional inducements in the agreement of the 14th of June, 1894, four of the seven members who were present when the ordinance of consent was passed on the 2d of July, 1894, were, after their discharge, employed by the defendant in accordance with said agreement and inducements, in duties to which they were not accustomed, and are still so employed.

Of course, the act of The Lehigh Coal and Navigation Company, in discharging the councilmen from its employment on account of their vote, cannot be commended, whatever may be the company's strict right. But with this the Court has nothing to do. The councilmen are the servants of the plaintiff and the other citizens of the borough. The consent of the council gives the defendant a valuable franchise, and to some extent deprives the borough of its police and other control of the roads within the borough. The plaintiff has the right to require that the granting of so valuable a franchise shall not be obtained by improper influences. The bond, we think, if deficient, is amendable.

"The injunction heretofore granted is continued until final hearing, or until further order made before that time."

Counsel subsequently appeared and announced that they had no further evidence to take, whereupon the injunction was made perpetual. The defendant took this appeal and assigned as error:—

(1st.) The Court erred in entering the following final decree: "And now, Nov. 9, 1894 (the day fixed for further hearing in this case), both parties appear by counsel and orally state to the Court that they have no further evidence to take, and that the Court may make their order under the evidence as it now stands—it is therefore adjudged and decreed (under the opinion filed November 1, 1894), that the said Inter-County Street Railway Company, its officers, agents, contractors and employés, be restrained by injunction, to issue forthwith, from constructing, maintaining or operating an electric street railway, in, over, and upon Ridge street in the said borough of Lansford, or from entering upon or further interfering with said street for said purpose."

(2d.) The Court erred in holding that the ordinance passed by the borough of Lansford was not a valid and legal ordinance.

(3d.) The Court erred in holding that the ordinance duly passed by the borough of Lansford duly signed and published as required by law, was not a valid ordinance, and that it was obtained by means of promises of employment made to some of the councilmen.

(4th.) The Court erred in holding that the complainant had a standing in Court because he was an abutting owner on a street occupied by defendant railway.

(5th.) The Court erred in holding that the complainant had a standing in Court to question the validity of the ordinance giving the defendant the right to lay their railway on Ridge street.

(6th.) The Court erred in not holding that the complainant had no standing in Court, and should have dismissed complainant's bill.

Lewin W. Barringer and *J. O. Ulrich*, (with them *A. H. O'Brien* and *James Ryon*), for appellant.

The ordinance is a contract subject to the same rules that govern contracts between individuals.

Elliott on Roads and Streets, page 564 and note.
People *v.* O'Brien, 111 N. Y, 1.

Digitized by Google

Com. *v.* Essex Co., 13 Gray, 239.
New Orleans, Spanish Fort, etc., R. R. Co. *v.* Delamore, 114 U. S., 501.
Memphis R. R. Co. *v.* Commissioners, 112 U. S., 609.
People *v.* Brooklyn, etc., Co., 89 N. Y., 75.

The right to avoid the contract on the ground of fraud is a privilege conferred for the protection of the injured party, and may be waived by him if he finds it preferable to affirm the transaction and seek a remedy in damages for deceit.

Hare on Contracts, 301.
Pearsoll *v.* Chapin, 44 Pa. 9.
Leaming *v.* Wise, 73 Id. 173.

Assuming, therefore, that the borough of Lansford could rescind the ordinance upon the ground of fraud, or affirm it at its pleasure, the complainants in this case have no standing to intervene between the borough and the railway company. The complainants are strangers. The borough is not complaining. The parties in interest are complainants and the bill should have been dismissed.

Miller's Appeal, 159 Pa. 573.

The plaintiff has no right to complain of the occupation of the street, his damage is not special, but is the same as that suffered by any other citizen.

Larimer Ry. Co. *v.* Larimer Street Railway Co., 137 Pa. 533.

Fergus G. Farquhar, (with him *Craig*, *Loose* and *John W. Ryon*), for appellee.

March 25, 1895. WILLIAMS, J. The first question presented by the assignments of error in this case relates to the validity of an ordinance of the borough of Lansford giving consent to the occupancy of the borough streets by the defendant's street railway. This question has been settled during the present term by the Lehigh Coal and Navigation Company *v.* The Inter-County Street Railway Company, the appellant in this case. In that case the consent of the supervisors of Rahn township to the occupancy of its public roads had been obtained by means of a contract similar to that made use of to induce the action of the councilmen of the borough of Lansford in this case. We there held that it is in effect bribery to secure the action of a public official by the promise of a reward to be made to him as an individual; and that a Court of equity can not recognize as valid any official action induced by such rewards or the promise thereof. The action obtained in that case, and in this, was upon a subject of importance to the citizens and taxpayers of the district. It required deliberation and the exercise of judgment, in view of all the circumstances. The constituents of the supervisors and the councilmen had the right to have the question considered on its merits, and determined on the best judgment of the officers authorized by law to speak for them. What has happened is that the officers have been induced to make terms for themselves as individuals and to barter the interests of their constituents for considerations personal to themselves. We follow the rule laid down in the Navigation Company's case with no doubt of its wisdom or its justice, and overrule the second and third assignments of error. The remaining assignments relate to the standing in Court of the plaintiff. It is alleged that he is merely an abutting lot owner on a street on which the defendant is endeavoring to construct a street railway, and that he has no such interest in the subject as entitles him to be heard. But why not? He sees men at work in the street on which his property fronts, and in which he has the interest which a lot owner has in the highway into which his premises open. They are digging it up and laying pieces of timber and iron or steel along and upon it. He goes to them to inquire what it means and what right they have there, and he finds, as was the case here, that they have no right whatever, and that they are therefore committing a nuisance upon the highway in which he is interested. He has a right to prosecute in the Quarter Sessions or to seek to stop their operations by injunction. If they are not trespassers but enter under a valid charter and municipal consent, then he is in no position to complain unless some special damage is sustained by him; or if without a valid charter they nevertheless have municipal consent, the same thing is true. But the proposition contained in the head notes to the Larimer Railway case, 137 Pa. 533, is broader than the point decided. In that case a street railway company with no municipal consent and consequently with no rights whatever in the streets, sought to restrain another company from constructing a street railway on certain streets in the city of Pittsburgh notwithstanding the fact that the latter company had municipal consent to the occupancy of the particular streets. What was decided was that a company to which municipal consent had been refused, did not stand in a position to contest the right of a company to build, to which municipal consent had been given. The refusal to it left it without any right in the street whatever, and consequently without legal standing to contest the extent and character of the grant to its rival. Our Brother CLARK cited in support of his position the case of Sparhawk *v.* The Railway Company, 54 Pa. 401. In this case a bill was filed to restrain the Union Passenger Railway Company from running street railway cars on Sunday. The company was lawfully incorporated. Its right on the streets was not denied; it was

Digitized by Google

alleged, however, that the running of street cars was the pursuit of a worldly employment on the Lord's day, and therefore a violation of the Sunday law. What was held was that an act that was simply illegal will not ordinarily be restrained except at the instance of some person who can show that he is injured by it. If the object of the plaintiff is simply to enforce a general law, he will be left to the remedy which the law itself provides for its enforcement. Lockhart *et al. v.* Craig St. Railway Co., 139 Pa. 419, also relied on by the appellant, is quite as far from our question as the cases just referred to. The plaintiffs were abutting lot owners who had paved the street with asphaltum at their own expense. The municipality had given consent to its use by a street railway company. The bill alleged that the street railway company would impose an additional servitude on their lots, and that for the recovery of their damages the law had made no provision. For this reason they alleged the law under which the defendant was incorporated was unconstitutional, and the company, notwithstanding its charter and the municipal consent, was without corporate powers and without right in the street. The injunction prayed for by the plaintiffs was refused in the Court below, and this refusal was affirmed by this Court.

The street railway was an urban servitude that the city had a right to impose upon the surface of the street. The company did not possess or attempt to exercise the right of eminent domain and the plaintiffs had no claims for damages against it. They stood therefore in no position to raise the question on which they rested their right to equitable relief. But the position of the parties in this case is quite unlike that of the parties in Lockhart *v.* Craig Street Railway Co. The plaintiff is an abutting owner, but here the likeness ends. The defendant company is in the street in front of the plaintiff's premises without municipal consent. It and its employés are trespassers. They are disturbing the surface of the highway; committing a nuisance upon it of a permanent and, according to the general belief, of a dangerous character. An abutting owner is not debarred from proceeding in such a case because there are other lot owners on the same street who suffer in the same manner that he does. If the nuisance was a stable or a dwelling that was being erected in the center of the same street, and the borough authorities neglected or refused to interfere with its erection, an abutting lot owner would have no trouble in reaching the ear of a chancellor. Indeed there are cases in abundance where the building of even a projecting window has been enjoined at the instance of lot owners in the vicinity; so also with encroachments upon, and obstructions in the way of the unrestricted use of, public alleys and ways of all sorts. The plaintiff has what may be called a general interest in the streets as a citizen, and he has a special interest in this street as an abutting owner who must use it as a means of access to his property. He has therefore a right to object to its obstruction by a mere wrong doer. None of the assignments of error are sustained and the decree is affirmed at the cost of the appellant.

H. B.

Jan. '95, 359. March 14, 1895.

McMichael et al. v. The Inter-County Street Railway Company.

Borough—Veto—Burgess—Act of May 23, 1893.

Where an ordinance is passed at a called or special meeting of a borough council and is placed in the hands of the burgess on the day of the next regular meeting and but a short time before the assembling of the council, it does not become operative without the approval of the burgess simply because his veto is not received before the adjournment of the meeting, but the veto is on time if sent the next day.

Dubitur, whether an ordinance adopted at a called meeting is within the provision of the Act of 1893, which requires a burgess to return an ordinance to which he objects at the next regular meeting of councils.

Semble, an ordinance passed at one regular meeting should be promptly placed in the hands of the burgess who would then have until "the next regular meeting" for examination and decision.

A burgess who claims that an act which is justified under color of an ordinance, is illegal because the ordinance had been returned by him with his veto, is a proper party to a bill to restrain the commission of the act.

Appeal of the Inter-County Street Railway Company, defendant, from the decree of the Common Pleas of Carbon County, in a suit brought by the Lehigh Coal and Navigation Company and John I. McMichael, burgess of Summit Hill, to restrain the defendant from constructing a street railway within the limits of the borough of Summit Hill.

In this case a bill was filed setting up that the defendant was proceeding to construct a street railway upon the streets of the borough of Summit Hill, that a condition precedent to construct a railway was the consent of the borough council, and that the council had not legally passed the ordinance giving such consent. The answer denied that the ordinance had not been legally passed. The facts with reference to the passage of the ordinance appear by the following extract from the opinion of CRAIG, P. J., delivered after a hearing on bill, answer and evidence, on a motion to dissolve a preliminary injunction.

Digitized by Google

"That the consent of the local authorities is a prerequisite must be conceded, and unauthorized occupation of a public street by a railway track may be regarded as a nuisance *per se*, which will be enjoined: Larimer Ry. Co. *v.* Railway Co., 137 Pa. 533; Steelton Boro. *v.* East Harrisburg Pass. Ry. Co., 1 Dist. Rep. 667; Harrisburg, etc. Ry. Co. *v.* Harrisburg, etc. Turnpike Co., 15 Pa. C. C. 389.

"Under the evidence it is difficult to say when the ordinance of consent was passed by the council, and what were its exact terms. There was a vote on the 7th of September, 1894, giving the defendant a 'right of way subject to the ordinance to be passed.'

"Then, on the 11th of September following, there is this on the minutes: 'On motion that the electric railroad ordinance be read for the first time.' What this ordinance was we are not informed.

"Next, on the 5th of October, 1894, the ordinance marked Exhibit 7 was passed by a proper vote, according to the minutes; but, according to the testimony of James S. Smith, the secretary of the council, this ordinance was not passed finally on this date, but was 'read twice,' 'had two readings,' and finally passed on the 16th of October, 1894. In another part of his testimony, he says it was not passed finally until the 2d of November, 1894 (the minutes do not show this), and that what was passed on the 16th of October, 1894, was not the same ordinance that had been acted on on the 5th of October, 1894, but was a resolution, and differs in some of its wording from the ordinance of the 5th of October.

"On the 8th of October, the ordinance of the 5th of October was ordered to be published in the Lansford *Weekly Leader*.

"It appears in this paper for the first time on the 17th of October, 1894, signed by W. T. Jones, president of council, and attested by J. T. Smith, secretary. The conclusion of the advertisement is 'first passed on the 5th of October, 1894, and finally enacted and passed this 2d day of November, 1894.'

"It is undisputed that the ordinance was not presented to the chief burgess for approval until about 6 o'clock P. M. of the 2d of November, 1894, at his house, and that the council met on that day at the Town Hall, about half past seven in the evening.

"On the 6th of November, 1894, the burgess vetoed the ordinance. As to what was done after this, we are not advised, as the evidence does not come down later. If the ordinance of the 5th of October, 1894, was not finally passed until the meeting of the 2d of November, 1894, (being two regular and successive meetings), then clearly the ordinance which was presented that day to the chief burgess had not yet passed council, and he was not bound to notice it then. If, however, it be conceded that the ordinance of the 5th of October, 1894, was then legally passed, or that the resolution of the 16th of October was then legally passed, was the presentation of either to the chief burgess, about 6 o'clock in the evening of the 2d of November, the next regular meeting thereafter, a compliance with law? The purpose of this presentation is to receive the approval of the burgess. 'If he approve he shall sign it, but if he shall not approve, he shall return it with his objections to said council at the next regular meeting thereof, when said objections shall be entered at large in the minute-book, and said council shall proceed to a re-consideration of such ordinance or resolution.' (Pur. Dig., 12th Ed., Vol. 1, p. 348, plac. 172). We hold that the presentation of the ordinance or resolution to the chief burgess for his approval, about an hour and a half before the next regular meeting of councils, is not a compliance with the law. He is the chief officer of the borough, and responsible by virtue of his election for the proper supervision and execution of all ordinances and laws pertaining thereto. Surely, he is entitled to a reasonable time for the consideration of all ordinances and resolutions that are presented to him for approval. How can he (in case he disapprove) return an ordinance or resolution passed by council, with his objections, at the next regular meeting thereof, if he have not a reasonable time to do it? The law fixes no time of service; and we need decide no more in this case than to say, that the time of service or presentation of the ordinance or resolution (assuming them to have been legally passed on the 5th and 16th of October respectively) was too short to comply with the law: Purg. Dig., 12th Ed., Vol. II, p. 2007, plac. 3.

"It follows, then, that the defendant, neither by the ordinance of 5th of October, nor by the resolution of 16th of October, has that consent of the local authorities which is prerequisite to its right to enter upon the streets of the borough of Summit Hill and lay down its railway track. In this record it can make no difference whether the legal consent is by ordinance or resolution. Both are governed by the same rule: Kepner *v.* Com., 40 Pa. 124."

The Court continued the injunction. The defendant took this appeal.

Lewin W. Barringer and *J. O. Ulrich*, (with them *J. H. O'Brien* and *James Ryon*), for appellant.

The Act of 23d May, 1893, provides that "every ordinance and resolution which shall be passed by said council shall be presented to the chief burgess of such borough. If he approve,

Digitized by Google

he shall sign it; but if he shall not approve, he shall return it with his objections to said council at the next *regular* meeting thereof, when said objections shall be entered at large in the minute-book, etc."

The language is very plain that the burgess *shall* return it, if he shall not approve, to council, *at the next regular meeting* thereof.

It was too late to veto the ordinance thereafter.

Com'th *v.* Fitler, 26 WEEKLY NOTES, 369.
Pa. Globe Gaslight Co. *v.* Scranton, 97 Pa. 538.

The provision that the burgess shall return the ordinance to the next, regular meeting of the borough council is mandatory, because the grant of such a veto power is construed strictly.

Opinion of Justices, 3 Mass. 567.
Opinion of Justices, 45 N. H. 607.
Harpending *v.* Haight, 39 Cal. 189.

And this because the veto power does not exist unless granted.

Burlington *v.* Dennison, 42 N. J. Law, 165.
Phila. *v.* Given, 60 Pa. 136
Blanchard *v.* Bissell, 11 Ohio, 97.

And it is found in a municipal charter, where the universal rule of construction is that a grant of authority must be strictly followed in the mode of its exercise.

Zottman *v.* San Francisco, 20 Cal. 96.
Keese *v.* Denver, 10 Col. 113.
Head *v.* Ins. Co., 2 Cranch, 127.
Fuller *v.* City of Scranton, 18 WEEKLY NOTES, 18, 20.
Bloom *v.* Xenia, 32 Ohio, 461.
Danville *v.* Shelton, 76 Va. 325.
Jones *v.* Hutchinson, 43 Ala. 721.
State *v.* Deal, 24 Fla. 293.

As no replication was filed, the answer denying that the ordinance was not legally passed must be taken as true and the preliminary injunction should have been dissolved.

Russell's Appeal, 34 Pa. 258.
Gross *v.* Wieand, 151 Id. 639.

Fergus G. Farquhar, (with him *Craig, Loose* and *John W. Ryon*), for appellee.

March 25, 1895. WILLIAMS, J. The assignments of error in this case present two questions not involved in any other one of the series of appeals with which this one is connected.

The first of these relates to the validity of the ordinance of the Borough of Summit Hill under which the defendant claims to have secured municipal consent to the occupation of certain streets with its street railway. The evidence shows that an outline or draft of such an ordinance as was thought to be necessary had been prepared by the borough solicitor and presented or reported to the councils at a meeting held on the fifth day of October, 1894. One or two alterations were made in it by councils and then it was formally accepted as appears by an entry on the minutes made thus: "On motion the ordinance be accepted." This was probably intended as an expression of satisfaction with the character of the work done by the solicitor in the preparation of an ordinance suitable for consideration and adoption at the proper time. Another meeting of councils was held on the tenth day of the same month, which adjourned to meet at the call of the president. Six days later a call was made by the president and a meeting held at the house of one of the councilmen. At this meeting the ordinance was taken up and adopted, giving to the defendant permission to enter upon and occupy certain borough streets with its street railway. When this was done another adjournment was made to the call of the president. This call came on the following day and at that meeting the business done was the approval of a contract and bond given by the defendant company under the provisions of the ordinance adopted the day before. The next meeting of councils was the regular monthly meeting held on the second day of November. The hour for this meeting was seven and a-half o'clock in the evening. On the same evening at about six o'clock the ordinance, the agreement of the railway, the bond, and other accompanying papers came to the hands of the burgess for his examination and action. His veto was not presented to councils when that body met, and at its adjournment it was alleged that the ordinance had become effective under the provisions of the Act of 1893. The burgess completed his examination and sent his veto on the following day, and his veto message with a statement of his objections to the ordinance came in this manner to the notice of councils and of the defendant. Was this veto in time under the circumstances of this case? The burgess insisted that it was, and, as the defendant admits, protested against the validity of the ordinance and the right of the railway to occupy the streets under it. It may well admit of doubt whether an ordinance adopted at a called meeting is within the meaning of that provision of the Act of 1893 that requires the burgess to return an ordinance to which he objects at the next regular meeting of councils. It would seem that an ordinance passed at one regular meeting should be promptly placed in the hands of the burgess who would then have until "the next regular meeting" for examination and decision. If an ordinance passed at a called meeting is to be treated in the same manner as though passed at a regular meeting, then the called meeting might be held on the same evening with the reg-

Digitized by Google

ular one at an hour, or a half hour, earlier and an ordinance upon an important subject and of great length be passed. It could then be placed, as this one was, in the hands of the burgess at a time to make examination impossible, and if the object was to avoid a veto the shorter the interval between the special and the regular sessions, and the more prompt the adjournment of the regular, the better the prospect of securing an ordinance in defiance of the burgess. This is an opening for discord and uncertainty and litigation that the law did not contemplate. The Court below took the most favorable view possible of the situation for the councils, and the defendant, when it held that the burgess was at least entitled to a reasonable time for examination. That he was not allowed, by the council, a reasonable time in this instance, and that his veto promptly returned within twenty-four hours after the papers were placed in his hands was in time, were conclusions that followed logically, and we see no reason for disturbing them.

The second question relates to the right of the burgess to raise the question of the validity of the ordinance. This is hardly debatable. The statute confers on him the veto power. The councils arrange to render its exercise practically impossible, and assert that they have a valid ordinance without his signature. He has a right to assert his prerogative, and he can do this only by denying the validity of the ordinance alleged to be binding notwithstanding his veto. The appropriate remedy for him is by bill in equity to restrain action under the ordinance alleged on the one side to be legal and on the other to be without legal force. This brings his prerogative and the manner of its exercise before the Court and determines the duty of the councils towards him. The joinder of the other defendant has not been demurred to, and the decree may well rest on the right of the burgess to be heard on the validity of the ordinance. The decree is affirmed. The costs of the appeal to be paid by the appellant.

H. B.

Jan. '94, 59. January 11, 1894, January 8, 1895.

Plumb's Appeal.

Change of Grade of Tucker and Frankford Streets.

Municipal corporations—Change of grade of streets and of railroad—Property injured not bounding on the streets—Liability of railroad company — Snyder v. *Lancaster, 20* WEEKLY NOTES, *185, and Mellor* v. *Philadelphia, 160 Pa. 614, distinguished.*

Where an agreement was entered into in pursuance of a city ordinance between the City of Philadelphia and the Philadelphia and Trenton Railroad Company for the purpose of abolishing grade crossings, in which it was provided that the railroad company should at its own cost and expense change the elevation of its road, and where, in carrying out the undertaking the tracks of the railway company were so elevated as to interfere with the access therefrom to plaintiff's property, it being conceded that the change in the streets had no effect upon the said property, it was

Held, that plaintiff had no cause of action against the city.

Snyder *v.* Lancaster, 20 WEEKLY NOTES, 185, and Mellor *v.* Philadelphia, 160 Pa. 114, distinguished.

Appeal of Fayette R. Plumb, from the decree of Common Pleas No. 2, of Philadelphia County, setting aside the report of a jury assessing damages by reason of a change of grade of Tucker and Frankford streets.

The case having been argued in January, 1894, was ordered for reargument and was reargued in January, 1895.

It appeared from the report of the jury that in consequence of the changes of grade by which the two streets named were depressed, and the tracks of the railroad company elevated, to do away with the former crossings at grade, plaintiff's property, which bounded on the railroad, but not on either of the streets, was injured, access thereto from the tracks being interfered with.

The Court set aside the report of the jury which awarded to petitioner damages of $9,750 against the City of Philadelphia. The facts are more fully stated in the opinion of the Supreme Court.

Petitioner appealed, assigning as error the setting aside of the report and the sustaining of the exceptions thereto, of the City of Philadelphia.

David W. Sellers, (*John Roberts* with him), for appellant.

After discussing the history of the legislation awarding damages to property owners for property taken, injured or destroyed by municipal improvements counsel cited and relied on—

Snyder *v.* Lancaster, 20 WEEKLY NOTES, 185.
Mellor *v.* Philadelphia, 160 Pa. 614.

Howard A. Davis, assistant city solicitor,

Digitized by Google

(with him *James Alcorn*, assistant city solicitor, and *Charles F. Warwick*, city solicitor), for appellee.

The exceptions of the city contained three main reasons why the report of the jury should be set aside:—

1. Because the appellant's property did not front upon the street where the grade was actually changed.

2. Because the injury to appellant's property was to that part fronting on Trenton avenue, and was caused by the raising of the tracks of the Philadelphia and Trenton Railroad, and that the city was not liable for the damage so caused.

3. Because the report of the jury was contrary to law, in that it did not state whether any property in the locality was benefited or not by the change of grade.

Any of these reasons warranted the Court below in setting aside the report of the jury.

Thirtieth Street. 147 Pa 245.
Penna. Co. *v.* Schuylkill Valley R. R., 151 Id. 334.
Lawrence *v.* Philadelphia, 154 Id. 20.

This is an attempt to place upon the City of Philadelphia the liability for the damage or injury caused by the railroad's construction of its highway. Even if the councils could bind the city to pay such damage there is nothing in the ordinance of March 29, 1887, making the city liable. It was an ordinance, as it states, to avoid grade crossings, an improvement in which the railroad company was benefited as much, probably more, than the city. The city agreed to do certain things to accomplish the improvement and the railroad company was to do its part, but it was particularly provided that the city would not do anything until the railroad company agreed to do its work.

February 18, 1895. McCollum, J. The damages awarded by the viewers were the direct consequence of work done by the Philadelphia and Trenton Railroad Company on its right of way adjoining the plaintiff's property. It consisted of an elevation of the railroad tracks to a height which impaired his facilities for loading his goods on the cars. He claims that the city is liable to him for these damages on the ground that the act from which they resulted was necessitated by its change of the grade of Frankford street. It appears that on the 29th of March, 1887, the councils, with the approval of the mayor, authorized a revision of the lines and grades of the city plans along the line of the Philadelphia and Trenton Railroad from Tacony street to Pennypack creek in the Twenty-third ward, for the purpose of avoiding all grade crossings of the railroad between these points. In the ordinance authorizing this work it was provided that before confirmation of the revised plans, the railroad company should file an approved obligation that it would at its own cost and expense change the elevation of its road at such points, as in the revision of the plans might be found necessary in order to construct overhead or undergrade bridges, and, in accordance with the revision, construct all the bridges and other works incident thereto, within its right of way. In view of the proviso in the ordinance the latter may be regarded as a proposal by the city to the railroad company of co-operation in the abolition of the grade crossings of its road between the points named. The acceptance of this proposal by the railroad company was voluntary and in its interest as well as in that of the city. It was followed by a confirmation of the revised plans and the physical change of the grade of Frankford street in accordance with them. The work of lowering the grade of the street was done by the city and the work of constructing the overhead bridge and raising the railroad tracks to correspond with it was done by the railroad company. While this proceeding was instituted for the purpose of assessing the damages the plaintiff sustained by the change of grade of Tucker and Frankford streets it was conceded in his testimony and found by the viewers that his property was not injured by any work done by the city on either of them. Tucker street was not opened beyond the railroad and there has been no physical change of its grade. His property does not abut on Frankford street and is not affected by the lowering of it. It was the elevation of the railroad tracks and that alone which caused the injury complained of, and this, as we have seen, was work done by the railroad company at its own expense within its right of way on which his property abutted. Access to the property on the side of it which has a frontage on the right of way was and still is exclusively by rail, but the elevation of the tracks has increased the labor and expense involved in receiving the materials from and loading the manufactured products upon the cars. In all other respects access to it is unchanged. The undisputed facts, therefore, present a case of highways crossing each other at grade, one of them created and controlled by the city, and the other by the railroad company. A mutual desire of these corporations to abolish grade crossings resulted in an agreement under which, to accomplish the common purpose, the city lowered its street and the company elevated its road. The outcome of the facts is a proceeding against the city for the recovery of the damages sustained by a property owner in consequence of the elevation of the railroad. The city contends that its change of the grade of Frankford street was not the proximate cause of the damages claimed, and it rests its contention in this particular, on the plaintiff's

Digitized by Google

testimony, and the report of the viewers, who distinctly found that the entire damage done to plaintiff's property was "the result of the elevation of the tracks of the Philadelphia and Trenton Railroad Company." It also contends that there is nothing in its agreement with the company which subjects it to liability for damages occasioned by the act of the latter. We think that upon the undisputed facts on which the plaintiff's claim is based the city's entire contention is sound, and the order of the Court below setting aside the report of the viewers should be sustained. In this conclusion we do not disregard or in the slightest degree qualify the principle on which Snyder *v.* Lancaster, 20 WEEKLY NOTES, 185, and Mellor's Exr. *et al.*, *v.* The City of Philadelphia, 160 Pa. 614, were decided. These cases are plainly distinguishable in their facts from the case at bar. In Snyder *v.* Lancaster the opening of Filbert street was the direct cause of the injury complained of. The opening of the street took away from plaintiff's house the lateral support it had and left it without a gable. In Mellor *v.* The City, access to plaintiff's property by vehicles was cut off by the change of the grade of Oxford and Margaret streets. The injury complained of in the cases cited was the direct and proximate consequence of the opening of a street or a change of its grade. The principle on which they were decided is unquestionably sound but it is not applicable to the facts of this case.

The order setting aside the report of the viewers is affirmed.

J. D. B., Jr.

Orphans' Court.

October, 1894, 592.

Nathan's Estate.

Decedents' estates—Payment of debts, etc.—Personal estate primary fund for—Exceptions.

The primary fund for the payment of debts, legacies and annuities is the personal estate of the testator. But the testator may direct otherwise by express declaration, or his intention to exempt the personalty from such charges may appear by implication.

Exceptions to adjudication.

The facts appear sufficiently in the opinion.

George P. Rich, Henry C. Boyer, Matthew Dittman, David Mandel, David W. Amram, Clinton O. Mayer, J. L. Greenwald, G. Remak, Jr., for exceptants.

Emanuel Furth, Jacob Snyder and *Otto Wolff*, contra.

March 2, 1895. FERGUSON, J. The primary fund for the payment of debts, legacies and annuities is the personal estate of the testator. This is so well settled as the law that it is not necessary to quote authorities. A testator may, however, direct otherwise, as the whole matter is absolutely within his control. "It was formerly held that his intention to except the personalty must be expressly declared. Such is not the rule now. It is sufficient if it appear by necessary implication, collected from a sound interpretation of the whole will:" Eavenson's Appeal, 84 Pa. 172. In this case the testator gave to his nephew, Joseph Motzner, an annuity of $600, and, after some other bequests, to his beloved wife, Rose, "all of my personal property, to wit, cash in bank or elsewhere, bonds, mortgages and all other choses in action and in possession, my household furniture and effects, jewelry, plate and pictures, the good will of my soap manufacturing business, and the stock, fixtures, goods and effects belonging thereto, and all my right, title and interest in the same."

He thus, in general and in detail, specifically bequeaths to his wife all his personal estate, and, if there were no debts to be satisfied, she was entitled to have the same delivered to her at once. What is the necessary implication to be collected from this will? As he does not indicate any source from which the annuity is to be paid, and as he specifically bequeaths all his personal estate to his wife, there is nothing but the real estate left out of which the annuity can be paid. We think the intention of the testator to exempt his personal estate from the payment of this annuity and to charge it upon his land is as clear as if he had expressly so declared in words.

With regard to the other exceptions as to commissions and counsel fee, the commissions are the usual ones allowed in an estate of this size, and we see no reason why they should be disturbed. The counsel fee may seem large, but there has been considerable service rendered by counsel, and much for them yet to do; besides, at the audit the amount of the fee asked for was submitted by the auditing Judge, when all the parties and their counsel were present and objection thereto, if any, was invited. No objection was then made, and it is now too late.

All the exceptions are dismissed.

F. B. N.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, APRIL 19, 1895.* [No. 10.

Supreme Court.

Jan. '95, 172. February 28, 1895.

Scranton Gas & Water Company v. Lackawanna Iron and Coal Co.

Contract—Construction of—Tort—Statute of limitations, when it begins to run.

A., a water company, agreed in writing to furnish B., an iron company, with "pure water" for the "generation of steam, for fire hydrants and hydraulics and for stores and dwellings" for a fixed sum per annum, and expressly stipulated that the contract did not include water for tuyers, boshes, or condensers, or for any other purpose than those mentioned in the agreement. A. also stipulated for free access to B.'s works and reserved the right to put in meters if deemed necessary.

Subsequently A. further agreed to supply from the Lackawanna River or Roaring Brook "such other water as may be required" by B. for the excluded purposes, for which a rate of payment was arranged:

Held, that B. had a right to call upon A. after reasonable notice, for a supply of river water for such other purposes, but it had no right to demand pure water or to take it, without demand, from any connection within its control.

A. brought suit against B. for the improper taking of pure water, for a period of over ten years, for the purposes excluded in the original contract. The Court charged the jury that the taking of the water without the knowledge or consent of A. was fraudulent, and the statute of limitations did not begin to run until the discovery of the taking:

Held, that this was error; mere ignorance of the commission of a trespass will not stop the running of the statute of limitations, where the means of information are within the reach of the complaining party.

Appeal of the Lackawanna Iron and Coal Company, from the judgment of the Common Pleas of Lackawanna County, in an action by the Scranton Gas and Water Company, to recover the value of water alleged to have been used by said Iron Company.

The controlling facts are stated in the opinion of the Supreme Court, *infra*.

On the trial, before GUNSTER, J., counsel for defendant offered evidence of experts to show unreasonableness of plaintiffs' charges. Objected to. Objection sustained. (19th, 20th and 21st assignments of error.) Defendant offered in evidence the correspondence between the presidents of the gas company and the iron company to show the construction put upon the contract by the parties. Correspondence objected to because the letters did not purport to show the action of either of the companies, because they did not construe or tend to construe the contracts, and because the contracts are not ambiguous and speak for themselves. Objection sustained. (Eighteenth assignment of error.)

The plaintiff requested the Court to charge the jury as follows:—

"1. If the defendant committed constructive fraud in taking water from plaintiff's pipes as shown by the evidence, if believed by the jury, and said fraud was not discovered by the plaintiff until within six years before this suit was brought, the statute of limitations was no bar to this action and the verdict may be for the plaintiff. The tort having been waived in this case does not change this rule."

Answer of the Court. "I affirm that proposition, gentlemen of the jury." (Seventh assignment of error.)

"2. The plaintiff may recover in this case, if under the law and the evidence you find for the plaintiff, such an amount as would be a reasonable price, had a contract been made between the parties for the water taken under the conditions as shown by the evidence, if you believe the same."

Answer of the Court. "I affirm that proposition; that is, if you find the plaintiff is entitled to recover then they are entitled to recover such a price for the water as would have been a reasonable price if the parties had made a contract for it." (Eighth assignment of error.)

Defendants requested the Court to charge as follows:—

"1. The plaintiff is not entitled to recover in this action, and the verdict of the jury must be for the defendant."

Answer of the Court. "I decline to affirm that proposition. It asks me to take the case away from your consideration, and to render a verdict in favor of the defendant. I think under the evidence the case is properly one for you." (Ninth assignment of error.)

"2. Under the contract of 1874, as modified by the contract of 1881, the plaintiff, the Scranton Gas and Water Company, was obliged to furnish to defendant, the Lackawanna Iron and Coal Company, upon demand, all water for all purposes, except for water wheels, required by its works, in excess of the water obtained by its own appliances, and plaintiff was not entitled to any compensation in excess of the $10,000 per annum, which has been paid for the value or use of said water, nor for the value or use of plaintiff's pipes, reservoirs or other appliances in supplying the same, but in the event of a supply of water for purposes other than generation of

Digitized by Google

steam, fire hydrants or hydraulics, was entitled to receive only the interest upon the cost of any works required to be erected for the purpose of supplying such water, and the actual cost of operating and keeping the same in repair, and the burden of proof is upon the plaintiff to show the erection of any works necessary for such purpose, the cost thereof, and the cost of operating and keeping the same in repair."

Answer of the Court. "I affirm this proposition, with the qualification as to the kind of water that was to be used. There is no doubt at all that under this supplement of 1881 the plaintiff company was bound to furnish the defendant company with the water that they needed, upon request, whenever required to do so, only they were not obliged to furnish them all pure water from their pure water pipe. The gas and water company had the right to resort to the Roaring brook and Lackawanna river water if they desired to do so. If it were not, I would affirm the proposition absolutely." (Tenth assignment of error.)

"3. The plaintiff is not entitled to recover for any water used at defendant's converting works prior to May 19, 1888, this suit having been commenced upon the 19th day of May, 1894."

Answer of the Court. "I decline to affirm that proposition, gentlemen of the jury, but desire to say to you that if the plaintiff knew that the water was being abstracted from their pipe, and used at the converting works for other purposes than the four purposes which are mentioned in the first section of the contract of 1881, then it was their duty to bring their action to recover for that water within six years, and if they did not bring their suit within six years, after that they could not recover for the water that had been used prior to the six years. Now, if they knew, or had reasonable ground for knowing, that water was used at the converting works six years prior to the bringing of this suit they cannot recover for that, but they can recover, if the water was used, for that which was used within six years prior to the bringing of the suit, and the suit was brought on the 19th of May, 1894." (Eleventh assignment of error.)

"4. Plaintiff is not entitled to recover for any water used at defendant's foundry, boiler, machine, carpenter and smith shops prior to May 19, 1888, this suit having been commenced May 19, 1894."

Answer of the Court. "I decline to affirm that point for the same reason that I have given to you in declining to affirm the third point. They say the same rule applies to the foundry, blacksmith shop and those places that they ask to have applied to the converting works. Now, if the plaintiff knew that the water was being used there at the foundry, or at the blacksmith shop, then they were bound to bring the suit for the water that was used there within six years, and if they did not it is barred by the statute of limitations, the right to recover for it is gone, but they may recover for what was used within the six years. If they did not know that it was used there, then they may recover for it all." (Twelfth assignment of error.)

"5. The plaintiff is not entitled to recover for any water used at defendant's mule barns prior to May 19, 1888, this suit having been commenced May 19, 1894."

Answer of the Court. "I decline to affirm that proposition for the reason that I have given in my answers to the third and fourth points." (Thirteenth assignment of error.)

"6. Plaintiff is not entitled to recover for any water used through four-inch connection prior to May 19, 1888, this suit having been commenced May 19, 1894."

Answer of the Court. "I decline to affirm that proposition for the reasons that I have given in my answers to the third and fourth points." (Fourteenth assignment of error.)

"7. Plaintiff is not entitled to recover for any water furnished for any purpose, nor for the use of any water, nor for the use of pipes, reservoirs, and other appliances, nor for any other matter or thing prior to May 19, 1888, this suit having been commenced May 19, 1894."

Answer of the Court. "I decline to affirm that proposition for the reasons that I have given in my answers to the third and fourth points. It depends upon the knowledge of the plaintiff. If the plaintiff knew of the use of the water being made by the defendant, then they were bound to bring their suit within six years. If they did not know, then it was the duty of the defendant to have made it known; and if they did not, but took it secretly, without having the right to do so, then it was a constructive fraud upon the plaintiff. No fraud may have been intended, but it would be a constructive fraud upon the plaintiff. A use of their property without their consent and without any right, would be such a fact as would prevent the right of action being barred by the statute." (Fifteenth assignment of error.)

The Court charged the jury, *inter alia*, as follows:—

"Gentlemen of the jury, if the defendant company drew pure water from the pipes of the Scranton Gas and Water Company, and used it for other purposes than those specified in the first section of the contract of 1881, without the knowledge or consent of the gas and water company, then the law places upon them the liability, the obligation, to pay for it, and it also implied a promise to pay for it, even though there may not have been any express promise.

Digitized by Google

"Now, then, if that was the case, the two principal questions for your consideration are, first, did the defendant company extract and use water for other purposes than those four which I have mentioned? If they did, they ought to pay for it, and the measure of damages would be what that water was fairly worth. Not what the plaintiff might ask for it, because as I understand their charter, while they may fix rates, their rates must be reasonable; nor yet what the defendant might be willing to pay for it, because they might not be willing to pay for it what it was worth, but what, under all the circumstances of the case, situated as the parties were in relation to each other, what was the water which the defendant company took without any right, if it took any, fairly worth." (First assignment of error.)

" . . . . Were these valves opened, and the water belonging to the water company turned into the pipes of the defendant company and used for other purposes than for steam, hydraulics, fire hydrants, and for the stores and dwelling houses? If they were, then the coal company ought to pay for the water, and it ought to pay a reasonable price." (Second assignment of error.)

" . . . . Now, I say to you, therefore, as a matter of law, gentlemen of the jury, that the only water, if you believe that this was pure water in the pipes of the Scranton Gas and Water Company, that the only purposes for which the defendant company has a right to use that water, would be the four purposes which I have mentioned, that is for the generation of steam, for fire hydrants, hydraulics, for the stores and dwelling houses specified in the contract of 1874. Of course the stores and dwelling houses are entirely out of this case, there is no claim made for any extra water used there. If the defendant company used any of this pure water, as I said before, they are liable to the plaintiff for it, and they should pay the fair value of it." (Third assignment of error.)

" . . . . Ordinarily actions of this kind must be brought within six years from the time the right of action accrued, from the time the right to begin suit commenced; it must be brought within the six years. But you will observe, gentlemen of the jury, that in this case it is alleged, *and there is evidence to prove it*, that the defendant company took this water from the pipe of the gas and water company without their knowledge and consent, and that they did not know it until 1891. If they took the water from the pipes of the water company without having any right to do so, and without the knowledge and consent of the water company, then such abstraction of the water was a fraudulent use of the water, and until the plaintiff discovered it they could not bring suit, of course they could not, and therefore that would be an exception to the general rule that the action must be brought within the six years. But if the plaintiff company knew it, or had reasonable ground to know it, if they knew it, of course they had to bring their action within the six years, if they had reasonable ground to know it, it was their duty to inquire, but it was not their duty to inquire unless they knew, or had reasonable ground to know, it was not their duty to inquire whether the defendant company was abstracting the water from their pipe; it was the duty of the defendant company if they took the water from the pipe of the gas and water company without any right to do so, it was the duty of the defendant company to notify the gas and water company of what they had done, then the gas and water company would have known at once what was being done, and they would have acted, that is, it would have been their duty to act within the six years. Now, that is the allegation on the part of the plaintiff, that they did not know, they alleged that this water was withdrawn from their pipes without any right upon the part of the defendant, and without any knowledge or consent on the part of the plaintiff. If that was so, then to that extent the statute of limitations would not apply." (Fourth assignment of error.)

" . . . . There is some comparison made as to the value for the water that is supplied to the Scranton Steel Company, another steel company further down the river. It is alleged upon the one side and the other, that there is some difference, and in other respects that there is great similarity. Upon the part of the plaintiff it is claimed that substantially the same work is done by these two mills, and that the price paid for the water at the Scranton steel mill was about the price which is now claimed by the plaintiff for the present supply at the converting works. You have also the testimony of Mr. Williams, who was called to some extent to contradict the testimony of Mr. Scranton. You will remember that Mr. Scranton said the Scranton Steel Works paid $8,000 a year for their water supply down on the Flats. Well, Mr. Williams produced the figures and the bills, what the consolidated company had actually paid for 1891, '2, '3 and '4; he gives it at an average of $5,886. He testifies also that in these bills for the Scranton mill they pay not so much a year, but they pay on tonnage, I think five cents a ton; that is my recollection of his testimony about that." Without calling attention to the fact that, as shown also by the testimony of Mr. Scranton, from the period of 1883 to 1891, when he was president of the Scranton Gas and Water Company, and also of the Scranton Steel Company, the latter paid only $1,800 per annum for water used by it

Digitized by Google

for all purposes. (Fifth assignment of error.)

" . . . . If the plaintiff is entitled to recover, as I said before, they ought to be able to recover, and the jury should allow them what the water was fairly worth, and when you have ascertained that, find out what it all amounts to, add it all together, and add interest to it down to the present time, and render a verdict for that amount." (Sixth assignment of error.)

Verdict for the plaintiff for $27,500 and judgment thereon.

Defendants appealed, assigning for error the rulings in the evidence, the answers to the points and the portions of the charge quoted.

M. E. Olmsted and *John G. Johnson*, (with them *Joseph O'Brien* and *Hamilton Wallis*), for appellant.

There was certainly no presumption in favor of pure water, and the words of the contract are to be taken most strongly against the party using them.

White *v.* Smith, 33 Pa. 186.
Phila. Tool Co. *v.* Brit. Am. Ins. Co., 132 Id. 236.

It was error to exclude the correspondence showing the practical construction put upon the contract by the parties.

Lehigh C. & N. Co. *v.* Harlan, 27 Pa. 429.
Coleman *v.* Grubb, 23 Id. 393.
Topliff *v.* Topliff, 122 U. S. 121.
Bishop on Contracts, sec. 412 (ed. 1887.)

Statute of limitations is not barred, even by actual fraud, if by reasonable diligence it might have been discovered.

13 Am. & Eng. Ency. of Law, 692.
Spring *v.* Gray, 5 Mason (U. S.), 505.
Sankey *v.* McElevey, 104 Pa. 265.
Troup *v.* Smith, 20 Johns. 44.
Leonard *v.* Pitney, 5 Wend. 30.
Allen *v.* Miller, 17 Id. 202.
Kirby *v.* L. S., etc., R. R. Co., 120 U. S. 130.
Foster *v.* Mansfield, etc., R. R. Co., 146 U. S. 88.
Bates *v.* Preble, 151 Id. 149.
Pearsall *v.* Smith, 149 Id. 231.

When fraud is constructive only and not actual, the statute of limitations runs from the time of the transaction without reference to the time of its discovery.

13 Am. & Eng. Encyc. 728.
Gibbs *v.* Guild, 9 Q. B. Div. 59.
Wilmerding *v.* Russ, 33 Conn. 67.
Printup *v.* Alexander, 69 Ga. 553.
Austin *v.* Baiford, 68 Id. 201.
Downs *v.* Harris, 75 Id. 834.
Ryal *v.* Morris, 68 Id. 834.
Rouse *v.* Southard, 39 Me. 404.
Walker *v.* Soule, 138 Mass. 570.
Nudd *v.* Hamblin, 8 Allen, 130.
Rice *v.* Burt, 4 Cush. 208.
Fleming *v.* Culbert, 46 Pa. 498.
Glenn *v.* Cuttle, 2 Grant, 273.
Morrell *v.* Trotter, 39 Leg. Int. 256.
Musselman *v.* Eshleman, 10 Barr, 394.
Farnam *v.* Brooks, 9 Pick. 212.

It was error to add interest.

Richards *v.* Citizens Natural Gas Co, 130 Pa 37.
Comth. *v.* Press Co., 156 Id. 516.

H. W. Palmer and *I. H. Burns*, (with them *L. Amerman*), for appellee.

The contract was free from ambiguity, and its construction was for the Court.

Phillips *v.* Meily, 106 Pa. 543.
Hoffman *v.* Bloomsburg & Sullivan R. R., 157 Id. 174.
Fisher *v.* Moyer, 17 WEEKLY NOTES, 500.
Harvey *v.* Vandegrift, 89 Pa. 346.
Allegheny City *v.* Railway, 159 Id. 411.

A fraudulent concealment will prevent the running of the statute.

Mitchell *v.* Buffington, 10 WEEKLY NOTES, 361.
Beach on Equity Juris. § 83.
Avery *v.* Cleary, 132 U. S. 604.
Bailey *v.* Glover, 21 Wallace, 342.
Delram *v.* Brown, 19 Conn. 421.
Relf *v.* Eberly, 23 Iowa, 467.

The cases cited by appellant are distinguishable, because in all there was a fiduciary relation between the parties.

March 25, 1895. WILLIAMS, J. Two important questions are presented on this record. The first of these relates to the construction of the contracts between the parties for the supply of water to the defendants. A contract was made in 1874, and largely modified by a supplemental agreement made in 1881, which provided that the gas and water company should furnish the defendants with pure water for the "generation of steam for fire hydrants and hydraulics, and for stores and dwellings," belonging to the iron and coal company, for the price of ten thousand dollars per annum, payable in monthly instalments. It stipulated that the undertaking should not include the furnishing of water for tuyers, boshes or condensers, or for any other purpose than those named in the agreement. It also stipulated for free access by the officials of the water company to the works of the iron and coal company, to enable them to see if the arrangements for saving water were working satisfactorily, and reserved the right to put meters upon the waste pipes at the pleasure of the water company, in order to determine with certainty the amount of water used under the contracts.

Having disposed of this subject the contract proceeded to consider another, viz., a supply of water for the purposes previously excluded. The water company undertook in this part of the agreement to furnish the defendant, upon reasonable notice, "Such other water as may be required by said iron and coal company," for tuyers, boshes and condensers, and for all other purposes required by the works except for water wheels, from the Lackawanna river or Roaring brook, for which it

Digitized by Google

was to receive interest on the cost of constructing the necessary works to bring the water to the defendant's mills, and the actual cost of operating them and keeping them in repair. The water of the Lackawanna river and that of Roaring brook at or near the defendant's works was not pure water but was charged with acids and other impurities from the drainage of the coal mines near which both streams passed, which rendered the water unfit for domestic purposes and for generating steam.

The learned Judge of the Court below held that the contract provided for a supply of pure water for the four enumerated purposes, and for a supply of "other water," or water not pure, to be taken from the river or the brook at any convenient point, for all other purposes, except water wheels, that the business of the defendants might require. This was a correct construction of the contract. The undertaking of the water company was to supply pure water for certain specified purposes, and to supply for other purposes "such other water" as might be needed. The words "such other water" are not equivalent to such additional water, but are put in contrast with "pure water" which the water company was to supply for purposes that required pure water. The right of the defendant to pure water, under the terms of the contract, was confined therefore to such a supply as was necessary for the "generation of steam, for fire hydrants and hydraulics, and for stores and dwellings." It had the right to call upon the water company, on reasonable notice, for a supply of river water for all other purposes, but it had no right to demand pure water for such other purposes, or to take it without demand from any connection under its control, without being liable to pay for it in addition to the sum of ten thousand dollars, the price of the water to which it was entitled under the contract. The plaintiff alleges that the defendant did use pure water for purposes for which it had no right to use it, and without the knowledge of the plaintiff. The defendant denies this, or alleges that only a small quantity was used. The facts were for the jury, but the learned Judge was right in holding that the defendant was liable in this action for such quantity of water as was improperly taken from the pure water supply.

But the plaintiff's claim extended over a period of ten years, from 1881 to 1891; and this brings us to the second question which relates to the statute of limitations.

The learned Judge held and so instructed the jury that if the defendant "took the water from the pipes of the water company, without having any right to do so, and without the knowledge and consent of the water company, then such abstraction of the water was a fraudulent use of the water, and until the plaintiff discovered it they could not bring suit—and therefore that would be an exception to the general rule that the action must be brought within six years." Now it must be borne in mind that no deception or fraudulent practice was made use of to divert the attention of the water company, or to relax its vigilance. It must also be remembered that the connection by means of which the pure water was used for unauthorized purposes was put in by the water company, and that its officers and employés had access to it at any and all times when they might choose to examine it. All that the evidence shows, or that the instruction of the learned Judge assumes, is that the pure water was taken at times, without any legal right to take it, and without the knowledge and consent of its owners. Reduced to its true proportions the question is thus seen to be whether ignorance of the commission of a trespass will prevent the running of the statute against the owner of the property injured. The trespasser who enters my fields or my uncultivated lands and takes possession and holds them for the statutory period, acquires title to that which he has taken. He is not required to tell me of his entry, or render an account for the timber he has taken or the profits he has made. He comes upon my land, in the language of the learned Judge of the Court below, "without having any right to do so, and without the knowledge and consent" of the owner; but at the end of the statutory period he ceases to be a trespasser. My remedy is gone, and my land has gone with it. While I was wholly ignorant of his entry upon my land the statute has given it to him. The fee simple passes out of me and rests in him without any act of mine and without my knowledge. The cases that so hold are too numerous to justify an attempt at citation.

The true reason for this rule was stated in the recent case of Lewes *v.* The Coke Company, not yet reported. What an owner might know if he was personally present by himself or his employés on the surface of his possessions he is bound to know, unless his attention is diverted by the fraudulent artifices of the wrong-doer. Silence or concealment will not prevent the running of the statute: Sankey *v.* McElevey, 104 Pa. 265. The question in any given case is not what did the plaintiff know of the injury done him, but what might he have known by the use of the means of information within his reach with the vigilance the law requires of him?

In Lewes *v.* The Coke Company, *supra*, we held that the owner was not bound to take notice of a trespass committed upon the coal underlying his land, to which he had no access and at which his presence, by reason of the position of the

Digitized by Google

coal stratum, was impossible. When knowledge is impossible because of the laws of nature, or because of the actual fraud of the wrong-doer, the statute runs from the time of discovery. But a constructive fraud is not enough. Downey *v.* Garard, 24 Pa. 52; Campbell's Administrator *v.* Boggs, 48 Pa. 524; Hollinshead's Appeal, 103 Pa. 158.

But in the case now under consideration the pipes and the connection, through which it is alleged water was used in excess of the defendants' contract rights, were put in by the water company, were its property, and were as matter of law under its control. There was no difficulty in the way of fullest knowledge. The defendant used more water than it paid for and was silent in regard to it. The plaintiff took no pains to know whether the contract was being observed by its customer, and was therefore in ignorance of the fact that too much water was used. This state of facts is the common one on which the statute is held to run in favor of a trespasser from the date of trespass, and it should have been so held in this case. The 4th, 7th, 11th, 12th, 13th, 14th and 15th assignments of error are sustained. The judgment is reversed and a venire facias de novo awarded.

W. M. S., Jr.

Jan. '94, 515. January 16, 1895.

The Commonwealth Title Insurance and Trust Company v. Brown, Defendant, and The Camden National Bank, Garnishee.

Debtor and creditor—Conveyance of real estate by husband to wife—Rights of creditors in—Wife's inchoate right of dower—When insufficient consideration for such a conveyance.

Where a husband has conveyed real estate to his wife, her title can be sustained only as a gift, or as a conveyance founded upon a valid consideration.

If the conveyance is a gift, it is incumbent upon the wife to show that her husband was solvent at the time the gift was made; if it was a purchase that she gave a valid consideration therefor.

A builder, B., borrowed a large sum of money from a trust company for the purposes of his business, for which he gave his bond and mortgage. Subsequently he conveyed all his property except one tract, to one W. to secure the loan made by the company, it being agreed that the trust company should market the property, and after paying the debts of B. should repay to B. any balance that might remain. B. afterwards conveyed the tract thus excepted, through a third person, to his wife M., who sold the same and deposited the money in bank. B.'s debt to the trust company not being paid, the company entered judgment on the bond and attached the money in the hands of the bank. Defence was made that the money attached belonged to M. and not to B., and that M. had joined with her husband in executing the deed to W. in consideration of this conveyance to her. It appeared that the property conveyed to W. by B was very little, if anything, in value above the debts, and at the trial the indebtedness of B. to the company had not been paid:

Held, that there was no evidence of a gift by B to M., and especially of such a gift as could be sustained against B.'s creditors;

Held, also, that the consideration set up was no more than her inchoate right of dower in encumbered real estate conveyed to her husband's creditors to secure his debts;

Held, also, that such a bare possibility, which could be swept away by a sale under the then existing mortgages and other liens, was not a valid consideration as against creditors.

Appeal of the Camden National Bank, garnishee, from the judgment of the Common Pleas No. 3, of Philadelphia County, in an action of attachment sur judgment brought by The Commonwealth Title Insurance and Trust Company against Charles O. Brown, defendant, and The Camden National Bank, garnishee, to recover damages assessed at $6,222 upon a judgment entered on bond and warrant of attorney dated March 31, 1890, conditioned for the payment of $6,000 within six months from date with interest payable half-yearly at six per cent.

Upon the trial, before GORDON, J., the following facts appeared: Charles O. Brown, the defendant in the judgment on which this attachment issued, then living in Moorestown, New Jersey, but doing business as a builder in the City of Philadelphia, conveyed a piece of real estate in Moorestown, by deed dated March 4, 1890, to his brother-in-law Abraham P. Rittenhouse, for the use of his wife Marietta Brown, which deed was recorded June 5, 1890. In the spring of 1890, Charles O. Brown was building a number of small dwelling houses in the vicinity of Westmoreland and Twentieth streets, Philadelphia, and in order to acquire funds for their completion, he borrowed from The Commonwealth Title Insurance and Trust Company $8,000, secured by his bond and mortgage on said premises, dated March 31, 1890. He at that time owned several pieces of real estate, more or less encumbered by mortgages. On June 30, 1890, Brown and his wife executed a conveyance of a large number of properties in Philadelphia, including those which were involved in his building operations, to one Wildman, who took title as agent of the Commonwealth Title Insurance and Trust Company, the purpose of the conveyance being to secure to that corporation the repayment of the advances made by the company to Brown. As the company held mortgages on all the properties conveyed, with one or two exceptions, the convey-

Digitized by Google

ance was made to Wildman instead of directly to the company to prevent a merger. And it was agreed that after the sale of the properties the company should account to Brown and pay to him any balance remaining after deducting the amount of his indebtedness. Besides the mortgages, there were a number of mechanics' liens upon the property, in all about $25,000, and other indebtedness of Brown, all of which amounted in the aggregate to very nearly the whole value of the property. On September 6, 1890, Rittenhouse, to whom Brown had conveyed the title to the Moorestown property, by deed conveyed the same to Mrs. Brown, who paid nothing for the conveyance. This deed was not recorded until October 1, 1890, on which date there was also recorded a deed from Mrs. Brown and her husband to one Joseph H. Roberts, to whom the property had been sold for $3,800. The purchase money received from the sale of this property was deposited in the Camden National Bank. On November 14, 1890, the plaintiff entered judgment on the $8,000 bond of March 31, 1890, against Brown, and issued an attachment execution against the Camden National Bank as garnishees of this fund, $2,508 of which still remained on deposit at their banking house in Camden, in Mrs. Brown's name. At the trial, Mrs. Brown sought to sustain her title to the fund in question against the plaintiff, her husband's creditor, by her own testimony and that of her husband, to the effect, that the Moorestown property was conveyed to her, in consideration of her joining him in conveying the rest of his property to Wildman, for the benefit of the Commonwealth Title and Trust Company. Her husband also testified that at the time of the conveyance to Wildman, the values of the properties conveyed were more than sufficient to pay all of his indebtedness, and that he was solvent. At the time of the trial his indebtedness to the company plaintiff had not been paid. The Court charged the jury:—

"The money claimed by plaintiff in this case was on deposit in the Camden Bank to the credit of the wife of Mr. Brown. He, Brown, a debtor of plaintiff, owing them a large sum of money, and which they had reduced to judgment in this Court, and they accordingly issued an attachment execution, by which they attached this money on deposit in Mrs. Brown's name, contending that it was the money of her husband.

"On the trial of this case, it is incumbent upon her to show that it was her own money, and not his. In order to establish that, she has shown that she derived the money from the sale of a house in Moorestown, N. J., and that that house was conveyed to her by her husband, a third party being used as an intermediary.

"[She says she gave no money for the house thus conveyed to her by her husband, but that it was intended as a recompense to her for her uniting with him in a deed of conveyance of a large number of properties to the same plaintiff, the Commonwealth Company, to secure certain indebtedness of his to the company, and also a sum subsequently to be advanced for the payment of mechanics and material men, and for the completion of such of the properties as were not completed. It is alleged that such release of her dower rights was a good consideration for the conveyance of the Moorestown property to her. It raises purely a question of law, and one therefore which the Court must pass upon, and not the jury.]

"Whatever might be my opinion as to whether a release of dower by a wife joining with her husband in a conveyance of unencumbered property which was sold, and for which a consideration was received, was a good consideration for the conveyance of other property to her by her husband, I am clearly of the opinion that when a wife joins in the conveyance of encumbered property to secure the payment of encumbrances and debts of the husband for which it is liable by reason of the lien of some of the debts, and may be liable subsequently when the other debts are reduced to judgment, such a conveyance by the wife is not a valid consideration, for the presumption is that the property was simply worth the debt, and in the present case it is in evidence that the debt is still unpaid.

"[Moreover, on the other proposition, I am also of the opinion that a tradesman, or a builder, as in this case, engaging in a hazardous business, who is in debt, and who conveys all his property to his creditors except the single one, the property which is the subject of this controversy, is not a solvent trader. The present debt existed when that conveyance was made, and when he conveyed the house in Moorestown to his wife, the money from which is now in litigation, he conveyed all the property he had and was no longer a solvent trader.

"Hence, on all the propositions of law raised by the evidence in this case, I am of opinion that the plaintiff is entitled to recover, and I therefore instruct you to find a verdict for plaintiff for the amount claimed.]"

Verdict for plaintiff and judgment thereon. Whereupon the defendant took this appeal, assigning for error, *inter alia*, the portions of the charge given above in brackets.

R. O. Moon, for appellant.

The question of the husband's solvency should have been submitted to the jury.

For an honest purpose and to secure or pay a just debt due by him to his wife, a man may make a valid sale or transfer of his real estate to her, with like effect as to any other creditor.

Digitized by Google

The question of fraud in such case is for the jury.

Benson *v.* Maxwell, 105 Pa. 274.

A trader who conveys all his property to his creditors, except one property, is not necessarily insolvent, unless his indebtedness bears such a proportion to his assets as to make his solvency doubtful.

Wilson *v.* Howser, 12 Pa. 109.
Clark *v.* Depew, 25 Id. 509.
Haak's Appeal, 100 Id. 59.
Ditman *v.* Raule, 23 WEEKLY NOTES, 301.
Hyatt *v.* Johnston, 91 Pa. 196
Longenecker *v.* Penna. Railroad, 105 Id. 328.
Wemrich *v.* Heffner, 38 Id. 207.

Rowland Evans, (*Edward H. Bonsall* with him), for appellees.

Mr. Brown was clearly insolvent. By his own evidence he did not know the amount of his indebtedness, and it was shown that the values of the properties given by himself left but little margin above what he owed. His debt to the plaintiff has never been paid. Under such circumstances there was nothing to submit to the jury.

Thompson *v.* Dougherty, 12 S. & R. 454.
Redfield Manuf. Co. *v.* Dysart, 62 Pa. 62.
Reade *v.* Livingston, 3 Johns. Ch. 485.
Woolston's Appeal, 51 Pa. 452.

In joining with her husband in executing the deeds, Mrs. Brown gave up nothing which could not have been taken from her. A sale under any of the mortgages or judgments would have wiped out dower. She therefore gave no consideration for the property transferred to her.

Scott *v.* Crosdale, 2 Dallas, 127.
Graff *v.* Smith, 1 Id. 481.
Mitchell *v.* Mitchell, 8 Pa. 126.
Helfrid *v.* Obermayer, 12 Id. 115.

It is only when the property acquired by the wife after marriage has been paid with her separate estate, clearly and satisfactorily established, that it is hers and protected from her husband's creditors.

Fritchey's Estate, 1 Pearson, 169.
Aurand *v.* Schaffer, 43 Pa. 363.
Baringer *v.* Stiver, 49 Id. 132.
Conley *v.* Bentley, 87 Id. 44.
Wilson *v.* Silkman, 97 Id. 509.
Winter *v.* Walter, 1 Wright, 161.

March 4, 1895. FELL, J. The money in the hands of the garnishee at the time of the service of the attachment was a deposit to the credit of the wife of the defendant in the judgment. It was derived from the sale of real estate which her husband had conveyed to her. The consideration for the conveyance was her joining with him in the conveyance of a number of properties to the plaintiff to secure an indebtedness then due it. The defendant had borrowed money of the Commonwealth Company, the plaintiff, on a mortgage secured upon a number of pieces of real estate upon which he was erecting buildings. He became unable to complete the building operation, and in order to secure the loan the company advanced money to pay mechanics' liens and finish the houses. To secure these advances as well as the original indebtedness the properties were conveyed to a third party, who held the title for the company. Nearly all of the real estate conveyed was subject to other mortgages, and the mechanics' liens amounted to about $25,000. It was agreed that after the sale of the properties the plaintiff should account to the defendant and pay to him any balance remaining after deducting the amount of his indebtedness. The conveyance by the defendant to the agent of the plaintiff was made June 30, 1890. The conveyance of the property from the sale of which the fund in question arose was made to the defendant's wife in September, 1890, in fulfillment of a promise made to her by her husband before she signed the deed of June 30. She sold the property in October, 1890, for $3,800.

The only question at the trial was whether the money in possession of the garnishee belonged to the defendant or to his wife. It was derived from the sale of real estate which he had conveyed to her. Her title could be sustained only as a gift or as a conveyance founded upon a valid consideration. If it was a gift it was incumbent upon her to show that her husband was solvent at the time; if it was a purchase, that she gave a valid consideration. She met neither of these requirements, and a verdict was properly directed for the plaintiff. There was no attempt to establish a gift, and there was no evidence which would have sustained one against her husband's creditors. The consideration alleged was her joining in the conveyance of real estate to the plaintiff. Her husband, at the time, if not insolvent, was indebted for a large amount, and was pecuniarily embarrassed. He was unable to pay the debts which were liens upon the property conveyed, or to complete the houses which were in the course of erection. He could not discharge or otherwise secure his obligations, nor complete his building operations and carry his houses for a better market. The purpose of the conveyance was to secure his indebtedness and to save his property from an immediate sale by his creditors.

The consideration set up for the conveyance by the wife was at most her inchoate right of dower in encumbered real estate conveyed to her husband's creditors to secure his debts. There was no evidence which would have sustained a gift to her of any part of his estate, and

Digitized by Google

it is difficult to see upon what ground a conveyance of a part to her in consideration of her assent to the transfer of the remainder to his creditors as a security can be sustained. As between the parties the conveyance was in effect a mortgage, and he could have mortgaged the land without her consent. She had no right which could have been successfully asserted against the creditors. As a sale made under the then existing mortgages and liens would have divested her dower, she gave up nothing which they could not have taken without her consent. There was no satisfactory evidence that the property conveyed had any value above the encumbrances. The possibility of such a value depended upon her husband's effecting a settlement by the conveyance in which she joined. Her inchoate right to this bare possibility was not as against her husband's creditors a valid consideration for the conveyance to her of a property worth $3,800. This was not to be determined by the jury as a question of fact, but by the Court as a question of legal policy.

The judgment is affirmed.

S. H. T.

Jan. '95, 320. March 4, 1895.

Commonwealth v. Weber.

Murder—Evidence showing malice aforethought—Practice—Argument to jury—Exceptions to be taken at the time—Commenting on failure of defendant to call witnesses to character unwarranted—Intemperate language of prosecuting attorney—Selection of jury—Handcuffing prisoner in presence of grand jury—Order of introducing testimony.

The wife of the prisoner having been present at the killing and being competent as a witness in her husband's behalf, counsel for the Commonwealth is not unwarranted in commenting upon the failure of the defence to call her as a witness.

The Commonwealth having offered the wife as a witness for the prosecution and the offer being objected to and overruled, it is not error for the Court to refuse to strike the offer from the record.

Counsel for the defence having allowed the language used by counsel for the prosecution in arguing to the jury, which it is claimed was not sustained by evidence, to pass unchallenged, cannot take exception thereto on appeal upon the report of the same taken down by their own stenographer.

It is clearly unwarranted for the Commonwealth to attack the character of defendant by inference from the fact that he called no witnesses to testify to good character. Previous character has no bearing unless the defendant chooses to make it the subject of consideration by attempt to prove a good character. But advantage must be taken of such error by objection at the trial, and no such objection having been taken the matter will not be considered on appeal.

Language of the prosecuting attorney in addressing the jury, which is intemperate, but not without foundation in the evidence, is not ground for reversal.

While there are instances where judgments of the serious character of this have been set aside because of errors or slips by prisoner's counsel which may have brought about the adverse verdict, there is no instance of such action where the trial on the whole was fair, and the verdict in accord with the overwhelming weight of the evidence.

Eleven jurors having been selected, a twelfth was chosen from those who had been previously stood aside, a jury from the same panel being at that time engaged in the trial of another case, and therefore not called. The prisoner's right of peremptory challenge not having been exhausted:

Held, that under the circumstances, such action was within the discretion of the Court.

Before indictment found the defendant was brought handcuffed into the Court room in the presence of the grand jury:

Held, not to warrant the inference that the grand jury were prejudiced against him in finding the bill of indictment.

The order of introducing testimony is in the discretion of the Judge; therefore the testimony of a witness which would have been evidence in chief and material as part of the Commonwealth's case, but which is also a contradiction of testimony given by the defendant on the stand, may properly be admitted after the close of defendant's testimony.

Appeal from the Oyer and Terminer of Berks County, upon verdict finding defendant, William Weber, guilty of murder in the first degree.

The trial before ENDLICH, J., having resulted in the conviction of the prisoner, this appeal was taken. The assignments of error are sufficiently set forth in the opinion of the Supreme Court, with the exception of the seventh, eighth and ninth assignments, which were as follows:

"7. The Court erred in allowing private counsel for the Commonwealth to argue the following matters of fact to the jury not produced in evidence: 'Then this fellow with the smell of the jail all over him, the disgrace of a felon all around him, he sneaks up the alley and says: "I want my wife, I will get her, by God. The son of a ——, if he comes out I will do him up."

"8. The Court erred in allowing private counsel for the Commonwealth to argue the following matters to the jury, not produced in evidence: 'Then, gentlemen of the jury, the meanest and dirtiest part of him—he wanted that certificate, that piece of paper; he wanted that little parchment on which the preacher wrote the marriage ceremony which separated her from the general harlot and made her the wife of a man. By the Eternal, he wanted to rob her of that, even to show that her babe was illegitimately born! I do not know of a man

Digitized by Google

whose conduct strikes me as more villainous and abominable than his. And if he had been let alone a little while longer he would have killed his wife, too.' "

"9. The Court erred in allowing private counsel for the Commonwealth to comment on the following state of facts not in evidence: 'And when he is convicted, he will make a confession before he goes to his God that what he said was false.' "

W. H. Stevens, (*Stevens* with him), for appellant.

J. H. Jacobs, (*Frank K. Flood*, district attorney, *Charles H. Tyson* and *H. P. Keiser* with him), for appellee.

March 25, 1895. DEAN, J. The defendant having been found guilty of murder of the first degree, and having been sentenced accordingly, he presses this appeal.

The testimony was ample to establish, in substance, these facts: Weber was a laborer, twenty-six years of age; from his birth had lived in the city of Reading; in April, 1892, had married Agnes Klemmer, a daughter of the deceased, Justus Klemmer, of Reading. Soon after marriage they went to housekeeping, and continued to live together until some time in the early part of the year 1893, when the husband was convicted of a criminal offence, and sentenced to one year's imprisonment in the Berks County jail. This resulted in breaking up the home; one child having been born to them, the wife, with this child, went to her father's house. The father and daughter took the furniture and household goods, with some of Weber's clothing, and stored them in the house of Walter Miller, a brother-in-law of Klemmer; the child remained with the grandfather, and its mother went out to service. Matters continued in this condition until 14th of May, 1894, when Weber was discharged from prison by reason of expiration of term. He immediately sought out his wife where she was employed, and had several interviews with her, but they did not again live together. Weber thought and probably correctly, that his wife's father was opposed to her living with him. He then determined to get possession of some of the household goods stored at Miller's, asserting they belonged to him; had one or more notices sent to his wife, by aldermen, demanding them. On the 7th of June he bought a revolver at one hardware store, cartridges at another, then went to his brother's house and loaded the pistol. About 6 o'clock on the evening of the 11th of June, he went to Miller's house, where the furniture was stored, and asked Mrs. Miller if his wife and her father were there yet; she said not; he said they were coming to divide the furniture; he waited about an hour on the steps, until they came. Some of the furniture was in the cellar, and at the suggestion of Klemmer, the three, Weber, his wife and Klemmer started down the steps; Miller, just then coming in, followed with a light; when they got to the cellar, they undertook to set apart for Weber articles that belonged to him; he demanded to know where a bed-room set was, belonging to him; Klemmer replied, he had all that belonged to him, and more too; he then demanded his marriage certificate; Klemmer replied, his—Weber's—wife had that, and she had a right to it; then Klemmer started to leave the cellar by a rear door opening out into the yard; Weber made a profane answer, drew a revolver, aimed at Klemmer and snapped it, again pulled the trigger, this time discharging it, shooting Klemmer in the arm, shattering the bone, again shooting him when he fell or was falling, this shot in the brain, causing almost instant death, —another shot, either preceding or following these two, it is not clear which, was fired, causing a slight wound on the arm. He then followed his wife to another part of the cellar, thrust the revolver in her bosom, snapped it and ran out into the alley. There was evidence of threats made by him against his father-in-law, both while in prison and after he was discharged. He denied, on the witness stand, these threats, and declared that Klemmer and Miller assaulted him in the cellar, that in self-defence he drew the revolver, when Miller caught and pulled his arm, causing its discharge. His story, throughout, at best, was improbable, and the jury did not believe him. It was improbable, not alone because in flat contradiction of Miller's statement, the only other competent witness of the shooting, but because its improbability was inherent in the story itself. If Miller had not testified at all, men of ordinary observation and experience would not have thought it credible. It is seldom, in the trial of felonious homicides, the evidence of malice aforethought and the fully formed purpose to kill, is so abundant and convincing.

The learned Judge of the Court below, in a charge, clear, impartial and comprehensive, as to the law applicable to every phase of the evidence, left the defendant's case to the jury. In fact, so impartial was the charge, that the able counsel for defendant do not complain of it.

But on appeal, fourteen assignments of error are pressed upon us for consideration. Nine of these complain of illegal conduct or speech during the trial, by counsel for the Commonwealth; two of them aver fatal irregularities in empannelling the jury; one, to bringing the prisoner into Court manacled in presence of the grand jury, which was made the ground for a motion to quash the indictment; one, to alleged error in the

Digitized by Google

admission of testimony of a witness; and the fourteenth, and last, that the evidence did not warrant a conviction of murder of the first degree. As to this last, we have already spoken; the evidence fully warranted the verdict. As to the others, the substance of them was considered by the Court below in a very full opinion, overruling a motion for a new trial. The gravity of the consequences of this judgment to the defendant, has, however, moved us to re-examine his complaints of error, to see if there be any such merit in them as calls for reversing the judgment.

The first assignment is: "The Court erred in allowing counsel for Commonwealth to comment on failure of defendant to call his wife as a witness." The wife saw her husband kill her father; she was incompetent as a witness for the Commonwealth, because she could not be called to testify against her husband; she was, however, a competent witness in his behalf; he could have called her to the stand; if his statement was true, that he acted only in self-defence, and the pistol was discharged in a scuffle, without intent to kill, why did he not call her to corroborate him? Counsel for Commonwealth argued, the fair inference was, her testimony would have contradicted her husband; this was not unwarranted comment; the force of it was for the jury; if she had been a competent witness for the Commonwealth and had not been called, it would have been allowable for defendant's counsel to have argued, it was because her testimony would have contradicted Miller. There is, under the circumstances, no legal presumption raised by the refusal to call a competent witness; it is simply a fact for the consideration of the jury, entitled to such weight, as, in view of all the circumstances of the particular case, it ought, in their judgment, to have.

The second assignment is: "That the Court erred in allowing Commonwealth to offer to place the wife of defendant on the stand as a witness for the prosecution, and in not striking the offer from the record." It is argued, that the testimony of the wife was clearly inadmissible, and must have been so known by counsel for Commonwealth, but, although the offer was overruled, yet the mere fact of its having been made was highly prejudicial to the defendant, and was so intended to be.

We know of no way the Court can rule on an offer without hearing it; it was to call the wife, if defendant did not object; defendant did object, and she was rejected; there could have been no other ruling except to admit her testimony, and this would have been manifest error. The assignment in effect is, that the Commonwealth called an incompetent witness, the defendant objected, and the Court sustained the objection, therefore, the Court erred. The offer being overruled, that, necessarily, made it a silent part of the record, and it had no effect in the trial that striking it from the record would cure.

The third, fourth and fifth assignments complain that the Court erred in permitting counsel for Commonwealth to argue matters of fact to the jury, not sustained by any evidence. The remarks of counsel as here presented, were taken down by the private stenographer of counsel for defendant, and not by the Court reporter. Counsel for Commonwealth deny they were made as here printed; the stenographer, when examined under oath, does not testify the report is full, nor does he testify with any positiveness that it is accurate; but assuming, we have before us a correct report, the words should have been objected to at the time they were uttered. No Judge can be expected to anticipate the line of argument counsel will adopt, and caution him against improper speech; a Judge may and often does, of his own motion, stop counsel in improper statements, and administer rebuke. But he may not give close attention to all that counsel say when addressing the jury; nor is he required to; that is the duty of opposing counsel, and if the argument be objectionable, the objection should at once be made to the Court, then the words can be taken down by the official reporter, and be made the subject of ruling by the Court and review here. That counsel on one side may go into Court with their own stenographer and take down the address of opposing counsel to be made the subject of criticism and objection, not at the trial, but afterwards in this Court, is so unfair to the Court below, and so obviously prejudicial to an even-handed administration of justice, that we dismiss these assignments without further notice.

The sixth assignment is, that the Court permitted counsel in the argument to attack the character of defendant, not from the evidence, but by inference, from the fact that he had called no witnesses to testify to good character.

If this was done as alleged, clearly it was unwarranted. The previous character of one charged with a crime has no bearing whatever on his guilt, unless he chooses to make it the subject of consideration by attempts to prove a good character. If he do not do this, as he did not here, the Commonwealth can offer no evidence on the subject. He is entitled to the presumption of innocence until his guilt be proven by the Commonwealth by evidence to sustain the particular averments in the indictment to which he has pleaded; he may then offer evidence to contradict that adduced by the Commonwealth; and to establish his innocence or to raise a doubt as to his guilt, may adduce

Digitized by Google

evidence of previous good character; then, and then only, is the door open to the Commonwealth to impeach his character preceding the crime charged. To permit an inference of bad character to be argued, because he has not adduced evidence of good character, is a palpable evasion of a well settled and humane rule. Prisoners are not to be convicted because their past lives indicate they are capable of committing crime, but because the proof shows, beyond a reasonable doubt, they committed the particular crime charged in the indictment. Until they raise the question of previous good character the Commonwealth cannot, either by evidence or argument.

But, how are improper statements and unlawful inferences to be taken advantage of on a review of the proceedings here? Clearly, as we have already said in reference to the other assignments of error, by objection at the trial. Prompt objection then, we doubt not, would have relieved defendant's counsel from the burden of pressing the assignments of error here. The Court's attention was not called to the matter by protest or objection; there was no erroneous ruling by the Court; there is not, even, upon the record, an official and trustworthy report of the words. In this Court, an error of speech by antagonistic counsel is complained of, and a reversal of the judgment sought because of it. If the Commonwealth had elicited from a witness on the stand irrelevant or incompetent testimony without objection, and there had been no request by defendant to the Court to withdraw it from the consideration of the jury, it would hardly have been argued, in view of the settled law, that this Court should reverse the judgment. His silence in the Court below would have been conclusive against his complaint here. And there is no distinction, in this respect, between improper evidence and improper argument. It is the duty of counsel to aid the Court by their learning and fidelity, in the administration of justice; any other rule of duty would, probably, lead to very undesirable results; because, without it, the most effective defence astute counsel could make for criminals with a hopeless case on the evidence, would be, by silence, to invite errors of omission and commission by the Court and opposing counsel, with the object of securing reversals on review; and thus, by persistent, expensive and vexatious appeals, wear out the prosecution.

The attitude of defendant's counsel, as exhibited by the record, is, in substance, this: "Counsel for Commonwealth erred in the matter of his address to the jury; I erred by remaining silent when I should have promptly brought his error to the notice of the Court by objection; the Court committed no error, but its judgment should be reversed because it did not perform my duty."

There are, it is true, rare instances, where judgments of the serious character of this one have been set aside because of errors or slips, by prisoner's counsel, which may have brought about the adverse verdict; but there is no instance of its having been done, where the trial on the whole was so fair as this, and where the verdict was in accord with the overwhelming weight of the evidence.

The seventh, eighth and ninth assignments are to arguments which though intemperate in language, cannot be said to be without foundation in the evidence.

The tenth and eleventh assignments of error relate to the empanelling of the jury. The forty-eight jurors drawn were not present in Court when this jury was called. Whatever inequality, if any, is produced by the right of the Commonwealth to stand aside jurors until the panel is exhausted, the right existed; all the jurors present had been called and either sworn, challenged or stood aside; eleven were accepted, sworn and in the box; the twelfth juror was called from those stood aside; the defendant's peremptory challenges were not then exhausted; he claimed the right to have called all the jurors in attendance, before any of those stood aside should be called. As twelve were out in their room deliberating on a verdict in another case, this could not be done without serious interruption of the business of the Court. Under the circumstances, it was within the discretion of the Court to proceed with this trial, without awaiting the return of the jury then in their room. Especially was this a reasonable exercise of discretion, when the defendant's peremptory challenges had not been exhausted.

The twelfth assignment of error is to permitting "the defendant, before indictment found, to be brought handcuffed into the Court-room, in presence of the grand jury."

What reasonable precautions the officer having the prisoner in charge, shall take to keep him safely in his passage from prison to the Court-room, during the progress of the trial, must largely depend upon the judgment of the officer. The fact that he was brought into the Court-room handcuffed, and the grand jury may there have seen him thus secured, does not warrant the inference, that, therefore, they were prejudiced against him in finding the bill of indictment. An athletic young man, charged with a high crime, of course would be securely kept to await trial; while not in Court, he would be within prison walls; going to and from the Court-room, escape would be guarded against, either by a prison-van or handcuffs; the grand jury would have known this if they had not seen it.

Digitized by Google

The thirteenth assignment is to the admission of the testimony of George Snyder, a fellow prisoner, who testified to threats made by defendant against his father-in-law, while in prison. The witness was called after the testimony of defendant had closed; what he testified to, would have been evidence-in-chief. It was material as part of the Commonwealth's case. But he was also called to contradict defendant, who had been asked when on the stand, whether he had not made the threats, in substance, testified to by Synder; he denied he had made them.

The order of introducing testimony, generally, is in the discretion of the trial Judge, and we see no abuse of that discretion here. But without this, the evidence was clearly admissible at this stage of the trial, as affecting the credibility of defendant's testimony.

After a most careful examination, we are all of the opinion, there is nothing in the record, or the assignments of error, which should move us to disturb the judgment; it is therefore affirmed and it is directed that the record be remitted to the Court below, that the sentence may be carried into execution according to law.

J. D. B., Jr.

Jan., '95, 104. February 1, 1895.

Cassidy v. Knapp, Admr.

Equity—Practice—Rules promulgated by Supreme Court January 15, 1894.

Equity proceedings, begun since the first Monday in March, 1894, which are not in accordance with the rules adopted by the Supreme Court on January 15, 1894, are irregular and void.

A bill was filed endorsed with a notice to appear in accordance with the old practice and not in accordance with the new rules, upon this bill a preliminary injunction was granted;

Held, that the bill not being in compliance with the new rules all proceedings consequent thereupon were void.

Appeal of Charles S. Knapp, administrator d. b. n. c. t. a. of Christian Donat, defendant, from the decree of the Common Pleas No. 3, of Philadelphia County, entered in a suit in equity brought against him by Charles Cassidy.

On September 13, 1894, the plaintiff filed a bill endorsed as follows:

"To the above named defendant: You are hereby notified and required within fourteen days after service hereof on you, exclusive of the day of such service, to cause an appearance to be entered for you in the Court of Common Pleas, No. 3, for the city and county of Philadelphia, to the within bill of complaint of the within named complainant, and to observe what the said Court shall direct. CARROLL R. WILLIAMS,
"Solicitor for Complainant.

"NOTE—If you fail to comply with the above directions, by not entering an appearance in the prothonotary's office within fourteen days, you will be liable to have the bill taken pro confesso, and a decree made against you in your absence."

On the same day he obtained from GORDON, J., upon an *ex parte* affidavit a preliminary injunction, prohibiting the defendant from taking "any further steps in the suit now pending before Magistrate Neall, and from bringing any suit against said complainant Charles Cassidy before any other magistrate in the city of Philadelphia for the recovery under the Act of March 21, 1772, of possession of the property, situate at Main and Highland avenue in Chestnut Hill, known as Donat's Hotel, upon the state of facts which existed at the time of the hearing and judgment of Magistrate Pole, to wit, August 22, 1894, until the further order of said Court in the premises."

On October 3, 1894, counsel for defendant moved to dissolve the injunction, and on his applying for information as to how the hearing upon the motion to dissolve the injunction would be conducted, GORDON, J., stated that the amendments to the equity rules adopted by the Supreme Court January 15, 1894, were not in force in Common Pleas No. 3, and on the question being asked by counsel whether those rules did not have the force of an Act of Assembly the learned Judge replied that the Court had adopted no rules to carry them into effect.

At the hearing the defendant read his answer and the plaintiff's counsel read an *ex parte* affidavit and put in evidence a transcript of the docket of Magistrate Pole. No witnesses were heard in open Court and no opportunity was afforded for cross-examination. The Court then made the following decree: "C. P. No. 3, June term, 1894, 1696. The temporary injunction heretofore granted is continued and modified so as to prohibit the respondent from beginning or proceeding in any suit before any other magistrate of the city upon the same cause of action on which the suit before Magistrate Pole was begun and determined. J. G. G., October 12, 1894."

The defendant took this appeal and assigned as error, *inter alia*, (1) that the Court erred in not requiring the bill to be endorsed according to the rules of January 15, 1894, and in ignoring said rules and allowing the bill to be endorsed with the notice prescribed by rules rescinded by the Supreme Court (*ut supra*).

(3). The learned Court below erred in ignoring the amended rules of the Supreme Court adopted January 15, 1894, to regulate the several Courts of Common Pleas in proceedings in equity and permitting at the hearing upon the motion to dissolve the preliminary injunction an

Digitized by Google

ex parte affidavit to be read and filed by the plaintiff, notwithstanding said rules prescribe that at such a hearing "the evidence must be taken subject to cross-examination, and *ex parte* affidavits will not be received."

Isaac Chism, for appellant.

The rules adopted by the Supreme Court are binding upon the subordinate Courts.

City of Phila. *v.* McManes, 17 Phila. 50.
Gibbons's Appeal, 104 Pa. 587.

Alfred N. Keim, (*Carroll R. Williams* with him), for appellee, cited

Delaware Co. & Phila. Electric Ry. *v.* Phila., 164 Pa. 457.

April 8, 1895. FELL, J. The assignments of error relating to the failure of the plaintiff to comply with the amended equity rules adopted January 15, 1894, must be sustained. These rules were formulated and adopted to regulate the practice of equity in the several Courts of Common Pleas in the Commonwealth, and went into effect on the first Monday of March, 1894. They were established under the direction and by the authority of an Act of the Legislature, and have all the force and effect of a positive enactment. All proceedings in equity which are not in conformity with them are irregular and void.

The preliminary injunction in this case was based upon a bill which was not in compliance with the rules, and this failure is fatal to the whole proceeding. This being the case it is unnecessary to consider the remaining assignments.

The order of the Court of Common Pleas of September 14, 1894, granting a preliminary injunction, is reversed and set aside at the cost of the appellee. H. B.

Common Pleas.

C. P. No. 3. March 16, 1895.

Rand v. Caflisch et al.

Change of venue—Practice—Act of May 22, 1878; P. L. 98.

An application for a change of venue under the Act of May 22, 1878, P. L. 98, may be allowed even after a trial in the Court from which it is sought to remove the cause, where that Court has granted a new trial and defined the issue to be tried thereat.

Petition for change of venue.

On May 15, 1891, judgment was entered in the Common Pleas No. 3. on a bond and warrant, dated April 10, 1888, conditioned for the payment of certain sums of money. It being made to appear to the Court that the bond was really to secure the payment of the purchase money of certain lands lying in Clinton County, with the exception of a part of one tract, which lay in Lycoming County and that a defence was alleged, the Court opened the judgment and let the defendants into a defence and framed certain issues to be passed upon by the jury. A verdict was given for the plaintiff for the sum of $6,197.56. A rule for a new trial was obtained, and after argument the Court made the following order:—

"Dec. 14, 1894. Rule discharged as to issues number one and two, and rule absolute as to issue No. 3 which was as follows: 'How much is due upon said bond.'

"And it is hereby ordered that upon the new trial of said issue the jury shall inquire and decide the following questions of fact:—

"Did the title of said Rand to any part of the lands for the purchase money of which the bond was given fail?

"If so what part of said purchase money was represented by the lands of which the title failed?

"After deducting such part of the purchase money from the whole thereof is there anything remaining due upon said bond?

"If so, how much?"

The defendants then presented a petition setting out—

"1. That petitioners are the defendants in the above entitled action; that the said action was brought for the recovery of the purchase money of real estate, none of which real estate is situate in the said County of Philadelphia where the said action was brought. That the said real estate for the recovery of the purchase money of which said action was brought is situate for the most part in the County of Clinton, State of Pennsylvania. A part of one tract of which (The William Lyon) extends into the adjoining County of Lycoming, State of Pennsylvania. The deed given to petitioners by plaintiff out of which the claim in this suit arose calls for fourteen several tracts of land with a total acreage in the aggreate of 5,632¾ acres and allowance of six per cent. for roads, etc., all of which according to the deed are situate in Clinton County except a portion of one tract as aforesaid; that it has been ascertained by surveying that about 325 acres of the said William Lyon tract are situate in Lycoming County and that all the said tracts of land so far as they have any existence are contiguous.

"2. That the question at issue involves an inquiry into and an adjudication of the title, boundaries, location, condition and value of the said real estate."

And praying that the Court grant a change of venue either to the Court of Common Pleas for Clinton or the Court of Common Pleas for Lycoming County.

Digitized by Google

M. J. Heywang, (*W. A. Manderson* with him), for the petition.

The Act of 1878 is mandatory. The change of venue is grantable *as a matter of right* and it is so declared by the Act itself.

Their case falls within the very letter and spirit of the Act:

(*a*) It is an action for the recovery of purchase money of real estate.

(*b*) The action was brought in the Court of Common Pleas of a county in this Commonwealth other than the county in which said real estate is situated.

(*c*) The question at issue involves an inquiry into and adjudication of the title, boundaries, location, condition and value of said real estate.

James Aylward Devlin, contra.

An absolute right may be waived or the one entitled to it may be estopped by laches.

Watsontown Bank *v.* Messinger & Co., C. C. Rep 609.
Kerns' Appeal, 120 Pa. 528.
Hoffeditz's Appeal, 52 Leg. Int. 91.
Yost *v.* Heffner, 69 Pa. 68.
Hammer *v.* Freese, 19 Id. 255.
Dieffenderfer *v.* Fisher, 3 Grant, 30.
Rogers *v.* Waterman, 25 Pa. 182.
Kensel *v.* Kern, 4 Phila. 86.
O'Neal *v.* Rupp, 22 Pa. 395.

Every one may waive his right given by a law made solely for the protection of an individual.

Endlich Interpretation of Stat., § 444.
Winder *v.* Smith, 6 W. & S. 424.

Right to a change of venue may be waived by failure to claim it in time, even under a statute like the present.

Krahner *v.* Hulman, 9 N. Y. Suppl. 633.
Powell *v.* Sutro, 80 Cal. 561.
Commissioners *v.* Griffin, 134 Ill. 330.
Granville *v.* State, 106 N. C. 81.
McMinn *v.* Hamilton, 77 Id. 300.
Kelly *v.* Jefferson, 9 Ohio, 606.
Prussel *v.* Knowles, 4 How. (Miss.) 90.
Toledo, etc. Ry. *v.* Williams, 77 Ill. 356.

The defendants are too late, there has been one trial, they cannot now ask for a second.

[REED, J. This is not asking for a second trial. The case is to be tried somewhere—the question is where? Whether it should be tried here where the defendant was brought without service of process or at his home? The place of trial is a mere incident. He is to have a trial.]

Petition granted and change of venue ordered to Court of Common Pleas of Clinton County.

H. B.

Orphans' Court.

October, 1892, 155.

Duffy's Estate.

Wills—Construction of—Surrounding circumstances—Interpretation leading to intestacy, to be avoided if possible—Transposition, etc., of words for such purpose—Absence of legatee for years, without word from.

A will is to be construed in the light of the circumstances surrounding the testator at the time of its execution; and the construction is to be upon the entire instrument.

An interpretation which leads to an intestacy, or which defeats partially or altogether a manifest purpose of the testator, will not be adopted if any other is possible; and to accomplish such purpose, words may be freely transposed, omitted or supplied.

In Pennsylvania, if the subject of a gift is personalty, the phrase "die without issue," means without issue living at the death of the person the failure of whose issue is spoken of.

Where a person is absent for many years without being heard of, a presumption arises not only of his death, but of his death without issue.

Exceptions to adjudication.

The facts are stated in the opinion.

Edward P. Bliss, for exceptants.

John M. Gest, contra.

March 2, 1895. PENROSE, J. If the provision of the will in this case, which has given rise to the exceptions, must be taken according to its strict letter and without reference to the circumstances under which it was made or the purpose for which it was intended, it may be that the alternative limitation which it contains—if it is not void altogether as transgressive of the rule against perpetuities—cannot take effect until the ascertainment of a fact manifestly unascertainable, and an intestacy, absolute or partial, will be the necessary result.

The testatrix gave her furniture and personal property to a daughter of her sister Jane, and her real estate to her mother for life, the sale of the real estate being ordered at the mother's death and the application of part of the proceeds in accordance with Jane's directions. Of the residue she gave one-third to her executor in trust for Jane, for life, and at her death to her children, and one-third in trust for Cecelia, another sister, for life, and at her death to her children.

There was a brother who had disappeared nearly twenty-five years before the will was executed and had not since been heard of. Presumably, therefore, he was dead, but as there was nevertheless a possibility that he was still alive, though it was highly improbable, the will further provided as follows: "One other third part of the residue of my estate I give and be-

Digitized by Google

queath to my said executor in trust to invest the same to and for the following uses and purposes if within the period of one year from the time of my death my brother Frank Duffy, who disappeared some years ago, shall be discovered to be alive, and my executor shall make search and inquiry during the said period as he may deem expedient, then I desire that the annual income of the said third part shall be paid over to the said Frank Duffy during the term of his natural life, and from and after his death the said one-third shall be divided equally among his children, share and share alike, but if my brother Frank shall die without issue, then the said one-third part shall be held by my executor under the terms of the trust as provided for my said sister Jane, to wit, to the said Jane during her life and after her death to her children freed and discharged from any debts or obligations of the said Jane as therein stated."

It will be observed that there is no gift to the brother's children except in the event of the taking effect, and at the expiration of, his life estate, which is itself contingent upon his being discovered to be alive within a year after the death of the testatrix (Fairfax's Appeal, 7 Outerb. 166; Campbell *v.* McDonald, 10 Watts, 179); and as he has not been so discovered, the provision, so far as he and his children are concerned, is no longer operative. The testatrix, however, evidently intended that if the trust should not take effect for the brother and his children it should continue for Jane and her children. This is one of "the uses and purposes" for which the share was given to the executor. It is to be "held," without interruption, "under the terms of the trust provided" for her and her children; and that she expected the benefit to Jane to be an immediate one—not deferred indefinitely until it could be known, if it ever could be, that the brother had left no issue—is made manifest by the provision that the income during Jane's life is not to be subject to her debts or obligations. It is true that the will, which is very inartificially expressed, does not in terms say that the trust for Jane is to arise if the brother is not discovered to be alive within the year, but only if he should die without issue; but in the interpretation of wills the precise, literal meaning of words or the grammatical construction of sentences is not to be too closely adhered to. *Verba intentioni debent inservire.* The objects contemplated by the testatrix were, first, her brother and his children, if he should be discovered to be alive within the designated period; and, second, her sister Jane and her family, if he should not be. The sense of the provision requires that the words "if he shall not be so discovered" and the word "or" be understood before the words "die without issue." The limitation for Jane was the alternative of the provision for the brother, and it would be absurd to suppose that it was intended to be dependent on a purely collateral event, viz., the death of the brother without children—the brother, and consequently his children, having no estate by reason of his existence having not been discovered. The testatrix did not intend an intestacy under any circumstances, and she did not intend that her other sister, Cecelia, should have any share of her estate except the third originally given to her.

That a will is to be construed in the light of the circumstances surrounding the testator at the time of its execution; that the construction is to be upon the entire instrument; that an interpretation which leads to an intestacy or which defeats, partially or altogether, a manifest purpose of the testator will not be adopted if any other is possible; and that to accomplish such purpose words may be freely transposed, omitted, or supplied (Abbott *v.* Middleton, 21 Beav. 143; Langston *v.* Pole, 2 Moore & Payne, 490; Leach *v.* Micklem, 6 East. 486, etc.,) are elementary principles, directly applicable to the present case.

But if it be conceded that the limitation to Jane is dependent upon the abstract fact of the death of the brother without issue, the result will be precisely the same. The failure of issue spoken of is evidently a definite failure. It is to take place in Jane's lifetime. The word "issue" appears to be used in the sense of "children," the gift to whom the expression "die without issue" immediately follows,—showing that the meaning is "such" issue; and in limitations of personal property the slightest circumstance will be laid hold of to prevent failure on the ground of remoteness. Moreover, it was held in Eachus's Appeal, 10 Norris, 105,—a case which has never been overruled—that in Pennsylvania, if the subject of the gift is personalty (and this, of course, applies to the proceeds of lands directed to be sold) the phrase "die without issue" means without issue living at the death of the person the failure of whose issue is spoken of: and in Miller *v.* Beates, 3 S. & R. 490, it was held, where a limitation over of personal property was dependent upon the death without issue of a prior legatee who had not been heard of for about fifteen years (just half the time that has elapsed in the present case), that such absence gave rise to a presumption not only of death but of death without issue. There being nothing to overcome the presumption of the brother's death with issue, it was, therefore, proper, on this ground also, to award the fund in trust for the sister to whom the will gives it.

The exceptions are dismissed and the adjudication confirmed absolutely. F. B. N.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, APRIL 26, 1895.* [No. 11.

Supreme Court.

July, '94, 216. January 28, 1895.

Young v. Fox, Executor.

Husband and wife—Tenancy by entireties—Tenancy in severalty—Laches.

Words, which in a conveyance to unmarried persons would create a joint tenancy, or a tenancy in common, create, where the grantees are husband and wife and they are so named in the conveyance, a tenancy by entireties.

But the converse of the proposition is equally true, that where the deed would create neither a tenancy in common nor a joint tenancy in unmarried persons it will not create a tenancy by entireties though the grantees may be described as husband and wife.

It has never been questioned that the husband is competent to take in severalty, and under recent legislation the competency of the wife to take and hold real estate as her own is just as clear as that of the husband.

Where a mortgage was assigned to a husband and wife as grantees each of a moiety in severalty, and where upon the death of the husband the wife, who was the executrix of her husband, treated this mortgage as though it had been her own by right of survivorship, a grandson of the husband, who for eight years (being all that time of full age) acquiesced in this settlement of his grandfather's estate is guilty of laches and estopped from demanding at the death of the executrix that an executor should file an account showing the disposition of the moiety of the mortgage which belonged to her husband's estate.

Appeal of David Young, petitioner, from decree of the Orphans' Court of Philadelphia County, refusing an order upon Henry K. Fox, executor of Elizabeth Young, deceased, executrix of David Young, deceased, to file a supplemental account of said Elizabeth Young as executrix of the estate of David Young.

The matter having been referred to an examiner, upon his report, the Court, in an opinion by HANNA, P. J., held that the mortgage in controversy upon the death of David Young became the property of his widow, Elizabeth Young, by right of survivorship, and that she was not accountable for one-half the same as executrix of her husband's estate. The facts are fully stated in the opinion of the Supreme Court.

Petitioner appealed, assigning as error the action of the Court.

W. H. Woodward, for appellant.

The single point of this case is whether apt words will create a tenancy in common between husband and wife, or whether the old common law rule, set forth in Coke upon Littleton, 187b, that "there can be no moieties between husband and wife;" and which formed the basis and reason for the decision of Stuckey *v.* Keefe's Exrs., 26 Pa. 397, is still in force. In that case the opinion is expressly limited to the case before the Court of a conveyance before the Act of 1848 relative to married women. In the later decisions a conveyance to husband and wife and their heirs is held not to be affected by that Act and to still create tenancy by entireties, but whether apt words for the purpose will or will not create tenancy in common or joint tenancy between husband and wife has not since arisen.

There was excellent support for an opinion contrary to the rule in Stuckey *v.* Keefe's Exrs., even without the aid of the Married Women's Property Acts.

Sharswood's Note to 2 Blackstone's Comm., 182, and authorities cited.
4 Kent's Comm. 363.

In England and several of the United States it is held that estates by entireties depend upon the unity of husband and wife, and that the Separate Property Acts have destroyed this unity so far as property is concerned, and that with the existence of this unity estates by entireties have ceased to exist.

9 Am. & Eng. Encyc. of Law, 851, notes 11, 12.

In Pennsylvania a chain of decisions has maintained that conveyance to husband and wife and their heirs create a tenancy by the entireties.

Diver *v.* Diver, 56 Pa. 106.
Gillan's Exrs. *v.* Dixon, 65 Id. 395.
Bramberry's Appeal, 156 Id. 628.

This principle was applied to personalty in the Orphans' Court of Philadelphia County in

Donnelly's Estate, 7 Pa. C. C. 196.

But in none of these cases was it attempted to create a tenancy in common or joint tenancy, or to specify the manner of holding.

In other States where the doctrine of entireties has not been altogether rejected, it has yet been held that a conveyance during coverture is not wholly inconsistent with a tenancy in common.

McDermott *v.* French, 15 N. J. Eq. 80.
Buttlar *v.* Rosenblath, 8 Cent. Rep. 353.
Fladung *v.* Rose, 58 Md. 13.
Meeker *v.* Wright, 76 N. Y. 262.
Bertles *v.* Nunan, 92 Id. 152.
Hicks *v.* Cochran, 4 Edw. Ch. 114.

(Counsel then discussed the provisions of various Married Persons' Property Acts in Pennsylvania.)

David Wallerstein (*William Henry Fox* with him), for appellee.

Digitized by Google

That the estate created was an estate by the entireties was decided in

Lodge *v.* Hamilton, 2 S. & R. 493.
Johnson *v.* Hart, 6 W. & S. 319.
Robb *v.* Beaver, 8 Id. 107.
Fairchild *v.* Chastelleux, 1 Pa. 176.
Slaymaker *v.* The Bank, 10 Id. 373.
Auman *v.* Auman, 21 Id. 343.
Stuckey *v.* Keefe's Ex., 26 Id. 397.
Martin *v.* Jackson, 27 Id. 504.
Bates *v.* Seely, 46 Id. 248.
Diver *v.* Diyer, 56 Id. 106.
French *v.* Mehan, 56 Id. 286.
McCurdy *v.* Canning, 64 Id. 39.
Gillan's Ex. *v.* Dixon, 65 Id. 395.
Holcomb *v.* Savings Bank, 92 Id. 338.
Fleek *v.* Zillhaver, 117 Id. 213.
Bramberry's App., 156 Id. 628.

Respondent contended in the Court below that the petition in this case was really a petition for review, and therefore barred by the Act of Assembly concerning such petitions. Even if a petition for a supplemental account was the proper proceeding petitioner was guilty of such neglect and delay in presenting it that it should have been dismissed upon that ground.

March 18, 1895. WILLIAMS, J. It appears from the petition and answer that David Young was in 1879 the owner of certain real estate in Philadelphia. He sold it in that year to C. E. Johnson for twelve thousand dollars, payable one half in cash and one half in mortgage secured on the premises. Elizabeth Young, the wife of David, refused to join her husband in executing a deed to the purchaser unless she was paid three thousand dollars out of the purchase money. Her husband finally agreed to this, the deed was executed and delivered to the purchaser, and the money and the mortgage turned over to Young. But some four thousand dollars of the money seems to have been required to pay liens upon the land sold and it became necessary to pay Mrs. Young out of the mortgage. In order to do this Young assigned the mortgage to H. K. Fox, his attorney, who immediately reassigned it to David Young and Elizabeth Young his wife, "to have and to hold to the said David Young and Elizabeth Young his wife, their heirs, assigns, forever, in equal moieties, or one half parts as tenants in common; that is to say, one full equal moiety or one half part unto the said David Young, his heirs, executors and assigns, and the other full, equal moiety or one half part to Elizabeth Young, her heirs, executors and assigns." Our first question is over the effect of this assignment by Fox to David Young and Elizabeth Young. The Orphans' Court held that it vested the title to the mortgage in the husband and wife as tenants by the entireties so that upon the death of either the survivor became the owner in severalty of the entire mortgage. The general rule that a conveyance to husband and wife as such whether they are described in the deed as tenants in common or as joint tenants, vests in them an estate as tenants by entireties is well settled. The reason of the rule is clearly stated by Blackstone in the second volume of his Commentaries, on page 182, thus, "If an estate in fee be given to a man and his wife they are neither properly joint tenants nor tenants in common; for husband and wife being considered as one person in law, they can not take the estate by moities but both are seized of the entirety, *per tout et per my;* the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor." This is the rule in this State. In Johnson *v.* Hart, 6 W. & S. 319, the conveyance was in express words to the husband and wife as tenants in common, but we held, in accordance with the rule just stated, that they were tenants by entireties. Being one person in law a conveyance to them as husband and wife was necessarily a conveyance to the survivor. But it by no means follows that a grantor can not convey to them as individuals. Nobody ever doubted that the husband was competent to take in severalty; and under recent legislation the competency of the wife to take and hold real estate as her own is just as clear as that of the husband. As to this subject the legal unity of husband and wife has been so far impaired as to enable the wife to use and enjoy her separate estate free from any right of possession or control by her husband. The cases cited by the appellee do not reach the real point of contention. The whole line of cases from Lodge *v.* Hamilton, 2 S. & R. 491, down to Bramberry's Appeal, 156 Pa. 628, is fairly within the rule as laid down by Blackstone. Perhaps the most frequently cited case is that of Stuckey *v.* Keefe's Executors, and we fully approve, and are ready in any proper case to follow the doctrine there stated. It was re-stated in Bramberry's Appeal, *supra*, by our brother McCOLLUM very clearly. He said in substance that words which in a conveyance to unmarried persons would create a joint tenancy or a tenancy in common, would create where the grantees were husband and wife, and they were so named in the conveyance, a tenancy by the entireties. The converse of this proposition is equally true, viz, that where the deed would create neither a tenancy in common nor a joint tenancy in unmarried persons it will not create a tenancy by the entireties though the grantees may be described as husband and wife. This is illustrated by a case put by Preston in his treatise on Estates, vol. 1, p. 132, as follows: a lease is to be made to three persons, to A. for life, to B. in tail, and to C., his wife, for years. Here each

Digitized by Google

takes in severalty, for a several estate is granted to each. LEWIS, C. J., in commenting on the case put by Preston, said in Stuckey *v.* Keefe, *supra*, "We do not see how it could be otherwise. The wife under her lease for years acquired no interest in her husband's estate in tail and could have no claim to hold it as survivor in case of the death of the husband; and the husband by virtue of a conveyance to him in tail acquired no interest in his wife's term. The interest which each would acquire in the estate of the other would not be through the grant to the party acquiring it but would be such as the law of marriage carves out of the estate granted to his or her companion." In other words, the nature of the thing granted, and the words of the grant, are to be taken into consideration as well as the existence of the marriage relation between the grantees.

With this distinction in mind let us now turn to the assignment from Fox to David and Elizabeth Young, and see what, and in what manner, it grants to each. It transfers the whole mortgage debt to the grantees, and in a sort of habendum clause undertakes to describe the interest which each shall take. It says they shall hold in equal moieties or one-half parts as tenants in common. This shows an intent that they shall not take by entireties but as tenants in common. But the assignor seems at this point to have recalled the fact that he was transferring, not real, but personal property, the evidence of a debt, and he immediately adds by way of explanation "that is to say, one full equal moiety or half part to the said David Young, his heirs, executors and assigns, and the remaining one full equal moiety or half part thereof to the said Elizabeth Young, her heirs, executors, administrators and assigns." This was a grant to each in severalty. If David Young should die this assignment in express words carried his half to his heirs, personal representatives or assigns and not to his wife as survivor. If Elizabeth Young had died before her husband her one-half of this mortgage was her separate estate, to be disposed of by her will or to go into the hands of her personal representative for disposal under the intestate laws. Without explanation by the grantor the words first used to describe the respective interests of his grantees would have given them a joint interest, to which a right of survivorship would have attached by operation of the rule relied on by the Court below. But the grantor did not leave his intention to stand upon words about whose effect he evidently felt uncertain, but proceeded to put in other words, words of whose meaning he felt sure, just what he intended and what was exactly in accordance with the understanding of all the parties. These words give one-half of the mortgage debt to each in severalty, and provide for the sale by either of his or her part without the assent of the other, and in case no sale should be made carry the share of each to his or her heirs or personal representative. To hold otherwise would be to disregard and absolutely to subvert the intention of the assignor, and the arrangement under which the assignment was made. If Fox had executed two assignments, one to the wife, her heirs and assigns for one-half of the mortgage, and the other to the husband for the remaining half to hold for himself, his heirs and assigns, it is not likely that this contention would ever have arisen. He really did this, but put both instruments in the same paper. Their effect is precisely the same it would have been if he had separated them and executed and delivered each by itself. If the intent was left in doubt upon the terms of the paper instead of being, as it is, quite plain, recourse could be had to the circumstances out of which the assignment grew and the character of the entire transaction could be taken into the account in order to resolve the doubt and settle the meaning of the instrument: Taylor *v.* Birmingham, 29 Pa. 306; Dexter *v.* Billings, 110 Id. 135. All the evidence was before the Court. It appeared that the property belonged to David Young. His wife demanded as the price of her joining in the deed that she should have three thousand dollars out of the purchase money. Her husband yielded to her demand. The assignment by Young to Fox and the assignment of the same mortgage in equal half parts to Young and to his wife was the method resorted to to carry out the bargain between Young and his wife and give to her the three thousand dollars out of the purchase money to hold as her separate property free from the control and the survivorship of her husband. But we are nevertheless of the opinion that the decree must be affirmed. The laches of the petitioner were properly held to be a fatal barrier in the way of the relief sought. He is the grandson of David Young and Elizabeth Young. She survived her husband and was the executrix named in his will. She settled her account as executrix and it was duly confirmed. She survived the confirmation of her account more than eight years. During about eight years of this time the petitioner was of full age. He neither appealed from the decree of confirmation nor applied for a review of the account. He waited till her death, and till her executor is engaged in the settlement of her estate, and then asks by this petition that her executor be required to file an account showing the disposition made by his grandmother of the one-half of the mortgage held by David Young under the assignment by Mr. Fox. This is in effect an attempt

Digitized by Google

to open by indirection the decree of confirmation made upon the final settlement of Elizabeth Young as executrix of David Young. That decree stands unappealed from and it cannot now be disturbed in the manner attempted. For this reason the petition was rightly dismissed and the decree of the Orphans' Court is affirmed.

J. D. B., Jr.

July '94, 153. January 23, 1895.

Saake v. Dorner.

Married women—Husband and wife—Act of June 3, 1887—Separate property of wife—Power of disposition over—Claim that property in possession of wife, belongs to husband—Burden of proof.

There is no presumption arising from a wife's possession of money that she stole it from her husband, and if he alleges that she took it from him without his consent or knowledge, he must support his assertion by evidence.

It is not sufficient to aver in his bill that she did so, when that averment is specifically denied by the answer.

A married woman being the owner of money or other property, has an undoubted right under the Act of June 3, 1887, to dispose of it by way of a trust or otherwise.

Appeal of Charles Saake, plaintiff, from the decree of the Common Pleas No. 2, of Philadelphia County, sustaining exceptions filed to the report of the master in a suit in equity brought by Charles Saake against Elizabeth Dorner to obtain discovery as to certain property in the possession of said defendant, and for a decree that said property should be ordered to be delivered to the plaintiff.

The facts of this case as found by James L. Miles, Esq., master, were as follows:—

The plaintiff, Charles Saake, married Henrietta Dorner, sister of the defendant, March 4, 1873, and lived with her up to January 10, 1890, when she died intestate, leaving to survive her four minor children the issue of the said marriage.

At the time of said marriage Mrs. Saake had no separate estate or property of her own.

After her marriage she received no property or estate by will or descent, but the defendant testified that her mother, who was a woman of means, gave her sister money from time to time, sometimes in her presence; and that when her sister gave her (the defendant) the money it was sought to recover, she told her that it was money she had saved up, and that none of it belonged to her husband.

The plaintiff carried on the business of a costumer at 466 North Eighth street, where his wife assisted him in the store and in the manufacture of costumes, and where she took in and paid out money incident to the business, and also, as testified to by the plaintiff, received from him money for the house, but no spending money.

On September 21st Mrs. Saake took the defendant, Elizabeth Dorner, her sister, to the Philadelphia Saving Fund Society and there transferred to her the sum of two hundred dollars, Mrs. Saake having at the time an account with the savings fund society, of which the two hundred dollars was a part.

Defendant then opened an account in her name at the same institution, and the money was placed to her credit; subsequently, upon November 25, 1890, she made a deposit of fifty dollars, and upon January 7, 1890, a further deposit of fifty dollars, both of which she received about the time of decease of Mrs. Saake. Upon January 22, 1890, twelve days after the death of Mrs. Saake, a further deposit was made, this money was received by the defendant from Mrs. Moore, another sister of Mrs. Saake; this manifestly came from the same source, as defendant testified, "Mrs. Saake gave me $375. The money is still to my credit in the saving fund." She further testified, "I do not hold this money for myself, but I hold it for the benefit of Mrs. Saake's children, especially for Amelia. I hold it in consequence of what she said to me."

Upon these facts, the master found that the sum of $375 (together with the interest accumulated upon the same) deposited by the defendant, Elizabeth Dorner, in the Philadelphia Saving Fund Society, belonged to and was the property of Charles Saake.

To this finding the defendant excepted, and the exceptions were sustained by the Court, PENNYPACKER, J. Whereupon the plaintiff took this appeal, assigning for error this action of the Court.

Henry J. Scott, for appellant.

Where the findings of a master have been set aside, the Supreme Court, having equal advantages in arriving at the truth, will examine the testimony and determine whether it sustains the master.

Mirkil *v.* Morgan, 134 Pa. 144.

Where much of the evidence given before a master is of a vague and uncertain character, yet if in his conclusions, he disregards such evidence, and bases his findings upon testimony that is certain and definite, there is no reason for reversing the decree reported by him.

Perry's Appeal, 8 Atlantic Rep. 450.

The burden is upon the defendant to show conclusively that the money was the wife's and not the plaintiff's.

McDermott's Appeal, 106 Pa. 358.
Gracie's Estate, 158 Id. 521.

Wm. Henry Lex, for appellee, cited—

Adams *v.* Grey, 32 WEEKLY NOTES, 192.

Digitized by Google

April 8, 1895. McCollum, J. This is a case in which a husband tried to annul a trust created by his wife for the benefit of their children, and to appropriate the subject of it. To accomplish his purpose, he entered a Court of equity and craved its assistance. He made his wife's sister defendant in his bill, and as he proceeded upon his suspicion rather than upon his knowledge of the existence of facts entitling him to what he sought, he inserted in it a prayer for discovery. An answer was filed and a master was appointed, who, upon a hearing had, reported that the defendant received from the plaintiff's wife three hundred and seventy-five dollars in trust for his children, and that the money so received belonged to him. The master allowed the plaintiff to testify in his own behalf, although it was objected that his wife being dead he was not a competent witness. There was not a word in his testimony tending to support the allegation in the bill that his wife took his money without his consent and gave it to her sister, or which indicated that anybody had taken his money without his permission. The substance of his testimony was that he was married in 1873, and his wife died in 1890; that she had no money when he married her, and he was not aware that she acquired any by will or descent during coverture. In regard to money he let her have from time to time, he said: "I gave her money for the house and whatever she needed, and that is all. I gave her no spending money." He did not claim or suggest that this money was more than sufficient for the purpose for which it was given, or that any portion of it entered into the trust fund. He called the defendant for cross-examination under the statute and she testified to receiving the money as stated by the master, and that when she received it, her sister told her it was money she had "saved up," and that none of it belonged to her husband. She also testified that her mother who was "a woman of means," gave her sister money from time to time, and sometimes in her presence. In regard to money given in her presence she said: "I was present several times when my mother gave her money; sometimes the amount would be as high as $50; one time I know she got $25; I think it would aggregate more than $100. I can't say it was over $200." The plaintiff and the defendant were the only witnesses in the case, and we have referred to all of their testimony which affects the ownership of the trust fund. In this testimony there is no fair basis for an inference that this fund was saved from money which the plaintiff let his wife have, or that she at any time appropriated any of his money surreptitiously. His own evidence excludes such an inference. True, he alleged in his bill that his wife took his money without his consent or knowledge, but the answer to this allegation was responsive, and specifically denied it. There is no presumption arising from the marital relation which, in the presence of this answer and the testimony in the case, is sufficient to establish the plaintiff's claim to the trust fund. All the evidence harmonizes with and supports the declaration of his wife when she created the trust, and rejects the imputation of dishonesty on which his bill was based. It shows that his wife received from her mother from time to time gifts of money from which she might have accumulated the fund in dispute and as there is nothing in the evidence which suggests that it could have been raised from her husband's money, we think the learned Court below was justified in rejecting the learned master's conclusion as to the ownership of it, and in dismissing the plaintiff's bill. The only inference fairly deducible from the testimony is that Mrs. Saake was the owner of the money with which she created the trust, and being the owner of it she had a clear right under the Act of June 3, 1887, to dispose of it as she did. There is no presumption arising from a wife's possession of money that she stole it from her husband, and if he alleges that she took it from him without his consent or knowledge, he must support his accusation by evidence. It is not sufficient to aver in his bill that she did so, when that averment is specifically denied by the answer.

Decree affirmed and appeal dismissed at the cost of appellant. S. H. T.

Jan. '95, 13. March 12, 1895.

Huston's Estate.

Book accounts, when incompetent as evidence —Silence not an admission.

A book account contained in the ledger of a decedent which does not purport to be a book of original entries, and many of the items of which are not in chronological order, is not, when unsupported by other testimony, admissible as evidence of indebtedness in favor of the decedent.

The mere fact that a person was present at an audit when the question of his indebtedness to a decedent's estate was discussed, heard that the books showed a large balance due from him to the decedent, and made no objection, is not sufficient to warrant a finding that he was indebted to the estate, when the matter before the auditor was solely in relation to an attempted surcharge of the administrators.

Appeal of Oscar Huston from the decree of the Orphans' Court of Monroe County.

Robert Huston died May 11, 1888, intestate, leaving to survive him a widow and five chil-

Digitized by Google

dren, viz.: Oscar Huston, the appellant, and Horace G. Huston, Milton Huston, Owen Huston and Altha B. Morgan, intermarried with Eli B. Morgan, and since deceased.

Letters of administration on the estate of Robert Huston, deceased, were granted to Horace G. Huston and Milton Huston, who filed their first and final account on January 11, 1893, to which exceptions were filed by Eli B. Morgan, and an auditor was appointed to examine and if necessary restate the account and make distribution. Before the auditor Eli B. Morgan sought to have the administrators surcharged, *inter alia*, with a book account of Robert Huston against Oscar Huston, which the auditor refused to do, but found that Oscar Huston was indebted to the estate in the sum of $2,070.26, and set this amount off against his share of the estate. No claim was made before the auditor that any amount should be set-off against Oscar Huston's share. By agreement the account of Milton Huston, agent for the widow and heirs in the management of the real estate of said Robert Huston, deceased, was also submitted to the auditor for the purpose of having the auditor distribute the balance in the hands of said agent, Milton Huston. The auditor distributed both funds and awarded Oscar Huston nothing, applying his share to the amount which the auditor found Oscar Huston owed said estate. The auditor relied in support of his finding on the fact that the question of the alleged indebtedness of Oscar Huston to the estate was asserted before the auditor in Oscar's presence, and that a ledger of the decedent showed such indebtedness; the ledger did not purport to be a book of original entries and some of the items were not in chronological order. Exceptions to the auditor's report were filed by Oscar Huston, which were dismissed and a petition was presented to the Orphans' Court for a rehearing, which was also refused, and the Court overruled the exceptions; from which decree this appeal is taken.

W. A. Erdman, for appellant.

The appellant is placed in the novel position of having an auditor find a fact and perform an act unsought before him, and of which the appellant had no notice and consequently no opportunity to defend. No effort was made to discover whether Oscar Huston was indebted to his father for the purpose of setting off such amount against his distributive share, and no evidence was taken for that purpose. No one asked the auditor to find that he was indebted to his father in any amount, or to set off any sum against his distributive share. The auditor's findings are unsupported by evidence, the testimony having been taken in a collateral proceeding, and should have no more force and effect than a verdict in dollars and cents of a jury trying a criminal case.

If the plaintiff's case was not proved, the silence of the defendant did not help it.

American Underwriters Asso. *v.* George, 97 Pa. 238.

The copy of the book entries shows that the decedent's book was incompetent as evidence: because it is not a book of original entries, as is evidenced on its face by reference to pages in day books; because the majority of the charges therein contained are lumped sums.

Nichols et al. *v.* Haynes, 78 Pa. 174.
Corr *v.* Sellers et al., 100 Id. 169.

Because many of the items, and these the principal part of the account, are not the proper subject of book entry. Books of original entry are not evidence of the casual sale of a special article, the seller not being in that kind of business.

Shoemaker *v.* Kellogg, 11 Pa. 310.
Stuckslager *v.* Neel, 123 Id. 53.

Items charging board and cash are not the proper subject of a book entry.

Gibbon's Estate, 1 Leg. Gaz. R. 29.

The items contained in said account were not proven.

The auditor's finding being entirely based on incompetent testimony, has nothing to support it and must fall.

Speakman's Appeal, 71 Pa. 25.
Sawtelle's Appeal, 84 Id. 309.
Breneman's Estate, 65 Id. 299.
Harbison's Estate, 145 Id. 456.

J. B. Storm, (with him *Palmer* and *Charles B. Staples*), for appellee.

Entries made by a father in a book are evidence of advancement.

Hengst's Estate, 6 Watts. 86.
Oller *v.* Bonebrake, 65 Pa. 338.

An entry by a father in his account book of a charge against his daughter for cash paid her indicates an advancement; such inference stands until overthrown by other evidence.

Auchy's Estate, 7 Montg. Co., 21.

The Court refused to interfere with the finding of an auditor that a debt was converted into an advancement.

Sickler's Estate, 2 Mona. 23.

April 1, 1895. STERRETT, C. J. If the question of Oscar Huston's alleged indebtedness to his father's estate had been properly raised before the learned auditor, and the fact of its existence and the amount thereof had been established by competent evidence, there would have been no error in setting off the same, or part thereof,

Digitized by Google

against Oscar's distributive share in his father's estate; but no offer was made to prove such indebtedness for that purpose, nor was there any evidence before the auditor sufficient to justify him in finding such indebtedness for any purpose.

Standing alone and unsupported by any other testimony, the so-called "book account . . . . against Oscar Huston as contained in the ledger of Robert Huston," was incompetent for either purpose. It does not purport to be a book of original entries. On the contrary, many of the entries therein are not in chronological order, and some of them evidently refer to other books, not produced, and in regard to which no explanation appears to have been given.

The question of appellant's alleged indebtedness arose on exceptions to the account of the administrators, filed for the purpose of surcharging said accountants with the amount thereof. This course was resisted by them; and one of them testified in substance that Oscar denied owing the estate anything, and further, that on account of the condition of decedent's books they were advised by their attorney not to bring suit on the account, "as they would be beaten." In this he was corroborated by the attorney referred to, who testified in substance that he advised against the appraisement of the account, because on its face it was such as could not be collected, and, learning also that Oscar disputed the account, he advised against bringing suit.

In view of this and other testimony the auditor refused to surcharge the accountants with the alleged balance claimed to be due by Oscar Huston to the estate; but he proceeded to say that Oscar "was present at the hearing of the audit when this question of his indebtedness to the estate was discussed, heard that the books showed a large balance due from him to his father . . and made no objections. The auditor therefore decides to set off this balance, $2,070.26, shown by said books to be due the decedent from the said son Oscar, against his share as an heir; and as this balance is considerably greater than his share in the present distribution, the whole fund for distribution is distributed to the remaining heirs." This conclusion, as we have seen, is unwarranted by any evidence in the case, unless the fact of appellant's presence at the audit and his silence while the question of his indebtedness to the estate was discussed, can be construed as an admission of said indebtedness by him. In view of the fact that the discussion referred to was solely in relation to the attempted surcharge of the administrators, it can not be possible that appellant's presence and silence will justify any such conclusion as that drawn by the auditor. It was wholly unwarranted; and the exception recited in the first specification should have been sustained. In so far as the remaining assignments of error involve the same erroneous conclusion, they are also sustained.

Decree reversed with costs to be paid by the appellees; and it is ordered that the record be remitted to the Court below with instructions to distribute the fund in accordance with this opinion. W. C. S.

Jan. '95, 352 & 368. March 8, 1895.

Estate of Ellen J. Harker.
Appeal of J. M. Titlow et al. Exrs.
Appeal of Ellena B. White.

Assignment of insurance policy—Trust, parol evidence to establish—Nature of trust shown by actions of parties.

An absolute assignment of a policy of life insurance by a daughter to her mother may be shown by parol to have been intended to create a trust in the mother to collect and manage the insurance money and apply the income to the support and care of the daughter.

When it appears that for a period of twenty-seven years the daughter was almost entirely dependent upon the mother, that no account of receipts or expenditures was kept or demanded, and no charges for care and maintainance made, on the death of the mother her estate will not be charged with interest during the whole twenty-seven years, less a small credit based upon an estimate of the expenditures.

Under such circumstances it will be presumed that the mother was entrusted with the management of the principal and the expenditure of the income with no thought or intention of accounting for the income, otherwise than by the support of her daughter, and the said daughter is therefore only entitled to the principal of the insurance money with interest from the date of the mother's death.

Appeals of J. M. Titlow and L. V. Titlow, executors of the will of Ellen J. Harker, deceased, and of Ellena B. White, from the decree of the Orphans' Court of Berks County, making distribution in the estate of Ellen J. Harker.

When the account of the executors came up for audit before BLAND, P. J., Ellena B. White, a daughter of decedent, presented a claim for the principal of a policy of insurance for $5,000, which she claimed her mother had collected for her in 1867, and for interest upon the same for 27 years, less certain credits. The auditing Judge found the facts in relation to this claim to be as follows:—

"That about the year 1863, Ellena B. Harker, now Ellena B. White, the claimant, a daughter of Ellen J. Harker, the decedent, was joined in marriage with one Meyer Hermann, and after her marriage resided with her said husband in the city of Philadelphia, until some time in the year 1865.

"2. That on January 21, 1865, the New York

Digitized by Google

Life Insurance Company, upon the application of said Meyer Hermann, issued a policy of insurance, numbered 29227, for the sum of $5000, upon the life of said Meyer Hermann, payable upon his death to his said wife, Ellena B. Hermann, now Ellena B. White.

"3. That after the issuance of said policy, and some time during the year 1865, Meyer Hermann left the city of Philadelphia for San Francisco; that he subsequently took passage from San Francisco on a vessel bound for Portland, Oregon; that the vessel on which he sailed was wrecked on the bar at the mouth of the Columbia River, and he was drowned, or otherwise came to his death, in the wreck.

"4. That on March 29, 1867, Ellena B. Hermann, now Ellena B. White, the claimant, executed under seal, and delivered, an assignment of said policy of insurance, to her mother, Ellen J. Harker, the decedent, in the following form:—

"For value received, I do hereby assign and transfer unto Ellen J. Harker, the annexed policy of insurance, issued by the New York Life Insurance Company, upon the life of Meyer Hermann, and known as No. 29227, and all dividends, benefit, and advantage to be had or derived therefrom. To have and to hold the same unto the said Ellen J. Harker, her executors, administrators and assigns.

"Witness my hand and seal this 29th day of March, one thousand eight hundred and sixty-seven.

"Sealed and delivered in the presence of ELLENA B. HERMANN [SEAL.]
"Joshua Spering,
"H. C. Young."

"5. That no valuable consideration passed from Ellen J. Harker to Ellena B. Hermann, for the assignment mentioned and found in the 4th finding of fact, and that the statement or recital therein, of a valuable consideration, was merely formal. That no valuable consideration passed from Ellen J. Harker to Ellena B. Hermann at the time of the execution of the assignment, or at any other time; and that it was not intended by the parties to the assignment, that a valuable consideration should at any time pass from Ellen J. Harker for the assignment. That the inducement and motive of the assignment arose out of the following facts: Ellen B. Hermann was at the time of the assignment, is now, and during the whole interval of time has been a person of weak mind, and incapable of the custody and management of money. At the time the assignment was made she was living with her mother, Ellen J. Harker, and was being supported by her. She was absolutely, and very properly, subject to and under the control of her mother, Mrs. Harker. Mrs. Harker knew that Mrs. Hermann was weak in mind and unfit to have the possession and disposal of money, and determined that any money which should be paid upon the policy should not be paid to Mrs. Hermann, but to herself, in trust, and for the use of Mrs. Hermann. That in execution of her design to take the proceeds of the insurance policy in trust for Mrs. Hermann, Mrs. Harker required and obtained from Mrs. Hermann the assignment of the policy and its proceeds mentioned and found in the 4th finding of fact. That Mrs. Harker declared, at the execution of the assignment of the policy, on March 29, 1867, in the presence and hearing of the witnesses to the assignment, and of Mrs. Hermann, the assignment was executed and delivered by Mrs. Hermann upon the faith of the declaration, that Mrs. Hermann was unfit, by reason of mental weakness, to receive the money payable on the policy, and that the object of the assignment was to enable her, Mrs. Harker, to draw the money from the company in order that she might receive and hold it in trust for Mrs. Hermann, and invest it so that Mrs. Hermann would get the benefit of it; and that she, Mrs. Harker, would pay it out to Mrs. Hermann, or for her use, as she might need it. That Mrs. Hermann executed and delivered, and Mrs. Harker accepted the assignment of said policy, in pursuance of an understanding and agreement between them, that she, Mrs. Harker, should invest the proceeds of the policy for the use of Mrs. Hermann, and pay them to the latter, or for her use, as her needs should require.

"6. That on June 26, 1867, Ellen J. Harker, the decedent, received from the New York Life Insurance Company, in full for all claim for loss on said policy, the sum of $4975.07, and gave a receipt in writing to the company in the following form:—

"PHILADELPHIA, June 26, 1867.

"Received from the New York Life Insurance Company, by the hand of Thomas I. Lancaster, agent of said company at Philadelphia, the sum of four thousand nine hundred and seventy-five and 7–100 dollars, which is in full for all claim for all loss under the within policy No. 29227, of the New York Life Insurance Company, which said policy is hereby cancelled and surrendered to the company. ELLEN J. HARKER.

$4975 7–100
as per following statement:—

Amt. Ins . . .		$5000 00
3 Notes, $43 each	$129 00	
Int.	3 93	132 93
		$4867 07
Div. '66 & '7 . .		108 00
		$4975 07"

Digitized by Google

"That Ellen J. Harker, the decedent, received the said $4975.07, from said insurance company, in trust and for the use of said Ellena B. Hermann, now Ellena B. White, the claimant, in pursuance of the said understanding and agreement mentioned and found in the fifth finding of fact. That Mrs. Harker, on various occasions, after she received said insurance money, the last occasion being within a month of her decease, declared that she held it for the claimant.

"7. That having received the proceeds of said policy as mentioned and found in the fifth and sixth findings of fact, Ellen J. Harker invested the same in real estate, in the city of Philadelphia, in her own name, and it continued to be invested in real estate in her own name up to the time of her death. That Ellen J. Harker died seized of a large amount of real estate, situate in Philadelphia and Reading, Pennsylvania, Cape May, New Jersey, and other places, comprising 21 houses and lots in Philadelphia, 1 house and lot in Reading, 2 lots in Cape May, 1 unimproved lot at Engleside, and one at Chiselhurst. That no proof was submitted of the market value of said real estate, but it does appear in proof, and is found as a fact, that it is subject to mortgages amounting in the aggregate to $20,146 and to a ground rent of $4,200.

"That Ellena B. Hermann resided with, and was wholly maintained by her mother, Ellen J. Harker, from the time of her marriage with Meyer Hermann in 1863 until 1869, when she married one Thomas J. White, and left her mother to reside with him; that Thomas J. White died in the month of November, 1883; that during the life of Mr. White and his marriage with the claimant, Mrs. Harker supplied money and clothing to the claimant, and the claimant during a period of seven months in the year 1883, while Mr. White was still living, lived with and was entirely maintained by her mother, Mrs. Harker; and that from the death of Mr. White in November, 1883, to March 1, 1893, Mrs. Harker, the decedent, supported, clothed and wholly maintained Ellena B. White, the claimant.

"9. That from the assignment of the policy, March 29, 1867, to her death, on March 15, 1893, the decedent, Ellen J. Harker, paid to, and for the use of Ellena B. White, the claimant, for her maintainance and support the sum of $6200, for which her estate is entitled to credit on account of the said trust money and its interest; and that there is now due to Ellena B. White, on account of said trust fund of $4975.-07, and its interest from the date of its receipt by the decedent, June 26, 1867, the sum of $6954.08.

"10. That Ellena B. White, the claimant, is a person without the strength of will required to resist the persuasions and importunities of others, and is without any appreciation of the value of money, or prudence in its use; that she is so infirm of mind as to be entirely subject to the control of those about her, and to constantly expose her property to their cupidity and dishonesty. That since the death of the decedent, *i. e.*, on August 28, 1893, while Mrs. White was on a visit to her sister, Emmarene H. Thimme, in the city of Reading, Mrs. White, without any valuable consideration, past or contemplated, assigned, of the expected proceeds of this claim, to Emmarene H. Thimme $3500; to Charles Harker Thimme, a minor child of Emmarene H. Thimme, $50; and to Olga Viola Thimme, another minor child of Emmarene H. Thimme, $50; and on the same day executed a will bequeathing all her estate to the said Emmarene H. Thimme. That besides being helplessly weak in mind, she is so afflicted in body, that she must be assisted up and down stairs, and is unable, on account of weakness in her wrists, to cut her food. That Ellena B. White, from her infirmities of mind and body, is unfitted for the possession and control of what may be decreed to her out of this estate, and that it is necessary for her protection, to make the distribution of her part of the estate to a trustee for her, to be held for her benefit, until appropriate proceedings can be taken to secure her interest."

On the above state of facts, the auditing Judge was of opinion:—

"1. That Ellen J. Harker received the proceeds of the insurance policy in pursuance of an express trust in favor of the claimant; and, 2. That owing to the mental condition of the claimant at the time of the assignment, and of the receipt of the money on the policy by Mrs. Harker, and the confidential relation then existing between her and the claimant, the law implies a trust of the money in Mrs. Harker for the benefit of the claimant." And a decree was entered in favor of claimant for $6954.08, in accordance with the ninth finding of fact, which sum was directed to be paid to the Pennsylvania Trust Company in trust for Ellena B. White.

From this decree the executors appealed. assigning for error the fifth and sixth findings of facts, the conclusions of law as above, and the decree.

Ellena B. White also appealed, assigning for error, *inter alia*, the refusal to award her the full amount claimed by her.

Jeff. Snyder, (*W. S. Baer* and *Philip S. Zieber* with him), for J. M. Titlow *et al.*, appellants.

Carrie B. Kilgore and *David C. Harrington*, for Ellena B. White, appellant.

Digitized by Google

April 1, 1895. WILLIAMS, J. There are two principal questions in this case. The first is over the effect of the assignment made by Mrs. Hermann, now Mrs. White, to her mother, Mrs. Harker, of the policy of insurance on the life of her husband made in 1865. The assignment was *prima facie* a transfer of the title to the proceeds of the policy to the assignee; and it cast upon the assignor the burden of showing that this was not its object as it was understood at the time by the parties. Considerable testimony was given for this purpose, and we concur with the learned Judge in thinking that this testimony justifies the conclusion that the assignment was intended to put the mother in a position to collect and manage the insurance money in such way as should seem best to her, for the comfort and care of her daughter. The next question relates to the proper manner of stating an account between the mother, now deceased, and her daughter.

For more than a quarter of a century the parties have shown their own understanding of their relation to each other and to this fund. No account of its investment, or of the items of receipts and expenditures from the income seems ever to have been asked or rendered. It is conceded on all hands that the daughter needed, and it is clear that the mother has given to her, the same affectionate supervision and maternal care as in the days of her childhood. Her clothing, her board, her pocket money, have all been supplied during most of these twenty-seven or eight years by the mother, and the question has never been considered whether the income from the insurance money was sufficient for this purpose or not. This voluntary and unrewarded stewardship has now been closed by the death of the mother; and the daughter not content to receive the principal, for the very existence of which she is indebted to her mother's thrift and economy, seeks to charge interest upon it during the whole period and to allow a pittance only for her own support, and nothing for her mother's labor and care. The Orphans' Court is clothed with full equity powers. These parties never interpreted their relations to each other in this way while the mother lived and the daughter enjoyed her care, and we will not so interpret them now. When the incapacity of the daughter for the management of her own affairs is considered; when the smallness of the income that could have been earned by this fund is also taken into account, and the absolute dependence of the daughter during most of this time on her mother for all the necessaries of life, we have no difficulty in concluding that the income was consumed year after year in a manner well understood and intelligently acquiesced in by the daughter. After a course of dealing extending over twenty-seven years, we are fully justified in assuming that no account of receipts and expenditures was kept because none was contemplated or desired by the parties, and that, under all the circumstances of this case, the mother's judgment was deliberately and wisely trusted for the management of the fund and the expenditure of the income therefrom, with no thought of an account in the mind of either. Under such circumstances to charge this mother, as a trustee, with the interest for the whole time at the legal rate without knowing what she actually received; and to credit her with what we may guess she expended with no knowledge of her actual expenditures, is to inflict upon her estate and her memory an injustice. The decree is affirmed so far as it charges the appellants with the principal of the insurance money and interest from the death of the decedent. It is set aside so far as it states an account of income during the decedent's lifetime.

The costs of this appeal to be paid out of the fund. W. M. S., Jr.

Oct. '94, 210. October 31, 1894.

Ruppel v. The Allegheny Valley Ry. Company.

Assumpsit— Common carriers — Negligence— "Reasonable dispatch"—Measure of damages —Bill of lading.

In an action against a common carrier for loss arising from delay in the delivery of perishable goods the question of whether such delay was caused by the failure of the carrier to provide proper conveyance for the goods is for the jury to pass upon, and the fact that the delay occurred beyond the line of the company which issued the bill of lading is not material where the contract was to carry the goods to a point beyond the terminus of the contracting company.

The measure of damages, in case of negligence on the part of the common carrier, is the market value of the goods at the point of destination at the time when under ordinary circumstances they should arrive.

Willock *v.* R. R. Co., 166 Pa. 184, followed; R. R. Co. *v.* Plank Road Co., 71 Id. 350, distinguished.

Appeal of the Allegheny Valley R. R. Co., defendant, from the judgment of the Common Pleas No. 3, of Allegheny County, entered on a verdict in an action of assumpsit wherein George Ruppel was plaintiff.

The facts of the case are fully set forth in the opinion of the Court.

At the trial, before McCLUNG, J., the defendant submitted the following points:—

First. That under all the evidence in the case the verdict should be in favor of the defendant. *Refused.*

Second. That if the jury find from the evidence that it was necessary to make repairs to the car, as recited by defendant's witnesses, and

Digitized by Google

that such repairs were made with reasonable dispatch, the verdict should be for the defendant. *Answer*. "This is refused as put. Their duty was not simply and solely as to the making of repairs. They had a duty as to the inspection of the car to begin with, and they had a duty with respect to the forwarding of the car under some circumstances, at least, perhaps, beyond that of merely making the repairs, but outside of the inspection of the car, the point would probably be understood by the jury as presenting the law fairly."

Third. The measure of damages in this case is the market value of the potatoes at the time and place of shipment and the freight paid to Buffalo, less the amount received for the potatoes at Buffalo. *Answer*. "That, gentlemen, is the measure of damages, provided this loss was not the result of negligence upon the part of the defendant company. If they were liable for this loss, but it was not the result of negligence, if it was simply the result of a failure of judgment perhaps, in some employé, that would be the measure of damages. But in case it was the result of negligence, then the Buffalo market would afford the measure of damages. As I have said, in that case you would simply find the value in the Buffalo market, and deduct the amount received there. You have, then, nothing to do with the freight bill."

These were made the first, second and third assignments of error.

The fourth assignment was to that part of the charge of the Court wherein it was said :—

"But the plaintiff alleges that the defendant negligently, carelessly and unduly delayed the shipment of these goods, and that is the principal question for you to determine. You have the facts all before you. There is no particular dispute about the facts as to how this car was delayed. Now, was the defendant negligent in that delay? It would appear here that ordinarily this car would have gotten to Oil City on the morning, I believe, of the 12th, and would, probably have passed on sometime during that day upon the other road and reached Buffalo during Monday. The witnesses differ as to whether it would have gotten there Monday morning or not until Monday evening, but no one disputes that if there had been no accident it would have gotten there by Monday evening at the latest. It appears that it was not actually delivered to the Western New York & Pennsylvania Company at Oil City until some time upon the afternoon of Tuesday. Now, was the defendant company excusable for this delay, and if it was not excusable, was that the cause of the damage to these potatoes? That is practically the simple question before you. It was the duty of this defendant company to use due care with regard to the car at the time that it received it. Under the general arrangement amongst the railroad companies, it took this same car in which the goods were then loaded, and used it to transport them to Buffalo. It was its duty to use due care, reasonable care, in inspecting that car to find out if it was in proper order for that journey at the time it started. Did it exercise that care? It was not bound to remake the car, it was not bound to go over every detail of the car and examine everything about it, because that would not be practicable. It would not be practicable to take out the brasses, for instance, and examine all the journals. It was only bound to use due and reasonable care in inspecting the car. If it did that and this car seemed, under that inspection, to be in proper condition, or, if that inspection revealed to them that it was in proper condition, then it was proper for them to start with the car; and then the question of care would arise as to the transportation of the car after it had been put upon its journey. If they did exercise the proper care before starting with the car, did they exercise the proper care after it was developed that there was something wrong with the car, after it was determined that it had this hot box? That is not a usual occurrence, I believe, with cars, that is, the happening of the heating of a box, but it is not, I presume, an extraordinary occurrence at all. It is something that does occur and no doubt does occur even when the best of care is taken. If they found that it had a hot box, then they were bound to use the care which those circumstances demanded in order to get the goods forward. They were bound, of course, still to transport them as promptly as possible, but they were to be allowed for the delay that would occur by reason of an accident, which was not the result of their negligence, and if they then used all the effort which would be reasonably required of them under the circumstances, they would be held blameless, and they could not be held liable for the damage that would occur. In this matter, as in others, you will take into account all the circumstances. There are some circumstances under which they would be bound to greater care than others. If they had specially perishable goods, there might be some circumstances under which, rather than submit to even a short delay, they ought to transfer the goods into another car, if one was attainable; but you cannot apply any rule of ideal perfection to these matters, because it is not possible that a railroad company, should always have agents of the highest degree of judgment running its cars, and you have to adopt the reasonable rule which the law suggests, that is,—were the efforts made which could reasonably be expected under the circumstances, upon the part of the reasonably competent men whom

Digitized by Google

they are bound to employ? You will examine into the question as to whether or not they were negligent at Kittanning, as to the occurrences between this and Kittanning, and then again at the next stopping place, and still again at Oil City, where it seems that the car had again to be repaired. It would seem that this car was unusually unfortunate on this trip. Was this delay simply on account of that which was purely an accident, or was it by reason of the negligence of the defendant? If it was nothing but a pure accident without there being negligence, then it matters not what became of the potatoes; the owner of them would have to suffer the loss."

The fifth assignment of error was to the Court's admitting the answer of the plaintiff to a question as to whether he inquired of the freight agent at Pittsburgh the probable time of the arrival of the car at Buffalo.

The sixth assignment was to the admission of the evidence of an expert witness as to whether, had there been no delay in the delivery of the potatoes in Buffalo, they would have been in bad condition, and the seventh assignment was to that portion of the charge of the Court where it was said:—

"If, however, they failed to forward them with reasonable dispatch, and the plaintiff suffered damage thereby, they would be liable to him; so that the questions that you have to determine are, first, whether or not they failed to fulfil their contract, failed to forward these goods as promptly as they could in the exercise of reasonable care under the circumstances which surrounded them, and under the occurrences which happened; then, in the second place, whether or not the plaintiff suffered damage, and if he did suffer damage, how much that damage amounted to."

George B. Gordon, (*William Scott* with him), for appellant.

There was no failure on the part of the defendant to use "reasonable dispatch," the circumstances of the case not being "ordinary."

Where this is the case the carrier is not liable.

Empire Transportation Co. *v.* Wallace, 68 Pa. 302.
Geismer *v* Lake Shore Ry., 102 N Y. 563.
Braddon *v.* Gt. Nor. Ry., 28 L. J. Ex. (N. S) 51.
Parsons *v.* Hardy, 14 Wend. 215.
Vicksburg Ry. *v.* Rogsdale, 46 Miss. 458.
Bowman *v.* Teall, 23 Wend. 306.
Conger *v.* R. R., 6 Duer, 375.
Hutchinson on Carriers, sec. 328–330.

Nor was there any negligence on defendant's part proved; negligence cannot be presumed, it must be affirmatively *proved*.

Farnham *v.* C. & A. Ry, 55 Pa. 53.
Patterson *v.* Clyde, 67 Id. 500.
Huey *v.* Gahlenbech, 121 Id. 238.
Brownfield *v.* Hughes, 128 Id. 194.
Buck *v.* P. R. R. Co., 150 Id. 170.

The measure of damages should be the value of the goods at the end of the defendant's line possibly the *nearest* market to the place where negligence occurred.

Sedgwick on Damages, sec. 845–846.
Brown *v.* Gilmore, 92 Pa. 40.
Penna. R. R. *v.* Plank Road Co., 71 Id. 350.

William Yost, for appellee.

The negligence of defendant consisted in the failure to provide proper transportation for the goods or at least to see before it started that the car was in a condition fit to accomplish the journey.

Wood on Railroads, (2d Ed.) sec. 430, p. 1898.
R. R. *v.* Eby, 22 WEEKLY NOTES, 92.
Buck *v.* R. R. Co., 150 Pa. 170.
Empire Trans. Co. *v.* Oil Co., 63 Id. 14.

The measure of damages is the compensation plaintiff should have obtained were the goods delivered in the usual course of events at their destination.

Defendant knew the destination of the goods when they accepted them and the obligation assumed was in reference to this fact.

3 Sutherland on Damages, 246.

A carrier cannot limit liability for negligence by the terms of a bill of lading.

Express Co. *v.* Sands, 55 Pa. 140.
Grogan *v.* Express Co., 114 Id. 523.
Weiller *v.* P. R. R. Co., 134 Id. 310.

Freight agents are presumed to have authority, in the absence of notice to the public of any limitations upon their authority in that respect, to give information as to expedition of transportation and delivery.

Easton *v.* Dudley, 45 Amer. & Eng. R. R. Cases, p. 341.
1 Wood on Railroads, (2d Ed.) sec. 165, p. 507 and 508.
Deming *v.* Railroad, 48 N. H., p. 457, 470 and 471.

April 1, 1895. DEAN, J. Ruppel, the plaintiff, by wire, had consigned to him at Pittsburgh, from New Orleans, a car load of potatoes; they were shipped 4th of June, and reached Pittsburgh, 10th June, 1892, being about six days on the way; before the car arrived, plaintiff had ordered its transfer to defendant's road for shipment to Buffalo, and when it came into the yard, he in company with two others, examined the potatoes, which were packed in barrels, and pronounced them in good condition. The same day the car was transferred to defendant's road and he the next morning took from defendant a bill of lading for shipment to Buffalo; the bill stated quantity, 164 barrels potatoes; advance

Digitized by Google

freight charge, $117.67. It also contained this stipulation: "The amount of any loss or damage . . . . shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon." On the evening of same day, the 11th, the car was made part of a train which was started for Buffalo. About thirty miles out of Pittsburgh it was discovered to have a hot box; in consequence it was side-tracked at Kittanning, 42 miles from Pittsburgh, for repairs; this was about midnight of Saturday the 11th. The car remained at Kittanning without repairs until Monday morning the 13th, when it was run to East Brady, 23 miles further towards destination, where an examination showed the brass of a journal to be broken; this was replaced in about thirty minutes. On Monday, in the evening, the car was again coupled to a train on its way to destination and arrived at Oil City early on the next morning, Tuesday the 14th. Here it had to be transferred to a connecting line, the Western New York and Pennsylvania, to reach destination. The inspectors of this road refused to receive it unless repaired; it was again delayed until repaired; in the afternoon of the same day it was again started for Buffalo where it was delivered to Ruppel's agent, Thursday morning, June 16th. Many of the potatoes were then found to be decayed and wholly worthless, and the remainder considerably damaged.

The plaintiff brought suit for damages, averring negligence of defendant, in not, under the circumstances, moving the car with reasonable dispatch to destination. The Court submitted the question of negligence to the jury, who found for plaintiff, and defendant appeals. There are seven assignments of error which in substance embrace three questions: 1. Was there such evidence of negligence as warranted the Court in submitting that question to the jury? 2. If so, was there sufficient evidence that this negligence caused the damage complained of? 3. Was the measure of damage adopted by the Court, under this contract, correct?

This written contract only expresses what the law implies on the part of the common carrier, namely, that goods which it accepts, shall be transported with reasonable dispatch towards destination. Whether the contract has been kept is a question of fact. If there be contradictory evidence or if the facts warrant opposite inferences the case must go to the jury. Here it was undisputed that in the usual course of transportation this car ought to have reached Buffalo on Monday; other cars which started with it on the same train did arrive at that place on Monday; this car was delivered on Thursday, three days later, in about the same time from Pittsburgh to Buffalo as from New Orleans to Pittsburgh. It was not an unwarranted assumption on part of plaintiff, that reasonable dispatch was the ordinary and usual time taken for the movement of such freight between those points. Appellant's counsel argues in pressing his assignment that there was not sufficient evidence of negligence; in his view there is, perhaps, no more accurate statement of what is reasonable dispatch, than that of POLLOCK, C. B., in Braddon *v.* G. N. Ry. Co., 28 L. J. Ex. (N. S.) 51: "The contract was to carry the cattle to Nottingham without delay, and in a reasonable time, under ordinary circumstances." Here it is argued under ordinary circumstances the car would have been delivered on Monday, but because of the happening of a circumstance which could not be provided against, for it could not be foreseen, a hot box, it was not delivered until Thursday. There was evidence that usually no degree of care in inspection or operation can guard against this obstruction to speedy transportation; that a car in apparently good condition as to journals and axles and properly lubricated, will at times have a hot box. And in so far as the delay was necessary because of a hot box, which could not with ordinary care have been provided against, the dispatch was reasonable. But then plaintiff replies to this, appellant accepted this car at Pittsburgh after it had made the trip from New Orleans without inspection. The car inspector of defendant at East Brady, where it was repaired, testified the brass of the journal was broken, and that he thought the brass in the first place had not fitted the journal; that it was not the proper pattern. The car repairman for defendant at Oil City, where this car had been rejected by the connecting road, testified it had also had a broken centre plate and bolt and damaged timbers. With a broken brass and the other injuries, at this distance from Pittsburgh, after a journey of more than 1,000 miles to Pittsburgh, and no proof of inspection there, the appellee argued that it was out of repair and defective before leaving Pittsburgh; that ordinary care required inspection and repair at that point or a transfer of the potatoes to another car. It is settled, "a railroad company is bound to provide cars reasonably fit for the conveyance of the goods it undertakes to carry, and that the carrier owes the same duty of inspection of cars received from another road and run over its own lines, as in respect to its own cars:" Wood on Railroads, sec. 430; Patterson on Railway Accident Law, p. 238. To the same effect are all the authorities in this country and England. Whether the cause of this hot box existed and by reasonable inspection could have been detected in Pittsburgh was a question for the jury on the evidence. The Court could not weigh it to deter-

Digitized by Google

mine the truth. Clear and full instructions were given on this point, and we see no error in the submission.

As to whether the delay resulted in the loss, the evidence on that point, though not clear, is not purely conjectural. No less than three witnesses, of experience in shipping and dealing in potatoes, testify in substance that the condition of these when the car was opened at Buffalo indicated that decay had commenced within two or three days. If the loss resulted from not being taken out of the car two or three days sooner, and these two or three days were beyond that reasonable time which under the circumstances the law allowed the carrier, the defendant was answerable for the loss. This question was also properly submitted to the jury on the evidence.

How is the loss to be measured? The contract stipulates that the market price of the potatoes at Pittsburgh at date of shipment is to be the measure of damages. If the loss be not attributable to the negligence of the carrier, then this condition of the contract is binding on the consignor. There is no rule of public policy which forbids it. But the verdict of the jury has determined as a fact that the loss was occasioned by the negligence of defendant. The carrier cannot by contract in this State limit his liability in case of negligence. The law on this subject is so clearly stated by our brother WILLIAMS and so amply vindicated by a citation of authorities both of this country and in England, in the late case of Willock *v.* The Railroad, 166 Pa. 184, that repetition is unnecessary. And the general principle announced in that case is conceded by counsel for appellant, but it is argued it has no application here; this stipulation, it is urged, is not to relieve the carrier from any liability for negligence, but was adopted to avoid the uncertainty which would otherwise be incident to proper proof of loss. If this were the object of the stipulation there is no public policy which would avoid it. The trouble with this view, however, is that the condition is palpably a limitation of or reduction on the loss of the shipper. The sole inducement to shipment of marketable commodities is the higher price at point of destination. This alone creates and stimulates international, interstate and domestic trade. Railroads and all other common carriers would have but lean incomes if this were not so. The plain effect of it is not alone the avoidance of inconvenience and uncertainty in the demand, but a restriction in the amount of it, a reduction in the real loss. It is therefore void.

The fact that Buffalo was not on defendant's line and that its terminus was Oil City, does not in view of this contract and the facts fix the market price at Oil City as the measure of damages. Defendant accepted the car for transportation safely to Buffalo and charged a through freight rate per 100 pounds from Pittsburgh to that point; it was not answerable for any default or neglect beyond its own line, but it undertook to carry safely and with reasonable dispatch on its own line and deliver to the connecting road on the route to destination. The verdict of the jury finds it did not carry with reasonable dispatch on its own line towards destination, and that this caused the damage sustained at Buffalo; the loss there is therefore the measure of damages. Pa. R. R. Co. *v.* Plank Road Co., 71 Pa. 350, cited and relied on by appellant, is clearly distinguishable from this case. The contract averred there on part of the company was to carry the lumber from sidings on its own road to Corry at the end of it, from whence it was to be transported by the Oil Creek Railroad to Titusville, 26 miles further. The plaintiffs did not claim there was any agreement, express or implied, to forward the lumber by delivery to a connecting road, but only that defendant was bound to transport to Corry; and further averred failure in this particular as the cause of the damage and then that the measure of the damage was the loss at Titusville. Having that contract in view, this Court said: "What then ought to be the measure of damage on the failure of duty of the railroad company to transport to Corry? The rule is compensation; such damage as might reasonably have been anticipated, and within view of the parties."

In this case the shipment is by the bill of lading from Pittsburgh to Buffalo on a through rate; Oil City is not mentioned. This question now raised, does not seem to have occurred to appellant at the trial in the Court below; there was no evidence concerning it, and it was not mentioned in the written points. The only instruction asked on the subject in this particular is in defendant's third point, thus: "The measure of damages in this case is the market value of the potatoes at the time and place of shipment, and the freight paid to Buffalo, less the amount received for the potatoes at Buffalo."

This the Court affirmed unless the loss resulted from the negligence of defendant, in which case the Buffalo market would determine the measure of damages. But even if it had been raised by a prayer on part of appellant for special instructions, under this contract and "what reasonably might have been anticipated and within view of the parties," it ought not to have been affirmed.

What we have said disposes of all the assignments of error demanding notice. The judgment is affirmed.

MITCHELL, J., dissented from so much of this opinion as relates to the measure of damages.

W. D. N.

Digitized by Google

Jan. '95, 174. February 19, 1895.

Romberger v. Henry.

Trespass—Negligence—Act of July 12, 1842 (P. L. 339, Purd. Dig. 741, pl. 21)—Capias ad satisfaciendum.

A capias ad satisfaciendum may issue in execution of a judgment recovered in an action of trespass by an employe against his employer for negligence in supplying dangerously insufficient means for carrying out the work at which he was employed.

The above case is not one founded on contract within the purview of the Act of 1842 prohibiting arrest on civil process in suits founded upon contract.

Appeal of Daniel D. Romberger from the judgment of the Common Pleas of Schuylkill County in making absolute a rule to set aside and stay the execution of a judgment entered on verdict in an action of trespass wherein appellant was plaintiff and Walter J. Henry was defendant. The facts as shown by the pleadings were as follows: On the 17th of November, 1892, plaintiff, who was a competent mechanic, was in the employ of defendant, a contractor and builder, engaged in doing outside carpenter work on a dwelling, which defendant was building on his wife's premises in Porter township, Schuylkill county. The work which defendant directed plaintiff to perform on that date was the making of a cornice around the building about the eaves, for which purpose the defendant had himself a day or two previous erected a scaffold or platform with boards, posts and scantlings on which the men were to stand while engaged in that labor. When ordered by defendant to that work, plaintiff asked defendant whether the scaffold was safe, to which he replied it was entirely sufficient and all right. Thereupon in company with another employé, plaintiff ascended the scaffold and began working. Shortly thereafter the scaffold broke and fell, precipitating both men to the ground, a distance of between 25 and 30 feet, and greatly injuring plaintiff.

In July, 1893, plaintiff brought action, and on March 31, 1894, obtained a verdict of $100, upon which judgment was entered. On August 8, 1894, he issued a capias ad satisfaciendum. On August 15, 1894, defendant was arrested. On August 17, 1894, the Court granted a rule to show cause why the execution should not be stayed or set aside, and on September 17, 1894, made the rule absolute. And the plaintiff took this appeal, assigning this action as error.

J. W. Moyer, for appellant.

The section of the Act of July 12, 1842, on which the Court below based action is as follows:

"SEC. 1. No person shall be arrested or imprisoned on any civil process issuing out of any Court of this Commonwealth, in any suit or proceeding instituted for any money due upon any judgment or decree founded upon contract or due upon any contract, express or implied, or for the recovery of any damages for the non-performance of any contract, excepting in proceedings as for contempt to enforce civil remedies, action for fines or penalties, or on promises to marry, or moneys collected by any public officer or for any misconduct or neglect in office, or in any professional employment, in which cases the remedies shall remain as heretofore."

It has been decided by this Court that this section applies only to judgments on contract indebtedness.

Howard *v.* McKee, 82 Pa. 413.

The proximate cause of the injury sued for was appellee's negligence. The remote cause was the contract of employment and implied contract to furnish suitable appliances. The law only regards the proximate cause.

Hoag *v.* R. R. Co., 85 Pa. 293.
Railroad Co. *v.* Kerr, 62 Id. 353.
Railway Co. *v.* Trich, 117 Id. 390.
Railroad Co. *v.* Hope, 80 Id. 373.

The injury was not the natural and probable consequence of the contract, but of the negligence.

Nicholas Heblich, for appellee.

The case of Howard *v.* McKee, 82 Pa. 413, referred to by the appellant, fully sustains the Court below in its action setting aside the ca. sa., because as there said "the judgment was founded on a contract, and is not within the exceptions enumerated in the Act."

April 8, 1895. FELL, J. The verdict in this case was rendered in an action in trespass for damages for negligence upon the part of an employer in not furnishing his employé with reasonably safe appliances for work. The plaintiff was a carpenter in the employ of the defendant, who was a contractor and builder. He was directed to work at the top of a building on a scaffold which had been erected by the defendant. Before going upon the scaffold the plaintiff was told by the defendant that it was properly constructed and safe. It broke because of its defective construction.

A capias ad satisfaciendum issued upon the judgment was upon rule set aside. No reason was given by the Court for its action, and the only reason assigned upon the argument in support of the ruling is that the judgment was founded upon an implied contract upon the part of the plaintiff to furnish the defendant with safe means of employment, and that the plaintiff was therefore within the exemption of the Act of July 12, 1842. The first section of the

Digitized by Google

Act provides: "No person shall be arrested or imprisoned on any civil process issuing out of any Court in this Commonwealth, in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree founded upon contract, or due upon any contract express or implied, or for the recovery of any damages for the non-performance of any contract," etc.

The construction claimed by the appellee cannot be sustained. The recovery of damages was not for the non-performance of a contract within the meaning of the Act. The action was in trespass to recover damages for negligence. The negligence alleged and proved was the failure to perform a duty. That duty was to furnish an employé with suitable appliances for work; it arose by implication of law out of the relation of the parties. It was imposed by law, not created by contract. That the relation had its origin in contract is manifestly not to the point.

The order of the Court of Common Pleas making absolute the rule to set aside the capias ad satisfaciendum is reversed and set aside, and the record is remitted with a procedendo.

W. D. N.

Jan. '95, 439. January 11, 1895.

City of Chester to use of Ross v. Eyre et al.

Municipal lien—Right to file same—Affidavit of defence.

The right of lien for curbing and grading is the right of the municipality and cannot even with its consent be exercised except where the work is done by its direction and for it.

To a sci. fa. sur municipal lien defendant filed an affidavit of defence denying that the city authorized the work to be done:

Held, that this denial negatives any implication of authority that might arise from the fact that the lien was filed by the city solicitor in the name of the city.

Appeal of Martha S. Eyre et al., from the judgment of the Common Pleas of Delaware County. The City of Chester to the use of Michael Ross, contractor, filed a lien against defendants, property for $893.86, for curbing, grading and paving, and subsequently issued a scire facias to which defendant filed an affidavit of defence, averring, *inter alia*, that the work for which the lien was filed was not done by the city, but by a private individual on his own motion. A rule for judgment for want of sufficient affidavit of defence was taken, which the Court made absolute.

Defendant appealed, assigning for error this action of the Court.

O. B. Dickinson, for appellant.

A. A. Cochran, (*George M. Booth* with him), for appellee.

April 8, 1895. Fell, J. Judgment was entered for want of a sufficient affidavit of defence in a proceeding by scire facias upon a municipal lien for paving. The lien was filed in the name of the city of Chester, to the use of the contractor who did the work. It is stated in the affidavit of defence "that said paving was not done by the city of Chester, nor in pursuance of its authority, but was done as your deponent believes and expects to be able to prove, by one Michael Ross, the use plaintiff in the above case, on his own motion and without the authority of the city to do so." And in the supplemental affidavit it is averred "that the work was not done by the street commissioner, but was done by Michael Ross, a private individual, and that he had no direction or authority from the city, but that on the contrary the city officials had decided that the work for which said lien was filed need not be done at the time it was done."

The right of lien exists only when the work is done by the city. If the work is done for the city either under a specific contract to do the particular work or under a general employment to do all work required by city ordinances the contractor may with the consent of the municipality use its name in filing a lien to his use. But the right of lien is the right of the municipality, and cannot even with its consent be exercised except when the work is done by its direction and for it. There is in the affidavit a distinct denial that the city authorized the work to be done, and this denial negatives any implication of authority springing from it which might arise from the fact that the lien was filed in its name by the city solicitor. If the work was done by the use plaintiff at his own instance, without any authority from or contract with anyone, no right of either lien or recovery exists.

The averments in the affidavit of defence put the plaintiff to proof of his authority, and were sufficient to prevent judgment and to carry the case to a jury.

The judgment is reversed with a procedendo.

W. M. S., Jr.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, MAY 3, 1895.* [No. 12.

Supreme Court.

July, '94, 37. January 30, 1895.

J. G. Brill Co. v. The City of Philadelphia.

Municipal corporations—Damages — Elements of—Change of grade.

In an action for damages for change of grade of a street, the jury cannot consider the matter of opening future streets through plaintiff's property so far as concerns damage that may be occasioned by such future change.

There is no duty upon a city to define its future policy as to opening streets; it is liable for land taken and the injury caused by opening streets, but is not liable for what it intends to do or what a land owner conjectures may be its future action.

It is error to charge a jury in an action for damages for change of grade that they can find the property is worth less since the change because the city has not defined its future policy in regard to grades of other streets that may be opened through the property.

Appeal of the City of Philadelphia from the judgment of the Common Pleas No. 3, of Philadelphia County, in action by the J. G. Brill Co., to recover damages occasioned to their property by reason of a change of grade of Bridge street to avoid a grade crossing of a railroad.

On the trial, before REED, J., the plaintiff gave evidence to show the effect of the depression upon that part of their property fronting upon Bridge street and proceeded to show further that the rest of the tract was seriously damaged because of the uncertainty as to what the city might hereafter do in regard to the grade of other streets which would probably be extended through this property.

A part of the city's defence was that the depression of Bridge street afforded an element of benefit to plaintiff's property because it permitted of convenient drainage. The plaintiff's answer to this was that a sewer had been laid prior to the change at a depth corresponding with the depressed level of Bridge street.

The defendant requested the Court to charge, *inter alia*, as follows:—

"4. If the jury find that the sewer on Bridge street was laid with a view to, or in connection with the change of grade of Bridge street, now complained of, plaintiffs cannot claim against the city for this change of grade on the basis of any advantage which they had from the use of so low a sewer."

Answer. Refused. (Second assignment of error).

"5. The jury cannot consider the matter of opening future streets through plaintiff's property, so far, at least, as any damage which may be occasioned is concerned. If damage will be caused by such streets, or the grades at which they may be opened, those damages cannot, in whole or in part, be now considered."

Answer. I refuse that point, because I think I have given you a more accurate instruction in the course of my charge. The damages for which the city is liable from the opening of streets are matters which you cannot assess now, but if the uncertainty of the city's action in connection with the opening of future streets affecting the value of the property as Mr. Ritchie thinks it does, then you can find that the property is worth less, because the city has not defined its future policy in regard to the grade of these streets. (Third assignment of error).

The Court charged the jury, *inter alia*, as follows:—

"Now it is important here to keep a distinction in mind, which is a perfectly solid distinction, but which, when we come to state it, seems rather a fine one, and that distinction is this: You have no right in this case to give damages for the opening of future streets. Sufficient for the day is the evil thereof. When those streets are opened, if they are opened, then the city will have to pay any damages accruing to the owners of the properties; but that is not inconsistent with the position taken by Mr. Ritchie in this case. He says it is not the damage that will accrue from the opening of the streets, but it is the uncertainty as to how those streets will be opened when opened. He said it was plainly possible that there were several different ways of opening those streets on that land. In other words, they could all be reduced to the level of Bridge street and every street carried under the railroad, or they could all be left on the present level, and stopping at the railroad, not crossing the railroad at all, or some could be lowered and made to pass under the railroad, and some could be left on the present grade; and he said that in his judgment, a person would buy that property, owing to the uncertain way in which those streets would be run, that a man could not be made to give as much for that property as if it had remained at the original grade. In other words, it was the uncertainty as to how those streets would be opened. Whether they would be opened on the present grade, or whether they would be opened at the present grade of Bridge street." (First assignment of error.)

Digitized by Google

Verdict for plaintiff $13,800, and judgment thereon.

The city appealed, assigning for error the part of the charge quoted and the answers to the points.

E. Spencer Miller, assistant city solicitor, (*Charles F. Warwick*, city solicitor, with him), for appellant.

The possible opening of future streets does not constitute an element of damages.

Allegheny *v.* Black, 99 Pa. 152.

If any benefit arose from the construction of the sewer, the city is entitled to have that considered by the jury when they estimate the damages.

Francis Rawle and *George S. Graham*, for appellee.

March 18, 1895. WILLIAMS, J. The plaintiff is the owner of a tract of land lying in the outskirts of the City of Philadelphia containing thirty-six acres. It is irregular in shape. Its surface has not been graded. No streets have been opened through it by the city or the owner. At one of its angles it has a front of four hundred feet on Bridge street. This street has been depressed by the action of the city in order to avoid a grade crossing of the Phila. and Trenton Railroad, whose tracks adjoin the plaintiff's land. This was a proceeding to determine the damages suffered by the plaintiff in consequence of the depression of Bridge street so as to secure an under grade crossing at this point. The plaintiff gave evidence to show the effect of the depression upon the value of his Bridge street front; and then proceeded to show by real estate dealers that the value of his tract, not fronting on this street, had been reduced at least ten thousand dollars more because of the uncertainty as to what the city might do hereafter in regard to opening streets through it. The learned Judge was asked by a written point to withdraw this evidence from the jury and instruct them that "any damage to be occasioned by the opening of streets in the future could not be considered now, but could be recovered when such streets were actually opened." This instruction was refused and the evidence submitted to a jury as proper to be taken into consideration. He said, "But if the uncertainty of the city's action in connection with the opening of future streets affecting the value of property, as Mr. Ritchie thinks it does, then you can find that the property is worth less because the city has not defined its future policy in regard to the grade of these streets." This instruction is assigned for error. It assumes that the city is under a duty to the land owners to "define its future policy" in regard to the opening of streets over his suburban lands, and to indicate with certainty the grades on which each one will be opened when the time for opening it arrives. If no such duty exists, then the failure of the city to furnish the information required will afford no cause of complaint, and will justify no assessment of damages against it. No statute or rule of public policy has been brought to our attention that binds such a duty upon the city. We are aware of none. If for any purpose the city should undertake to render such a service to real estate owners it would not be bound to continue it, nor would it be bound by its own action in that regard. Councils cannot bind their successors, nor can they bind themselves by a declaration of "future policy." Such a pronunciamento is not within the powers or duties of a municipal government and it would confer no rights and impose no obligations. Resolutions and ordinances directing the opening and grading of streets no matter how clearly or strongly they show the purpose of the city at the date of their passage, may be modified or repealed to-morrow, and property owners affected thereby may be greatly disappointed and the value of their property affected, but such loss of a prospective gain is not a cause of action. It is *damnum absque injuria*. But if the ordinance remains unrepealed and is at the proper time carried into execution by the actual opening and grading of the street the injured land owner has then a cause of action for the actual injury sustained. The city must pay for the land it takes, and the injury it does, in the opening of streets. It is not liable for what it intends or threatens to do; much less for what a land owner may conjecture the consequences of possible action in the future.

Some people speak of having suffered great losses when they really mean that they have missed an opportunity to make great gains. If they had known what was to happen, or if they could have foreseen the "future policy" of some person, corporation, or government on whose action the value of some commodity was to depend, they could have made the proper purchase or sale at the proper time to have realized a substantial advance. That is really the complaint of the plaintiff. He does not quite know when or how the city will open streets across his land. If he did he would know better how to deal with the property. But because "of the uncertainty of the action" of the city he can not deal with it to the same advantage, as he could do if the "future policy" of the street department so far as it affects his land was known to him now. The city can not foresee the course of future developments any better than the plaintiff. It is her duty to open streets when they are needed to accommodate the public, and not till then. She must fix the grade when the time

Digitized by Google

comes to open the streets, and she will then be liable for the injury actually sustained by the land owner. For the purpose of determining the amount of this injury each street stands by itself and must be separately considered. If the city at some future time shall open streets over the plaintiff's lands, and the grade adopted for one or more of them shall affect the plaintiff injuriously, he will then be entitled to recover the damages he may suffer by reason of the opening or grading of each. But until then, *non constat* that any street will be opened or any injury be done. The first and third assignments of error are sustained. The second is not sufficiently definite or intelligible to enable us to understand its purpose. The judgment is reversed and venire facias de novo awarded.

W. M. S., Jr.

Oct. '94, 81. October 23, 1894.

In re Shiloh Street.

Act of May 16, 1891, P. L. 71—City councils—Ratification—Change of grade.

The councils of a municipality have the power to validate and ratify the act assumed to be done on its behalf, although such act was not done in accordance with any ordinance or resolution passed before the act was performed.

Appeal of John C. McCormick and others, from the judgment of the Common Pleas No. 2, for the County of Allegheny, in dismissing exceptions to the report of the viewers in the matter of the change of grade of Shiloh street from Grandview to Southern avenue, in the City of Pittsburgh. The City of Pittsburgh presented a petition for viewers upon the grading and paving of Shiloh street, shortly after the passage of the Act of May 16, 1891, P. L. 71, and the Court having appointed viewers, they proceeded to view and assess, and made report of their finding to the Court on the 27th day of November, 1891. To their report exceptions were filed, which, after argument, were dismissed, but upon an appeal being taken, the decree dismissing said exceptions was reversed by the Supreme Court at No. 124, October term, 1892. (*In re* Shiloh Street, 31 WEEKLY NOTES, 352.)

On February 18, 1893, the report of the board of viewers was recommitted to them with directions to proceed in accordance with the Act of May 16, 1891.

On November 29, 1893, their report was filed and the exceptions made thereto having been dismissed on January 8, 1894, this appeal was taken.

Charles L. Powers, for appellants.

William C. Moreland and *Thomas D. Carnahan*, for appellees.

January 7, 1895. GREEN, J. The viewers in their report found specifically that the change of grade from the grade established by the ordinance of March 16, 1888, was necessary to make a connection with Grandview avenue, and that the grading of Shiloh street had been partly done under the ordinance of 1884, and before the grade of Grandview avenue was established. They also found that the change involved an additional cost of about a thousand dollars, but that the benefit of the change was fully equal to the additional cost and damage, and that the properties along the line of the street were benefitted to the extent of any and all damage which may have been caused by the change. They also found that the total amount of damages, costs and expenses of the improvement was $13,126.61, and that said total amount is not in excess of the worth and value of the improvement. They then ascertained and reported the damages sustained by the owners and the benefits conferred by the improvement, and fixed and reported the amounts to be paid by the owners who were benefitted.

The only real question now in dispute under the exceptions is the power of councils to make the change of grade without a special ordinance to that effect. The exceptants claim that this change could not be made without a special ordinance to that effect. The power of the councils to change the grade by means of a special ordinance is not controverted. But it is very familiar doctrine that councils may by subsequent ratification validate and adopt an unauthorized act of its agents, officers and employees.

Thus in McKnight *v.* City of Pittsburgh, 91 Pa. 273, which was a sci. fa. upon a municipal lien against a lot owner to enforce payment for work done in the grading of a street, and the defendant contended, as here, that the grade originally established had been changed by the city engineer without the authority of any ordinance, we held the defendant liable to pay because the work of the engineer in changing the grade was subsequently adopted by the city. GORDON, J., delivering the opinion, said, "The difficulty, however, is found in the fact that between the time of the making of the ordinance and the letting of the contract a grade for Ridge street was adopted by the proper authorities. Such being the case, the engineer exceeded his authority when he disregarded that grade and adopted a new one, and the city, at any time before the adoption by it of the work done by the contractor might have repudiated the act of its

Digitized by Google

engineer and avoided the contract. But it could not do this after such adoption; for as in the case of a private person, it having the power to contract, the power to adopt a contract made for its benefit is necessarily involved in the original power. It is indeed but a question of power that we have to consider; that being determined all is determined. Hence, we repeat, the city having the undisputed power to establish grades and to make contracts for paving, the correlative power of adopting grades and contracts made by its officers for its own benefit, necessarily follows."

We followed the same ruling in City *v.* Hays, 93 Pa. 72. We held there that although the agent of the city exceeded his authority, as the contract was one which the city might have authorized, it could waive the irregularity and adopt the contract after it was made.

The question of adoption is one exclusively for the city, and with which the citizen has nothing to do. We said in the opinion, "But under the power vested in the city councils, already referred to, there is no doubt that they could have approved and accepted the work, and so have bound the city."

In Silsby Manufacturing Co. *v.* Allentown, 153 Pa. 319, we held that councils of a municipality may adopt an unauthorized act done for the benefit of the city by one of the municipal officers and assume the debt so contracted.

In 1 Dillon on Municipal Corporations, sec. 463, it is said, "A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers which are within the corporate powers but not otherwise."

There is no contention upon the correctness of the foregoing principles. The only remaining question therefore is upon the adoption and ratification of the work done upon the street after the change of grade. Upon that subject there is no possibility of controversy because the claim of the city is founded upon the work thus done. The report of the viewers sets out the fact of the change and describes the character, cost and expense of the work, and fixes the amount to be paid by each owner under the assessments for benefits occasioned by the work. That report was confirmed at the instance of the city, and this action of scire facias is brought to recover for that very work. It is asserted by counsel for the city in his counter statement that the work was accepted by the city, and this statement is not denied by the appellants.

We see no error in this record.

Judgment affirmed. W. D. N.

Jan. '94, 440; July, '94, 101. January 17, 1895.

Pile et al. v. Pedrick et al.
Appeal of Pile et al.
Appeal of Pedrick et al.

Party walls—Trespass—Costs in equity.

An owner of land, desiring to build entirely on his own lot, had his lines surveyed by the district surveyor and directed his builder to keep within the line. After the building was up it was discovered that while the wall proper was within the owner's line, a portion of the foundation below the surface extended over the adjoining property one and three-eighths inches:

***Held*, 1. That the wall was not a party wall.**

2. That the owner of adjoining property could treat this as a permanent trespass to be compensated for in damages, or could compel the removal of the offending foundation by rebuilding from the defendants' side.

3. That in view of all the circumstances of this case the discretion of the lower Court in allowing time for the removal of the wall and dividing the costs would not be disturbed.

Appeal of Joseph M. Pile *et al.* and of Daniel Pedrick *et al.*, from the decree of the Common Pleas No. 2, of Philadelphia County.

Bill in equity by Joseph M. Pile and Sarah E. Pile, against Daniel W. Pedrick and Henry G. Ayer, praying for an injunction to restrain defendants from placing windows in an alleged party wall; that they be directed to remove windows already placed, and general relief.

The answer denied that the wall was a party wall. The bill and answer were referred to Charles H. Matthews, Esq., as master, who found the facts as follows:—

"The plaintiffs are the executors under the will of Morgan G. Pile, who died in 1889, seized in fee of a lot of ground and messuages erected thereon, situated west of Tenth street, between Buttonwood and Hamilton streets, in the Fourteenth ward of the city of Philadelphia.

"The easterly line of the lot is sixty-three feet ten and one-quarter inches west of Tenth street; containing in front on the south side of Buttonwood street twenty feet, and extending of that width southwardly at right angles to Buttonwood street one hundred and fifty-nine feet eleven and five-eighths inches to Hamilton street.

"The house, 1006 Buttonwood street, erected on this lot, is a two-story frame building, the main part extending back about thirteen and two-tenths feet, and attached thereto is a small one-story frame structure with an additional depth to the main building of sixteen feet, and a short distance in the rear of this there are eight water-closets, with a shed or flat built over them for drying clothes.

"The house, No. 1005 Hamilton street, erected on this lot, is a three-story brick dwelling, and there are five three-story brick dwellings in the rear of it, and these run back to the

Digitized by Google

shed or flat. The five dwellings are known as the court properties, and front on a passage way or alley of about five feet in width, leading to them from Hamilton street, and west of said house No. 1005.

"Mary Ann Trout by deed dated February 14, 1829, conveyed the lot to Gottlieb Wilhelm, with a messuage and tenement thereon erected, and under proceedings in partition in his estate the property was conveyed to Morgan G. Pile, May 17, 1864, being described in the deed as the lot of ground with the one two-story frame, and six three-story brick messuages, No. 1006 Buttonwood street.

"There has been no material change in the improvements to the present day; and while the evidence does not fully disclose the particular time when the buildings described were erected, the fact is established that the frame house, No. 1006 Buttonwood street, was probably standing at the time of the conveyance in 1829, and that the other buildings were erected some years prior to the conveyance in 1864.

"In the year 1889 the defendants commenced the erection of a large brick shop or factory, for the purposes of their business in the manufacture of specialties for railroads, extending from Buttonwood street to Hamilton street, on their lot adjoining that of the plaintiffs on the east. The factory has a front on Buttonwood street of forty feet, and was first built to the height of two stories, and completed in 1890, with two additional stories, and in the course of the erection of the latter, above the line of plaintiffs' buildings, and overlooking the same for the whole length of the lot, the defendants set and placed in their wall a number of large windows.

"There are thirty-two of these, all opening from the third and fourth floors of defendants' building, extending equi-distant, or nearly so, and on even lines from Buttonwood street, and from the ground floor of the factory to the sill of the first windows, the height is about thirty-eight feet.

"All the buildings of the plaintiffs now adjoin on the east the brick wall of the factory, and are occupied by tenants.

"The brick wall of the defendants' building, so far as visible, presents an even line and surface from the Hamilton street end north to Buttonwood street, except at a point at the north end of 'the court properties' where there is an off-set of four and one-half inches, marked 'B' on defendants' exhibit 'E,' and designated on 'plaintiffs' exhibits 'A' and 'B.' The distance from this point to Buttonwood street is about fifty feet.

"The important question in the case relates to the construction of the stone foundation laid by the defendants and the erection thereon of the brick wall of their building, with the openings described.

"The plaintiffs aver that the foundation was laid partly on their land, and although from the level of the ground the brick wall may be wholly on the property of the defendants, it will be considered a party wall and must be a solid wall without openings.

"The defendants deny the assertion of fact as to the encroachment of the foundation wall, and assert that no integral portion of the same extends as a party wall on the property of the plaintiffs; and they contend that if there be an encroachment at any point the wall of their building is not a party wall; that the trespass, if any, was not intentional, and they did all in their power to prevent it by having the party line marked out by the official surveyor of the district.

"The foundation wall for defendants' building was laid by their builder, who testified that the same was constructed entirely upon their ground, and by the lines given to him by Edward D. Roberts, then surveyor of the district, and since deceased.

"If the fact that lines were given by the surveyor is admitted, the evidence furnishes no reliable information by which the master can now determine their location and directions; and in the absence of proof that a record was made by him and notice given to the plaintiffs, as required by law, it is not to be assumed that a regulation was in fact made, which was conclusive and binding, as provided by the Act of April 15, 1782, 2 Sm. 48; Purd. Dig. 1303, p. 11.

"In support of the position already referred to, the counsel for defendants contended that the only evidence of the encroachment of the foundation wall relates to the construction of two pieces of wall entirely separate and distinct from the foundation wall in question, for the purpose of supporting certain walls or buildings on the land of the plaintiffs.

"Those two pieces of wall, it is claimed, were erected to replace the foundation of the frame house, No. 1006 Buttonwood street, which it became necessary to take down, together with a chimney of this house, in the erection of the foundation wall of defendants' building, and at about half the distance between the south end of the frame house and the north end of 'the court properties' where, by reason of the condition of the cesspools there 'a bed of stone,' in the language of the builder, was put in to sustain the pressure of the walls, and their contents from coming in on the ground and into the cellar of the defendants.

"In determining this question of fact, regarded by counsel as important to the defendants' case, and to establish which reliance is

Digitized by Google

placed principally upon the testimony of the builder, his evidence has been carefully considered. It might be excluded from the consideration of the principal question as to the points and the line of the encroachment of the foundation wall, upon the ground that in the judgment of the master it is not corroborated by the weight of the testimony, but in the particulars referred to, the construction of the two pieces of wall at the points and to the extent described, the information furnished is not sufficiently definite to be of value in determining the controversy.

"The master is, however, relieved of much difficulty in determining the location of the foundation and brick wall of defendants' building as related to the property line, by the careful surveys and measurements of the property, made since the bill was filed, by competent surveyors and by agreements of parties conjointly for the purpose of this case.

"The results of their examinations as appears by their testimony and their plans annexed thereto, show a substantial agreement in all important particulars, William W. Thayer, the surveyor and regulator of the Fourth district, the successor of Mr. Roberts, acting for the plaintiffs; and Chester E. Albright, Jr., an assistant of Dye & Datesman, civil engineers and surveyors of this city, acting for the defendants. The result of Mr. Thayer's examination of the locality in question is shown in the plans prepared by him annexed to the testimony and marked 'plaintiffs' exhibits 'A' and 'B.'

"The plan made for the surveys and measurements by Mr. Albright of the property, in reference to the dispute as to the property line and the party-wall line, was prepared from his draft under the special directions of John H. Dye, of the above-named firm, who was examined as a witness, and is annexed to the testimony and marked 'defendants' exhibit 'B.'

"The substantial agreement in the result of the examinations referred to, together with all the other testimony in the case, leaves no doubt in the mind of the master as to the true location of the brick wall of the defendants' building on the west side of their property; and he finds and reports as a fact that this wall, which is eighteen inches in thickness, is clear of the property line from Buttonwood street south to Hamilton street, that it stands its entire length on the defendants' land and does not at any point extend over on the property of the plaintiffs.

"The master further finds and reports as a fact, that the brick wall rests upon the foundation wall built by the defendants to support their factory, and extending the entire length of their lot; and that this foundation wall, which has an average thickness of two feet, does not encroach at any point on the property of the plaintiffs from Hamilton street north to a point at the north end of 'the court properties.' This point is at the offset in the brick wall already referred to, and which is described and designated in the testimony and the plans as the point 'B,' and the distance as already stated from this point of the offset to Buttonwood street is about fifty feet.

"The remaining and important inquiry as to the location of the foundation wall for the distance of fifty feet described, is now to be considered. In regard to this inquiry, it will be found that Mr. Albright's testimony confirms the results of Mr. Thayer's examination of the property, and that their measurements and plans agree, and further, that Mr. Dye, in his explanation of the defendants' plan 'exhibit E,' distinctly says that from the end of 'the court properties' north to the Buttonwood street end of the building the stone wall as he describes it, is about one and one-half inches over on the property of the plaintiffs.

"The encroachment being established by the testimony in the case, and at least to the extent indicated, the fact that at certain points it appears to be greater than at others, is not now regarded by the master of sufficient importance for discussion.

"If, as is claimed, the foundation of the frame house on Buttonwood street when removed, was replaced by a separate wall for its support, this is not indicated in the testimony, and by the plans of the surveyors which, as before stated, show a substantial agreement in regard to the encroachment along the line of fifty feet.

"The master adopts the conclusion, and finds and reports as a fact, that the stone foundation wall laid by the defendants from the point at the offset at the north end of 'the court properties' north to the Buttonwood street end of the building, the distance of about fifty feet, extends partly upon the ground of the plaintiffs, and the average of the encroachment along the line of this distance is from an inch and one-half to an inch and five-eighths of an inch, and further, that the brick wall of the defendants' building for the distance and between the points described is built upon this foundation but is wholly within their line.

"It may be proper to add, in view of certain testimony in regard to negotiations for a settlement of this case, that the master has not been called upon to consider the proposition, made by the defendants prior to his appointment, to secure to the plaintiffs or their grantees, the use of the wall in question without compensation."

The master recommended the following decree:—

"And now this cause having come on to be heard, it is ordered and decreed that the defendants, Daniel W. Pedrick and Henry C.

Digitized by Google

Ayer, be forever restrained and enjoined from maintaining the windows in the party wall described in the plaintiffs' bill, and overlooking their property for the distance of fifty feet, be the same more or less, from the point at the north end of the buildings of the plaintiffs, described in the master's report as the 'court properties,' north to the Buttonwood street end of their lot; that the said defendants, Daniel W. Pedrick and Henry C. Ayer, cause the windows, sashes and frames of all the said windows to be taken out and the spaces to be built up with brick, so as to conform as nearly as possible in thickness, material and general appearance with the other portions of said party wall; and that the said plaintiffs, Joseph M. Pile and Sarah E. Pile, suffer and permit the said Daniel W. Pedrick and Henry C. Ayer, their agents and workmen, to have proper and free access to said building for this purpose, and that the said defendants pay the cost of this cause."

The defendants filed, *inter alia*, the following exceptions:—

Ninth.—In not finding as a fact that the defendants have offered to enter into an agreement with the plaintiffs by which at any time at which the plaintiffs or their grantees should wish to use the wall in question, the defendants would close the windows now open and permit the plaintiffs so to use the wall without making any compensation therefor.

Tenth.—In finding the wall of the defendants from the point B north to the Buttonwood street front to be a party wall.

Twelfth.—In not finding that the plaintiffs' bill should be dismissed.

The Court, after argument on exceptions, entered the following order:—

"And now, 6th June, 1891, after hearing on bill, answer and master's report, the cause is referred back to the master to take testimony and report whether the encroachment by defendants upon the plaintiffs' land can be practically rectified by removal of the wall or a portion thereof; and, if so, what mode can be adopted for that purpose."

Further testimony was taken by the master, who reported that the testimony furnished no method by which the encroachment could be practically rectified without incurring the risk of weakening the foundation wall and reducing its thickness below the minimum prescribed by law, and that the express sanction of the building inspectors would be required for any change.

To this report defendants filed, *inter alia*, the following exceptions:—

Seventh.—In not finding that all that is required to bring the foundation of the wall in question entirely within the property line of the defendants is to chip off the encroachment.

Eighth.—In not finding that the cost of doing this work of removing the encroachment of the foundation of the wall in question without inflicting any permanent injury upon the plaintiffs or their tenants would be ninety-three dollars.

Tenth.—In not finding that this work of chipping off the encroachment of the foundation of the wall in question could be done without inflicting any permanent injury upon the plaintiffs or their tenants.

Eleventh.—In not finding that after the removal of the encroachment of the foundation of the wall in question, the said foundation would still exceed in thickness by two inches or more the thickness required by law for foundation walls for buildings of the dimensions of the defendants'.

After argument on these exceptions the Court (PENNYPACKER, J.), entered the following decree:—

"Now, 6th February, 1894, the Court having considered the two reports of the master, the exceptions thereto and the depositions on behalf of the defendants taken subsequent to the filing of the said reports, and having heard counsel for the respective parties:

"Order and decree that the defendants, by their workmen and pursuant to a permit of the building inspectors, have leave to remove so much of their wall mentioned in the master's report as is upon the ground of the plaintiff's replacing it by a wall of the existing width to be wholly upon the defendants' ground. But in so doing the said workmen shall not enter upon or dig into the ground of the plaintiffs.

"And that the costs of the case shall be paid by the respective parties, one-half by each.

"And it is further ordered that if the permission herein be not exercised within a reasonable time the plaintiffs have leave to apply to the Court for further direction or order."

From this decree Joseph M. Pile *et al.* appealed, assigning for error the refusal to grant the injunction prayed for, in not making the decree recommended by the master, in referring the cause back to the master, and in entering the above decree.

Pedrick & Ayer also appealed, assigning for error the dismissal of their exceptions above noted, the failure to permit them to enter upon the premises and remove the encroaching wall, in decreeing that they should pay half the costs.

E. Hunn Hanson, (*Joseph M. Pile* with him), for J. M. Pile *et al.*

The opening of windows in a party wall is a nuisance which equity will abate.

Vollmer's App., 61 Pa. 118.
Milne's App., 81 Id. 54.
Western Bank's App., 102 Id. 171.

The discretion of a Court of equity in regard

Digitized by Google

to costs must be a reasonable and not an arbitrary one; costs will not be imposed on a successful litigant, unless for satisfactory reasons.

Biddle's App., 19 WEEKLY NOTES, 219.
Mintzer's App., 35 Id. 326.

Leoni Melick, (with him *Sheldon Potter* and *John Sparhawk, Jr.*), for Pedrick & Ayer.

There was no party wall here; in the cases of closing windows cited above, the wall was admittedly a party wall.

Pedrick & Ayer made a very reasonable offer and the action of the appellants does not show such fair dealing and good conscience as entitles them to the aid of a Court of equity.

Orne *v.* Coal Co., 114 Pa. 182.
Hart *v.* Kucher, 5 S. & R. 2.

The party wall Act is to be strictly construed, and its provisions do not apply to a case of this kind.

Hoffstot *v.* Voigt, 29 WEEKLY NOTES, 397.

PILE'S APPEAL.

April 8, 1895. WILLIAMS, J. The learned Judge of the Court below was right in holding that the wall in controversy was not a party wall. It was not intended to be. The defendants were building a factory and under the advice of their architect decided to build within their own lines in order to avoid the danger of injury to others from vibration which might result from the use of their machinery. They called upon the district surveyor to locate their line and built within it as so ascertained. Subsequent surveys by city surveyors have determined that the line was not accurately located at first but was about one and a half inches over on the plaintiffs. This leaves the ends of the stones used in the foundation wall projecting into the plaintiffs' lands below the surface one and three-eighths inches. This unintentional intrusion into the plaintiffs' close is the narrow foundation on which this bill in equity rests.

The wall resting on the stone foundation is conceded to be within the defendants' line. The defendants offered nevertheless to make it a party wall by agreement and give to plaintiffs the free use of it as such, on condition that the windows on the third and fourth floors should remain open until the plaintiff should desire to use the wall. This offer was declined. The trespass was then to be remedied in one of two ways. It could be treated with the plaintiffs' consent as a permanent trespass and compensated for in damages, or the defendants could be compelled to remove the offending ends of the stones to the other side of the line. The plaintiffs insisted upon the latter course, and the Court below has by its decree ordered that this should be done. The defendants then sought permission to go on the plaintiffs' side of the line and chip off the projecting ends, offering to pay for all inconvenience or injury the plaintiffs or their tenants might suffer by their so doing. This they refused. Nothing remained but to take down and rebuild the entire wall from the defendants' side and with their building resting on it.

This the decree requires, but in view of the course of the litigation the learned Judge divided the costs. This is the chief ground of complaint on this appeal. Costs are not of course in equity. They may be given or withheld as equity and good conscience require. It often happens that a chancellor is constrained to enforce a legal right under circumstances that involve hardship to the defendant, and in such cases it is, as it should be, common to dispose of the costs upon a consideration of all the circumstances and the position and conduct of the parties. The costs in this case were within the power of the chancellor. They were disposed of in the exercise of his official discretion, and we see no reason to doubt that they were disposed of properly. The decree is affirmed. The costs of this appeal to be paid by the appellant.

PEDRICK'S APPEAL.

April 8, 1895. WILLIAMS, J. This is an appeal from the same decree just considered on the appeal of J. M. Pile *et al.* It is not denied that the foundation wall on which the appellant has built was located under a mistake made by the district surveyor, and does in fact project slightly into the plaintiffs' land. For one inch and three-eighths the ends of the stones in the wall are said to project beyond the division line. The defendants have no right at law or in equity to occupy land that does not belong to them, and we do not see how the Court below could have done otherwise than recognize and act upon this principle. They must remove their wall so that it shall be upon their land. This the Court directed should be done within a reasonable time. To avoid further controversy over this subject we will so far modify the decree as to permit such removal to be made within one year from the date of filing hereof. In all other respects the decree is affirmed. The appellants to pay all costs made by them upon this appeal.

W. M. S., Jr.

Digitized by Google

Oct. '94, 191. October 16, 1894.

Balfour v. Russell and Rindfuss.

Landlord and tenant—Oil lease—Condition as to continuance of lease contingent upon the production of oil or gas—Construction of lease.

B. leased certain land amounting to seventy acres to S., for the purpose of exploring for and obtaining oil or gas, at a rental of three dollars per acre per annum, and one-eighth of the oil and gas produced with the usual transportation for the same. The lease was for three years, or while oil or gas was produced from the demised premises in paying quantities. The continuance of the lease beyond three years was contingent upon the production of oil or gas in such quantities within that time, and it contained the following reservation: "Reserving therefrom four acres around the buildings, upon which no wells are to be drilled without the written consent of both parties, the boundaries of which are to be designated and fixed," by B. S. drilled two wells, one of which was not worth operating and he abandoned it. The other, which produced oil in paying quantities, was drilled within the reservation with the written consent of B. and S. The tenant S. then assigned his interest in the lease to R. and F., who drilled two other wells, one of which was useless, but the other produced oil and gas in paying quantities. At the end of the three years R. and F. tendered the rent which was payable in advance, but B. refused to receive it, and brought ejectment to recover the land, claiming that the paying well drilled by R. and F. had been drilled within the reservation without his consent, and that by the terms of the lease it expired at the end of three years, no paying well having been drilled under the lease within that time. It was in evidence that B. had always received rental upon the full seventy acres and had never notified R. and F. that the well was within any reservation, and had always accepted his eighth share of the oil produced by it:

Held, that the reservation was merely a stipulation that wells should not be dug within certain boundaries designated by the lessor, without his consent;

Held, further, that when such consent was given and resulted in the establishment of a paying well the effect was the same as if it had been constructed outside the boundaries;

Held, also, that this construction was in accordance with the understanding of the parties as shown by their conduct in the payment and acceptance of the rent.

Appeal of John Balfour, plaintiff, from the judgment of the Common Pleas of Butler County, in an action of ejectment brought by John Balfour against C. T. Russell and George Rindfuss, to recover seventy acres of land, more or less, situate in Adams township, Butler County, Pa.

Upon the trial, before GREER, J., the following facts appeared: John Balfour, the plaintiff, on September 10, 1889, leased a farm of seventy acres in Adams township, Butler County, Pa., to one John A. Snee, for oil and gas purposes, for the term of three years, "or while oil or gas is produced in paying quantities." The lease contained this reservation: "Containing seventy acres, more or less, excepting and reserving therefrom four acres around the buildings, upon which no wells are to be drilled without the written consent of both parties hereto, the boundaries of which are to be designated and fixed by the party of the first part, second party to pay three dollars per acre per annum, payable in advance." The lessee was also to furnish the lessor one-eighth of the oil and gas produced, and to furnish the usual transportation for the same in pipe line or lines. In the month of March, 1889, well No. 1 was drilled on the premises outside of any of the part reserved, but as it proved not to be a producing well, it was plugged and finally abandoned. On November 20, 1890, the tenant Snee obtained from Mr. Balfour his written consent, signed by both parties, that he might drill another well; Balfour having on the day before marked out the location of this well. Accordingly Snee drilled well No. 2, upon the reservation, and it produced oil in paying quantities. The plaintiff, John Balfour, on the trial disclaimed title to well No. 2, and it was not in controversy in the case. Some time afterwards Snee sold his interest in the lease to C. T. Russell and George Rindfuss, the defendants in this action, who drilled another well No. 3, which proved to be a paying well. Balfour claimed that before this well No. 3 was begun, he had in December, 1890, designated and fixed the reservation by marking and pointing out the lines to Snee, and that when the well was begun he made objection to its location, as being within the reservation, to the workmen engaged in drilling it, but it did not appear that he gave notice to the defendants, or that they knew anything about the lines of the reservation having been marked by him. On the other hand it was in evidence that Balfour continued to receive the full three dollars per acre upon the whole seventy acres, and his proportion under the lease of the oil and gas produced from well No. 3. Subsequently well No. 4 was drilled by the defendants, outside of that portion of the seventy acres claimed by the plaintiff to be within the lines of the reservation, but it never produced oil in paying quantities. All of these wells were opened within the three years' term of the lease. On September 10, 1892, the defendants tendered the rental to Balfour, who refused to accept it on the ground that the term of the lease, namely, three years, had expired, and they owed him no rental. He then brought this action to recover the entire leasehold estate. The plaintiff contended that the continuation of the lease beyond the term of three years was contingent on the finding of oil or gas in paying quantities on the ground outside of the part reserved, and that as the only paying wells, Nos. 2 and 3 were within the reservation, the tender of rental on September 10, 1892, when the term

Digitized by Google

ended, would not have the effect of extending the term beyond the three years. On the other hand the defendants claimed that well No. 3 was not within the so-called reservation, the plaintiff having only run his lines so as to include it after it was drilled, and that he could not, after permitting them to expend their money in drilling said well, under the belief that it was not on the four acres, now deprive them of the benefits thereof by arbitrarily and unreasonably exercising his right to designate the boundaries of the four acres so as to include this well.

The plaintiff submitted, *inter alia*, the following points:—

"1. The continuation of the lease in suit beyond the definite term of three years was contingent upon the finding of oil or gas in paying quantities on the lease proper, and not on the reservation." *Answer*. "We qualify this point, and say that as Mr. Balfour gave a written paper by which he consented that Mr. Snee should drill a well on this reservation, he made this reservation a part of the lease proper, and that we cannot affirm the point in that shape, but it is refused." (First assignment of error.)

"2. The payment of the rental of three dollars per acre in advance per annum means the payment within the term of the lease fixed by the parties, and a tender of the rental on the 10th day of September, 1892, at which time the term ended, would not have the effect of extending the term beyond the three years." *Answer*. "It is true that the tender of the rental and not accepted by Mr. Balfour would not extend the lease. If no oil was produced in wells Nos. 2 and 3, then we would affirm that point, otherwise it is refused." (Second assignment of error.)

"4. By the terms and provisions contained in the lease under which defendants claim, they have no right to drill for oil or gas on the reservation without first having obtained the written consent of plaintiff for each and every well." *Answer*. "We affirm that point; that is true, but as he gave his consent in writing and a well was drilled and Mr. Balfour received his royalty on all the wells, and rentals on the whole seventy acres, we believe he has made it part of the lease, and we affirm that point without other qualification." (Third assignment of error.)

"5. If the jury believed that well No. 3 is within the lines of the reservation and that there was no oil or gas being produced in paying quantities on the land covered by the written lease on the 10th day of September, 1892, the term was at an end, and the verdict should be for the plaintiff." *Answer*. "It is admitted that oil was produced at wells Nos. 2 and 3; we refuse that point." (Fourth assignment of error.)

"6. The written covenant in the lease giving the plaintiff the right to designate the boundaries of the reservation was notice to defendants, who are the assignees of the original lessee, and before expending any money in drilling No. 3 it was incumbent on them to call upon plaintiff to designate the boundaries of the reservation before locating No. 3." *Answer*. "That point, we think, is not in this case and we refuse it." (Fifth assignment of error.)

The Court charged the jury, *inter alia*, as follows:—

"On the 10th day of September, 1889, Mr. Balfour made an oil lease of seventy acres of this land on the one side of the road, the side on which his house and barn and other buildings are situate, for the term of three years; that is, the lease was to run from the 10th day of September, 1889, until the 10th day of September, 1892; there is no dispute as to that, and there is no dispute as to the boundaries of the lease. The lease was originally made to Mr. Snee, and assigned by him to the defendants; and Mr. Snee went on and drilled a well, No. 1. It was not a producing well, and was plugged and finally abandoned, and, I believe, the rig taken away. This lease had a provision in it that Mr. Snee had no right to drill on four acres immediately around the buildings; the clause in regard to that reads in these words: 'Excepting and reserving therefrom four acres around the buildings upon which no wells are to be drilled without the written consent of both parties hereto, the boundaries of which are to be designated and fixed by party of the first part, second party to pay three dollars per acre per annum, payable in advance.'

"Mr. Snee, after the first well was drilled, went to Mr. Balfour and obtained from him a written consent, signed by both parties, that he might drill a well, and he did drill No. 2 on the farm and on this reservation. Afterwards No. 3 was drilled. It was drilled without any written consent of Mr. Balfour, but there is a dispute as to whether it is on the reservation. It is alleged on the part of the defendants that if it was on the reservation that Mr. Balfour could not object, because he permitted them to drill without notice; but so far as that is concerned we will not go into that.

"[The well being drilled on the lease, on the reservation, on part of the seventy acres that was leased by Mr. Balfour to Mr. Snee, and for which he paid his three dollars a year rental, and was to pay it whether it produced oil or not, and that it was producing oil at the time this suit was brought, we believe extended the lease; that is, extended the time of the lease, and that the lease is extended until such time as there is no oil or gas produced on the lease, according to the terms of this agreement.] In view of that, we say to you that we think the defendants have

Digitized by Google

the right of possession to the property yet, because there is oil being produced in paying quantities, and was being produced in paying quantities at the time this suit was brought, and therefore [as the defendants have the right of possession the plaintiff cannot recover, and we say that it is your duty to find a verdict for the defendants.]"

Verdict for defendants and judgment thereon. Whereupon the plaintiff took this appeal, assigning for error the answers to the points given above, and the portion of the charge in brackets.

Lev. McQuistion, (with him *J. C. Vanderlin* and *A. B. C. McFarland*), for appellant.

The written consent to drill one well on the reservation vested no title in the appellee to the reservation, nor any right to drill any other well thereon. It did not make the reservation a part of the lease, because it was clearly excepted and reserved therefrom.

If the one well drilled on the reservation by written consent made it a part of the lease, as held by the Court below, the effect of that would be to prolong the term of the lease on the seventy acres as long as oil or gas was produced in paying quantities on the reservation. This would conflict with the covenants in the lease, and the intentions of the parties.

James Bredin, (*S. F. Bowser* with him), for appellees, cited—

Westmoreland National Gas Co. *v.* DeWitt, 25 WEEKLY NOTES, 103.

April 8, 1895. McCOLLUM, J. We think this case was correctly decided in the Court below. The plaintiff leased the land in dispute to John A. Snee, for the purpose of exploring for and obtaining oil or gas. The lease was for three years or while oil or gas was produced from the demised premises in paying quantities. The continuance of the lease beyond three years was contingent upon the production of oil or gas in such quantities within that time. Snee drilled two wells; one of them was not worth operating and he abandoned it, the other produced oil in paying quantities. He then assigned his interest in the lease to the defendants, who drilled two wells with a like result. All the wells were drilled within the three years, and as two of them were paying wells the learned Court below thought they were sufficient to continue the lease while oil was obtained from them at a profit. It is conceded that this is a correct view of the case if the producing wells are upon the demised premises. The plaintiff, however, contends that these wells are on land expressly excepted from the lease. Is this contention sound and consistent with a fair construction of that instrument? We think it is not. In the first place it is not in accord with the construction adopted by the parties, and under which rent was paid for three years. The land on which the producing wells were drilled is admittedly a part of the seventy acres described in the lease and on which the lessors paid rent at the rate of three dollars per acre. If the parties had understood that the lease included only sixty-six acres the lessor would not have exacted and the lessees would not have paid rent on seventy acres. If the language of the lease fairly raised a doubt respecting the intention of the parties, their interpretation of it during the definite term of three years would be entitled to great if not controlling influence in the decision of the question before us. But this is not all that is opposed to the plaintiff's present contention. He expressly consented in writing to the drilling of one of the producing wells, acquiesced in the drilling of the other and received his share of the oil in accordance with the provisions of the lease. During the definite term allowed for the development of the property he permitted the lessees to drill these wells without an intimation of his present claim. If he then entertained the view of the lease which he now advances in aid of his suit his silence was misleading and the purpose of it fraudulent. He must have known that the lessees would not have drilled the wells under such an interpretation as he now insists upon, because it renders the time consumed and expenditures incurred in drilling them of no account in determining their rights under the lease. It is an interpretation which makes the time and labor so expended operate as an extinguishment of these rights and a development of the plaintiff's property without compensation to the parties by whom the development was accomplished. Surely such results cannot be tolerated unless there is a clear warrant in the lease for a construction which produces them. But there is no such warrant in the lease. The so-called exception or reservation is nothing more than a restriction upon the lessee's right respecting the location of wells on the seventy acres included in it. It is a stipulation that the lessor may designate the boundaries of "four acres around the buildings" within which the lessee shall not drill wells without his written consent. When such consent was given, and the work done under it resulted in the establishment of a well which produced oil in paying quantities, the effect of it upon the rights of the parties under the lease was the same as if it had been drilled outside of the boundaries designated by the lessor. This is a construction which harmonizes with the understanding of the parties as manifested by their conduct during the definite term, and which, independent of their interpretation of their contract, best accords with the language and object of the instrument which defines their rights.

Judgment affirmed. S. H. T.

Digitized by Google

July, '94, 187. January 23, 1895.

Baugh & Sons Company v. Mitchell et al.

Sale of goods — Warranty — Affidavit of defence.

When an affidavit of defence alleges that goods were not of the quality contracted for and that there was a warranty in writing, and annexes two letters of the plaintiff, which do not in themselves show a positive warranty but which might have that effect if taken in connection with a letter of the defendant, which is presumably in the plaintiff's possession, and which is not set out by defendant, but is alluded to in one of the letters of the plaintiff attached to the affidavit, the Court is not in a position to pass upon the effect of the plaintiff's letter, and a warranty having been alleged the case must be sent to a jury.

Appeal of Henry F. Mitchell and Walter Pierson, trading as Mitchell & Pierson, defendants, from the judgment of the Common Pleas No. 4, of Philadelphia County, wherein Baugh & Sons Company was plaintiff.

This was an action brought to recover for neat's foot oil sold by plaintiff to defendants. The defendants filed an affidavit of defence, setting up as follows:—

"That defendants are engaged at the county aforesaid, in the business of tanning and dressing the skins of goats and other animals, and for the purpose of their business use large quantities of neats' foot oil. That plaintiff, before and at the time of the purchase of the oil as set forth in the statement of claim filed, promised and warranted defendants, in writing (a copy of which is hereto annexed), that said oil was and should be absolutely pure and free from adulterants of all and every kind, and relying upon this promise and warranty, defendants purchased said oil. That said oil was not pure and free from adulterants, but, on the contrary, was impure and adulterated. That said impurities and adulterations were not known to defendants, and could not have been known to them, until after said oil was used upon the skins to be dressed. That twenty-nine hundred and forty-six (2946) dozen of goat skins were thus tanned with the said oil so purchased from and for which suit is brought by plaintiff. That in endeavoring to overcome the defects in certain of the skins caused by the impurities in said oil so purchased from the said plaintiff by defendants, the defendants actually paid out in cash, for extracting grease, the sum of $336.64; for scrubbing the said skins with benzine, $164.50; for reglazing said skins, the sum of $33.25, and for recoloring said skins the sum of $449.75, or a total of cash paid out of $984.14, by reason of said impurities and adulterations in the oil so purchased from plaintiff, and that these prices were the cheapest and lowest at which the same could be done. That, in addition thereto, the skins upon which said oil purchased from plaintiff were so much damaged by impurities that twelve hundred and ninety-three (1293) dozen of said skins are worth $2 less per dozen, or $2586, than they would have been if the oil had been pure, and sixteen hundred and fifty-three dozen (1653) of said skins are worth $1 less per dozen, or $1653, than they would have been if the said oil had been pure, as promised and represented. That previous to the bringing of said suit the defendants had brought suit in Court of Common Pleas No. 4, of March term, 1894, No. 832, to recover damages for the losses sustained by them as aforesaid, and said suit is pending and undetermined."

To the affidavit were attached the following letters:—

"DELAWARE RIVER CHEMICAL WORKS,
PHILADELPHIA, Oct. 23, 1893.
MESSRS. MITCHELL & PIERSON,
1012 Passyunk Ave.,
Philadelphia.

GENTLEMEN:—

We are in receipt of your favor of the 21st inst., and appreciate your kindness in informing us that you can do better than the price we are charging you for our twenty-degree ice-pressed neats' foot oil. We can also sell a strictly pure ice-pressed neats' foot oil which will stand a cold test of thirty degrees for less money. We can furnish you with this article at 85 cents per gallon, but we can make no abatement from the price of the oil which you have been getting which will stand a cold test of twenty degrees. We have not been able in the past to supply the demand we have had for our twenty degree cold test oil. Those of our customers who have tried cheaper oils and spoiled their leather have been only too glad to get back to our oil again. If you think the thirty degree oil will suit your purpose, we should be pleased to supply you, but for winter work, we do not recommend it.

Very truly,
BAUGH & SONS COMPANY,
JOHN BARNARD,
Treasurer."

"PHILADELPHIA, Dec. 30, 1893.
MESSRS. MITCHELL & PIERSON,
1012 Passyunk Ave.,
Philadelphia.

GENTLEMEN:—

We have referred your postal of the 29th inst. to our superintendent of the works, who makes the following report:—

'The neats' foot oil is guaranteed, and all made exactly the same way; no change in the

Digitized by Google

way of chilling, pressing or bleaching for years.'

You will see from the above that we have made no change in our process, and as the material we use is precisely the same, we cannot account for this difference in the working of the last lot of oil shipped you. The trouble must have arisen from some other cause, as we have no complaints from other parties who are using the same oil. Yours truly,

BAUGH & SONS COMPANY,
JOHN BARNARD,
Treasurer."

The Court entered judgment for want of sufficient affidavit of defence. The defendants took this appeal.

Henry J. Scott, for appellants.

Where goods are bought for a special purpose, and are expressly warranted to be such as are suitable for the purpose, a breach of the warranty is a good defence to an action for the price.

Badger *v.* McKay, 9 WEEKLY NOTES, 528.
Nagle *v.* Potter, 3 Id. 26.
Bacon *v.* Scott, 154 Pa. 250.

Independent of the Act of April 13, 1887, P. L. 21, a stipulation that future deliveries will equal the sample may become a term of the contract and be enforced as such. It is then unnecessary to determine whether the stipulation is a warranty or a condition.

West Republic Mining Co. *v.* Jones, 108 Pa. 55.
Warren *v.* Phila. Coal Co., 83 Id. 437.
Scheppers *v.* Stewart, 11 WEEKLY NOTES, 106.

Albert B. Weimer, (*Charles H. Bannard* and *Frederick M. Leonard* with him), for appellee.

There is no warranty contained in the letter of October 23, 1893, annexed to defendants' affidavit of defence. There is no averment of quality, and the statement that the oil "will stand a cold test of twenty degrees" is not denied in the affidavit of defence. There is no averment that the oil was sold for a particular purpose, or that plaintiff knew for what purpose the oil was to be used.

Port Carbon Iron Company *v.* Groves, 68 Pa. 149.
Connett *v.* Brooks, 11 WEEKLY NOTES, 283.
Roebling *v.* Brown, 9 Id. 170.
Shisler *v.* Baxter, 109 Pa. 443.
Macbeth *v.* Lee & Co., 5 Pa. C. C. 225.
Whitaker *v.* Eastwick, 75 Pa. 229.

The cases relied upon by the appellants are not in point. The statement of plaintiff's treasurer in his letter of October 23, 1893, that "our customers who have tried cheaper oil and spoiled their leather have been only too glad to get back to our oil again," is merely praise of the plaintiff's oil, and does not rise even to the level of a representation, much less of a warranty. It has always been the rule that the mere representations do not amount to a warranty.

Wetherill *v.* Neilson, 20 Pa. 448.

Defendants cannot set up in their affidavit of defence as a set-off the identical claim which they have already used as grounds for damages in an action of trespass against the plaintiff. They cannot have two suits pending at the same time for the same cause of action.

Pennsylvania R. R. Co. *v.* Davenport, 154 Pa. 111.

March 11, 1895. GREEN, J. The plaintiffs' claim is upon an ordinary book account for the sale of a quantity of 20 degrees neats' foot oil. The affidavit of defence alleges that the oil was warranted to be pure and free from adulterants, and then asserts that the oil sold was not free from adulterants but on the contrary was impure and adulterated, and that the defendants had sustained heavy losses in consequence of the defects of the oil. The learned Court below, it is alleged by the appellants, gave judgment for the plaintiffs because there was no warranty disclosed by the affidavit of defence. It is true that the letter of plaintiffs dated December 30, 1893, and which contains a copy of the warranty, does not describe a warranty in the same terms as the affidavit of defence alleges, but it does contain an acknowledgment of the receipt of a postal card from the defendants dated December 29, and a reference of the postal to the plaintiffs' superintendent who reported that, "The neats' foot oil is guaranteed and all made exactly the same way; no change in the way of chilling, pressing or bleaching for years." The defendants' postal of December 29 is not now in the case, and without it the full interpretation of the meaning of the plaintiffs' letter is not certain. We cannot know at present what the contents of the defendants' letter were, and we think it is premature to declare judicially the meaning of the plaintiffs' letter until the contents of the defendants' postal are seen as they doubtless will be on the trial. We think it apparent that there at least might be a warranty which would sustain the defendants' contention. The plaintiffs' letter of December 30 certainly does contain an admission that there was a "guarantee" which may be a warranty, and that all the neats' foot oil sold to the defendants was made in "exactly the same way; no change in the way of chilling, pressing or bleaching for years." Just what this means may depend upon explanatory parol testimony as to the previous dealings of the parties. We think there is sufficient matter in the affidavit of defence to carry the case to the jury. We do not think the case of Pa. R. R. Co. *v.* Davenport, 154 Pa. 111, rules this case. The question raised there was in different circumstances. Judgment reversed and procedendo awarded.

W. C. S.

Digitized by Google

Jan., '95. February 20, 1895.

Frack et al. v. Gerber.

Husband and wife—Evidence of—Act of 1887—Evidence affecting credibility of witness.

A statement as to the ownership of goods made in the absence of the seller thereof, and of which he had no knowledge, cannot affect him, but where the statement is made by a witness for the seller, who as plaintiff is seeking to recover their price, and the said statement gives a different account of the ownership from that which the witness has testified to upon the trial, it is admissible in evidence to affect the credibility of the witness.

A husband, whose wife has been sued as co-partner of another and who has suffered judgment by default, is a competent witness for the plaintiff on the trial between the plaintiff and the co-partner.

Appeal of Mahlon A. Gerber, defendant, from the judgment of Common Pleas of Schuylkill County, in the suit of Samuel Frack, Daniel B. Frack and Leonora Meredith, executors of the last will and testament of Daniel Frack, deceased, against Mahlon A. Gerber and Margaretta C. Houtz, late partners, doing business under the firm name of Gerber & Houtz.

This was an action of assumpsit to recover for goods alleged to have been furnished to the above defendants. M. C. Houtz suffered judgment by default and the case went to trial against Gerber.

The essential facts in the case are stated in the opinion of the Supreme Court, *infra*.

On the trial the plaintiff called as a witness A. W. Houtz, husband of the late partner of the defendant Gerber. Objected to. Objection overruled. (First assignment of error.)

Houtz having testified that the goods, to recover the price of which action was brought, had been bought by the firm, a witness, one Scott, was called, who produced a statement in writing made by Houtz at a meeting at which he, Gerber and the witness were present in which the said goods were entered as part of Mrs. Houtz's contribution to the firm. The statement was offered in evidence, rejected. (Third assignment of error.)

In the course of the charge, the Court, PERSHING, P. J., said: "Then you have the testimony of Mr. Scott, who presents the statement here which was ruled out, a transaction between Gerber, Houtz and Mr. Scott at which Mr. Frack was not present, and there is no evidence he knew anything at all about it. It was impossible for me to see how he could be affected by anything that took place there. An alleged misrepresentation of Houtz as to the condition of the firm, if there was such a misrepresentation, might have been unjust to Mr. Gerber, but it would not pay Mr. Frack for the goods he sold the firm if it was a *bona fide* transaction. Mr. Frack or his estate could not be paid in that way through the misrepresentation of Houtz, if there were such misrepresentation to Gerber." (Thirteenth assignment of error.)

Verdict and judgment for plaintiff. The defendant took this appeal and filed, *inter alia*, assignments of error as above indicated.

G. H. Gerber and *J. W. Ryon*, for appellant.

Houtz was incompetent as a witness, he was a husband called to testify against his wife's interest.

Act of 1887, P. L. 158, sec. 5, cl. c.
Sahms *v.* Brown, 4 Pa. C. C. Rep. 488.
Alcorn's Exr. *v.* Cook, 101 Pa. 209.
Pringle *v.* Pringle, 59 Id. 281.

The statement of Houtz was admissible. It went to prove, first, that Houtz himself either owned or controlled the goods and put them into the concern as a part of his wife's capital; second, that Houtz had testified deliberately to falsehoods in his evidence when he pretended that Gerber ordered these goods or bought them.

George J. Wadlinger, (*James F. Minogue* with him), for appellee.

It is true that Margaretta C. Houtz was a party to the record as defendant, but a judgment had already been entered against her, in default of an affidavit of defence, and the jury was only sworn to try the issue joined between the plaintiff and Mahlon A. Gerber. The liability of Margaretta C. Houtz having been fixed, A. W. Houtz was not called upon, nor did he testify, against the interest of his wife. His testimony in this case would not affect her, either one way or the other. He was not adverse to her in any respect, and was therefore not disqualified on the ground of interest.

Young *v.* Senft, 153 Pa. 352.
Norbeck *v.* Davis, 157 Id. 399.
Evans *v.* Evans, 155 Id. 572.
White's Estate, 2 Dist. Rep. 808.

The appellant seems to have taken the law to support his contention from the case of Sahms *v.* Brown, 4 County Court Reports, 488, and quotes at length from the opinion of Judge THAYER. The point decided in this case, is that "a husband, plaintiff in an action for crim. con. is incompetent as a witness to prove his wife's adultery with defendant."

All other cases relied on by appellant are decisions prior to the adoption of the Act of 1887, and they are not authority now.

Bitner *v.* Boone, 128 Pa. 570.
Lacroix *v.* Macquart, 1 Miles, 45.
Freiler *v.* Kear, 126 Pa. 470.

April 8, 1895. FELL, J. The suit was to recover the price of goods claimed to have been sold by Daniel Frack to Gerber and Houtz. Judgment was entered against M. C. Houtz, for want of an affidavit of defence, and M. A. Gerber defended on the ground that the goods had not been purchased by the partnership, but

Digitized by Google

contributed by his co-partner as a part of her share of the capital. This was the only issue of fact raised. The business had been managed for the firm by A. E. Houtz, the husband of M. C. Houtz, one of the defendants, and the son-in-law of Daniel Frack, whose executors were plaintiffs; and their case rested mainly on his testimony. The partnership had been dissolved by the purchase by M. C. Houtz of her partner's interest, and at the time of the dissolution a statement of the business had been prepared in which the price of the goods claimed to have been sold was charged to capital stock, and did not appear among the bills payable. There was testimony that this statement had been made up from information derived from A. W. Houtz. The statement was offered in evidence and rejected. We are of opinion that it should have been admitted.

The learned Judge was right in the view expressed that a statement made in the absence of the seller, and of which he had no knowledge, could not affect him, but it affected the credibility of the principal witness for the plaintiff. This witness had been the manager in charge of the business, and had testified that the goods had been purchased by the firm. That on another occasion he had represented that the goods were a part of his wife's contribution to the capital went directly to his credibility.

The objection to this witness on the ground that he was called to testify against his wife was not well founded. M. C. Houtz had allowed judgment to be entered against her by default, and the case had proceeded to trial against M. A. Gerber alone. She was not a party to the issue on trial, and a recovery against the other party sued was in her interest and not against it. Of the numerous assignments of error the third is the only one that can be sustained, and we regret that a single error in a protracted trial which was carefully and ably conducted calls for a reversal.

The judgment is reversed and a venire de novo awarded. W. C. S.

Orphans' Court.

October, 1892, 237.

Keys's Estate.

Widow's election—Acceleration of gifts—Adopted child—Rule in Shelley's Case—Practice in O. C. as to bill of review, where widow elects against husband's will.

The refusal of a widow to accept the provisions of her husband's will accelerates the gift's taking effect at the expiration of the estate it gives to her to this extent only, that the legatees are in being, or can be ascertained, or have reached the age, or fulfilled the conditions prescribed by the will as requisite to their taking. If a hiatus is thus caused, the estate, in the meantime, will pass under the intestate laws or to the residuary legatee, if there be one, as for the time being, not specifically disposed of.

The rule in Shelley's Case does not apply to limitations of personal estate; but, by analogy to it, a gift to one for life, in personalty, with remainder to the heirs of his body, is an absolute gift to the first taker: *a fortiori*, it would seem, where the limitations is to heirs generally, taking successively, and not by ways of substitution, after a life estate to the ancestor.

Upon petition for bill of review of adjudication, where the widow has refused to take under her husband's will, she must be made a party.

Petition for review.

The facts are stated in the opinion.

C. G. Hawes, for petitioner.

G. T. and *J. W. Hunsicker*, for respondents.

February 9, 1895. PENROSE, J. While the result of the refusal of a widow to accept the provisions of her husband's will is to accelerate the gift's taking effect at the expiration of the estate which it gives to her, it can only be so to the extent that the legatees are in being, or can be ascertained, or have reached the age, or fulfilled the conditions prescribed by the will as a requisite to their taking: and if a hiatus is thus caused, the estate, in the meantime, will pass under the intestate laws or to the residuary legatee, if there be one, as, for the time being, not specifically disposed of. If, for example, at the death of the wife the will gives the estate to such of the children of A. as shall have attained the age of twenty-one years, A.'s children not having attained that age do not become entitled by reason of the widow's election to take against the will. So if the gift is to the persons whom A. shall appoint by will, or to the "heirs" of A., with nothing to show that the word "heirs" was not used in a technical sense, the widow's election could have no effect in accelerating the gift to A.'s appointees or to his "heirs" if he should still be living. Nor can the case be different if, as here, the gift is to "the heirs" (used in the technical sense of the word) of the widow herself. It is true the cases which discuss the question of the effect of the widow's election in accelerating the gifts at the expiration of her estate say, in some instances, that the election "shall be treated in all its results as the equivalent of her death;" but this is to be understood in relation to the subject with reference to which it is asserted. Actual death of the ancestor can alone determine whether even the heir apparent will be the heir, and there is no possible way by which before then his ascertainment can be accelerated. The heir

Digitized by Google

is ascertained "by the act of God . . . . for *solus Deus haeredem facere potest, non homo*" (Co. Litt., 7, b.) and the familiar maxim is *nemo est haeres viventis*. See also Smith on Ex. Int., sect. 384. If before the widow's election to take against her husband's will she should remarry, it would scarcely be contended that because of her "being in all respects to be regarded as dead by reason of her election," her second husband—there being no children—could claim the share of personalty which she acquired from the estate of his predecessor; yet this would be quite as logical as to give her election the effect of actual death for the purpose of ascertaining who is her heir. In the case before us the widow has not remarried, but some time after her husband's death she adopted a child who, under the Act of Assembly, acquired, by reason of such adoption, the rights of a child of whom she was the actual mother, and who, when she dies, will be her heir, provided she shall have no other children, by adoption or otherwise, and shall not leave a second husband surviving her, and provided also that the adopted child shall not die in her lifetime; but in the meantime he is certainly not entitled to take the portion of the estate of the testator which the will gives at the death of the widow to "her heirs"—any more than a husband would have been if instead of adopting a child she had remarried; yet a husband is the "heir" of the wife, at her actual death, if the fund is personalty or the proceeds of real estate converted under a direction to sell (Eby's Appeal, 3 Norris, 241).

But the gift of one-half of the estate at the death of the widow to her "heirs" (assuming that under the will they take as purchasers) does not fail because they are not yet ascertained. The subject of the gift is personalty—a conversion being directed—and the gift is good by way of executory limitation taking effect at the death of a person in being during the lifetime of the testator; and in making distribution at the present time their interests must be protected by requiring those entitled in the interim under the intestate laws to give security under the Act of Assembly or under the general power of the Court to protect future interests (Duval's Appeal, 2 Wright, 120–21).

If, therefore, we should now correct the distribution awarded by the adjudication which is the subject of the petition for review, it would be either by awarding, temporarily, to the persons entitled under the intestate laws the portion of the estate of the testator which cannot as yet pass under his will, requiring security from them for the protection of the legatees when they come into being or are ascertained, or by withholding distribution of the principal to that extent and directing payment of income only.

But do the heirs of the widow take as purchasers? It is said in the adjudication that her life estate is realty and for that reason does not unite with the gift to her heirs which is of personal estate. But this overlooks the effect of the positive direction to sell the lands, which is to work a conversion into personal estate as of the date of the death of the testator, notwithstanding the fact that the sale is not required until the expiration of a life estate (McClure's Appeal, 22 Smith, 414; Bright's Appeal, 4 Outerb. 603). There is no difference, therefore, in the character or quality of the estates; both are legal and the subject of both is personalty. Nor is the effect of a limitation to "heirs" changed by words of distribution—to them as "tenants in common;" for while words of distribution coupled with words of superadded limitation may show that the word heirs is used as a word of purchase, words of distribution by themselves, or words of superadded limitation by themselves will not (Hileman *v.* Bouslaugh, 1 Harris, 344; Guthrie's Appeal, 1 Wright, 9). The rule in Shelley's Case, does not, of course, apply to limitations of personal estate; but by analogy to it, under the rule that words which create an estate tail where the subject is realty confer an absolute estate where the subject is personalty, a gift to one for life, in personalty, with remainder to the heirs of his body is an absolute gift to the first taker (Browncker *v.* Bagot, 19 Ves 573; Williams on Executors, 752; Potts's Appeal, 6 Casey, 169; Mengel's Appeal, 11 Smith, 248); *a fortiori*, therefore, it would seem, where the limitation is to heirs generally, taking successively, and not by ways of substitution, after a life estate to the ancestor. See Co. Litt., 22, b.

We do not, however, decide this question. The widow, satisfied, perhaps, with the award to her adopted child, filed no exceptions to the adjudication, and she has not been made party to this proceeding for review. Should she ask to recall her election to take against the will, or if she should offer to make herself chargeable in final distribution or under a future account with what has been awarded to the adopted child, it is clear that the petitioner will not be entitled to the relief prayed for even if we have power to award restitution. (See Weaver's Appeal, 162 Pa. 547.) Without her joinder we cannot dispose of the case in a way to conclude all parties. We will, therefore, grant leave to the petitioner to amend, proceedings being suspended in the meantime. F. B. N.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, MAY 10, 1895.* [No. 13.

Supreme Court.

Jan. '95, 291. March 8, 1895.

Geiger v. President, Managers and Company of the Perkiomen and Reading Turnpike Road.

Bicycles—Rights to use of highway—Act of April 23, 1889, P. L. 44—Bicycles subject to payment of toll as two-wheeled carriages—Turnpike company's rights to collect toll—Charter of Perkiomen and Reading Turnpike Company.

The Act of April 23, 1889, P. L. 44, has established the character of a bicycle as a two-wheeled carriage, and under that Act the rider of a bicycle has the same rights of travel on a turnpike as the owner of a two-wheeled carriage drawn by a horse, but subject to the same restrictions.

By the charter of a turnpike company incorporated in 1810 (when it is conceded that bicycles were unknown) power was conferred npon the company to collect tolls upon certain enumerated vehicles, "or other carriage of burthen or pleasure," and a basis of computation of tolls was established upon such vehicles, and also upon "every other carriage of pleasure under whatever name it may come, the like sums according to the number of wheels and horses drawing the same:"

Held, that as it must be conceded that a bicycle is a two-wheeled carriage, it is liable to the payment of toll under this Act.

Assuming the amount of toll to be charged is incapable of computation by the method designated for other vehicles in the Act, that does not negative the power expressly given to collect toll from those travelling by carriage. As the statute confers the authority the law will furnish a remedy to enforce the right.

The only restriction upon the right is that the amount demanded as toll must be reasonable. The Act of April 23, 1889, P. L. 44, having placed the bicycle upon an equality with a two-wheeled carriage drawn by horses, has established a maximum which the company is authorized to charge, and a charge within that limit is reasonable.

The Act of April 23, 1889, P. L. 44, was passed for the benefit of the bicycler, as it invests the corporation with no power it did not already possess, and confers upon it no benefit which it did not already enjoy. Whether the company had accepted the Constitution of 1874, as provided in Art. XVI., section 2, is wholly immaterial.

Under the Act of 1889 there is no power to exclude the bicycler from the turnpike. He has the same power as owners of other carriages to insist that the highway shall be maintained in a reasonably safe condition of repair; the corporation is responsible for injury to himself or vehicle if this duty be not maintained. There is therefore no reason in law or in fact why he should not bear his fair share of the burden imposed upon the public for the use of the turnpike.

Appeal of The President, Managers and Company of the Perkiomen and Reading Turnpike Road from the judgment of the Common Pleas of Berks County, on a case stated in which A. J. Geiger was plaintiff, and appellants were defendants.

The Court below, ENDLICH, J., having entered judgment for the plaintiff upon the case stated, defendants took this appeal. The facts are stated in the opinion of the Supreme Court.

Isaac Hiester and *John G. Johnson*, (*David F. Mauger* with them), for appellants.

Conceding that bicycles are not carriages of pleasure under the meaning of the defendants' charter because not *ejusdem generis* with other carriages named therein (Williams *v.* Ellis, 5 Q. B. D. 175), they were made so by the Act of April 23, 1889, P. L. 44.

State *v.* Yopp, 97 N. C. 477.
In re Wright, 29 Hun 357, 65 How. Pr. 119.
Twilley *v.* Perkins, 77 Md. 252.
Swift *v.* City of Topeka, 43 Kansas, 671.

George S. Graham (with him *Jeff. C. Snyder* and *George F. Baer*), for appellee.

The Act of 1889 cannot be taken as defining rights of corporations which no legislation has given them, or to increase or enlarge the powers of a corporation, unless the accepted canons of construction and the oft-reiterated principles relating to corporations be entirely ignored.

April 29, 1895. DEAN, J. These facts, as abbreviated from the case stated, were agreed upon in the Court below:—

1. The defendant is a turnpike company, incorporated by Act of 20th March, 1810. Said Act and its supplements were made part of the case stated.

2. On March 9, 1894, the company made an order, that all persons riding bicycles upon the turnpike should not pass through any of its gates, except upon payment of toll at rate of one cent per mile.

3. The bicycle was not invented and in common use until the year 1875.

4. The plaintiff, on December 11, 1894, while on his bicycle, attempted to pass through a toll gate on the turnpike, but was stopped by the gate-keeper, who demanded from him five cents toll, being the amount demandable at the rate of one cent per mile. Plaintiff paid the five cents under protest, and was then permitted to pass.

5. As a general rule, horses gentle and well broken do not take fright at bicycles, but some such horses do.

Digitized by Google

The question of law for the Court to answer was whether on these facts the company had a right to collect this toll from the plaintiff? The Court below, being of opinion that there was no express statutory grant of authority, and no neccessary implication of one, to defendant to collect toll from bicyclers, entered judgment for plaintiff; hence this appeal by defendant.

The defendant was organized as a turnpike company under the Act of 1810, and under that Act had authority to make all such by-laws, rules and regulations for its management as the Centre Turnpike Company, organized under Act of 25th March, 1805, had, with the right to collect such tolls and profits in proportion to the distance as was granted to the Centre Turnpike Company. On turning to this last-named Act, we find, in section 11, the company had the right "to fix such and so many gates or turnpikes upon and across the said road as will be neccessary and sufficient" to collect the tolls hereinafter granted to the said company from all persons traveling on the same with horses, cattle and carriages.

Three distinct uses of the highway are here enumerated as subject to tolls—by horses, cattle and carriages.

Then the method of enforcing payment of tolls is specified: —"It shall and may be lawful for them (the managers) to appoint such and so many toll gatherers as they shall think proper, to collect and receive of and from all and every person and persons using the said road the tolls and rates hereinafter mentioned, and to stop any person driving any . . . . sulky, chair, chaise, phaeton, cart, wagon, wain, sleigh, sled or other carriage of burthen or pleasure from passing through the said gates until they shall have respectively paid the same." Then follows a basis of computation or limitation on the rates to be charged; thus, "that is to say, for every space of five miles in length of the road, ... and so in proportion for any greater or less distance, ... for every sulky, chair, or chaise with one horse and two wheels, six cents; with two horses, nine cents; . . . . for every other carriage of pleasure, under whatever name it may go, the like sums according to the number of wheels and horses drawing the same." There is no mention of bicycle propelled by the muscles of the rider; therefore appellees contend there is no express or plainly implied statutory power in the company to collect tolls from the bicycler.

There is no power in a corporation as against the public except that expressed in its grant, or that which is necessarily implied from it. What is the power granted to this company by the law?

The Commonwealth conferred on the defendant a right of eminent domain, for a public highway, under which it appropriated land and constructed and kept in repair its turnpike. As soon as constructed and opened it became public; it was open to all on equal terms, that is, to all paying toll alike, for a like use. The taking of tolls, it has been held, is only another method of taxing the public for the cost of construction, repair and reimbursement to the corporation for the capital invested: Com. *v.* Wilkinson, 16 Pick. 175; Plank Road Co. *v.* Thomas, 20 Pa. 91. The power here, then, was to a private corporation:—1. To take sufficient land for a public highway, and construct and keep the same in repair for the convenient and safe use of the public. 2. To collect from the public who used it by animals and carriages, tolls.

The word tolls, in 1810 and 1805, had in this State a well-defined meaning. As is said in Boyle *v.* Philadelphia & Read. R. R. Co., 54 Pa. 310: "It is a tribute or custom paid for passage." STRONG, J., in that case, says, "Before 1833 transportation had generally been over common roads, turnpikes and canals. The common and the legislative mind were then familiar with what is called tolls." Here the defendant demanded, through the toll gatherer it was expressly authorized to appoint, at the gate it was expressly authorized to erect, from the plaintiff, five cents for passage over the highway, or a toll for its use. It may be conceded, that the enumeration in the Act of 1805, of the uses for which tolls may be collected, restricts the right to collect for such uses only, as are either specially or generally designated. But if a bicycle be a carriage, then the general words "other carriage of burthen or pleasure," and "every other carriage of pleasure under whatever name it may go," are sufficiently descriptive to subject it to toll. It is not strenuously contended that a bicycle is not a two-wheeled carriage. It is no less a carriage because propelled by a man instead of being drawn by a horse; whether it be one of burden or pleasure, or both, is not material, for if either, defendant was expressly authorized to collect toll from the persons using it on the turnpike.

But, it is argued, the only basis fixed in the Act for computation of toll on carriages is by wheels and horses, not wheels or horses; therefore, as this carriage is not drawn by horses, the amount of toll cannot be determined by the law of the corporation, and as it cannot thus be determined there is no power to demand any.

Assuming the amount of toll to be charged is incapable of computation by the method designated for other vehicles in the Act, that does not negative the power expressly given to collect toll from those travelling by carriage. The method of computation by wheels and horses is not the power to collect toll, which is expressly given;

Digitized by Google

that is a mere limitation on the power; the demand must not exceed the sums specified for the animals and vehicles enumerated.

In Pa. R. R. *v.* Sly, 65 Pa. 205, it is held that toll is the consideration for the use of the highway, and where there is no express power to charge for transportation by the corporation itself over its own road, the right is a necessary incident of the power granted. Says SHARSWOOD, J., repeating the language of STRONG, J., in Boyle *v.* P. & R. R. R. Co., *supra*, "No provision was made respecting rates and charges for their own service as carriers; but the very purpose of their incorporation was, that they might carry. How can they carry without compensation? Authorized to engage in a business, it is necessarily incident to their authority, that they have the rights which ordinarily belong to such a business."

If no method of computation had been given in the 12th section of the Act, the power to collect could have been enforced. If a statute confers authority to receive toll, the law will furnish a remedy to enforce the right. Here, however, not only is the right or power statutory, but also the method of collection; the right to appoint toll gatherers, and erect gates, is expressly given, and the right to the managers to make all such rules and orders as shall be necessary for the well ordering of the affairs of the company.

Undoubtedly, the rules and regulations so made must be reasonable and the amount demanded for the carriage subject to toll must be reasonable; and this is the limitation on the power which the law fixes when the statute is silent as to the amount.

The manifest intent of the Act of 1810, clearly expressed, was to confer upon defendant authority to collect tolls upon this highway from all persons using the same by carriage of burthen or pleasure, and it acted within its authority in collecting toll from this plaintiff.

The only other question raised is, whether the amount demanded and received, five cents, was in excess of the amount authorized by law. Prior to the Act of April 23, 1889, it was at least a matter of disputation, whether the use of bicycles on the public highways was not fraught with danger to travellers driving horses; on some of the highways and bridges owned by private corporations they were excluded, because, in the judgment of the managers, safety to the general public demanded their exclusion. Then the Legislature, in the exercise of its undoubted control over the highways of the Commonwealth, passed the Act referred to, which reads thus:—

"Bicycles, tricycles and all vehicles propelled by hand or foot, and all persons by whom bicycles, tricycles and such other vehicles are used, ridden or propelled upon the public highways of this State, shall be entitled to the same rights and subject to the same restrictions in the use thereof, as are prescribed by law in the case of persons using carriages drawn by horses."

This Act deprived turnpike companies of all discretion in determining whether this kind of vehicle was dangerous to the travelling public, and, in effect, peremptorily forbade its exclusion. Under it, the bicycler, with his two-wheeled carriage, has the same right to travel on the turnpike as the owner of a sulky, whose carriage is drawn by a horse, but subject to the same restriction as is prescribed by law for the owner of the two-wheeled horse carriage. The only restriction of the right to the use of the road by the driver of the two-wheeled horse carriage is, that he shall pay six cents toll for every five miles. The amount charged in this case is somewhat less than that sum; therefore it is within the limit as to the amount fixed by the Act of 1889. Without this Act, the power to demand and receive tolls under the Act of 1810 was clear; the amount, however, being incapable of computation under that Act, the managers would have been restricted by the law to a reasonable charge; as this would have been a source of irritation and possible litigation, the Legislature has imposed a maximum charge on defendant, beyond which it cannot go. It has established, out of reach of the discretion of the company, the bicycler's right upon the turnpike, and at the same time has placed a peremptory limitation on the power of the company to exact excessive tolls. The Act invests the corporation with no power it did not already possess; confers no benefit it did not already enjoy; and therefore, whether it had accepted the Constitution of 1874, as provided in Article XVI., sec. 2, is wholly immaterial. The Act was solely for the benefit of the bicycler, and the corporation only points to it, as demonstrating that it did not exceed the limit of its power by the Act of 1810 in receiving this toll.

It may well be doubted whether, without express authority from the Legislature, the managers of a public highway could lawfully so discriminate between vehicles using it as to exempt wholly one class of carriages from the tolls which it imposed on all other carriages. Under the Act of 1889 there is no power to exclude the bicycler from the turnpike; he has the same right as owners of other carriages to insist that the highway shall be maintained in a reasonably safe condition of repair; the corporation is answerable for injury to himself or vehicle, if this duty be not maintained. Then why should he not bear his fair share of the burden imposed upon the public for the use of it? We see no reason in law or in fact why he should not. Therefore

Digitized by Google

the judgment is reversed, and it is directed that judgment be entered on the case stated for defendant. J. D. B., Jr.

July, '94, 219. January 30, 1895.

Bailey et al. v. City of Philadelphia.

City councils—Power of to appropriate money—Power to recognize moral obligation—Act of June 1, 1885—Construction of.

The city councils of Philadelphia have the right to recognize a moral obligation as a good consideration for the payment of public money.

A transfer by city councils of an item in an appropriation from one department to another is expressly recognized by Art. VII., of the Act of June 1, 1885.

Art. VI., of Act of June 1, 1885, which provides that "no money shall be drawn from the city treasury except by due process of law, or upon warrants signed by the head of the appropriate department" was not intended to interfere with the discretion of councils over the department to which appropriations should be properly assigned, but to prohibit the city controller from countersigning any warrant drawn by any department other than that for which the appropriation was specifically made.

The words "appropriate department" include all officials charged with duties pertaining to the city government, for whose expenses the city is obliged to provide; the clerks of councils, though not technically heads of departments, are such officers as to all matters which councils may impose upon them.

Appeal of John T. Bailey *et al.*, from the decree of the Common Pleas No. 4, of Philadelphia County, dissolving an injunction to enjoin the appropriate officers from drawing, countersigning or paying any warrant under item 8½ in the appropriation to the clerks of councils.

The facts are fully stated in the opinion of the Supreme Court, *infra*.

The Court, ARNOLD, J., dissolved the injunction and thereupon this appeal was taken.

Theodore M. Etting and *David W. Sellers*, (*J. Percy Keating* with them), for appellants.

James Alcorn, (*Charles F. Warwick* with him), for the City of Philadelphia, appellee.

John G. Johnson, (with him *Wm. A. Hayes* and *George L. Crawford*), for Margaret T. Sherry, appellee.

April 29, 1895. MITCHELL, J. This case does not raise any question of the relative powers of the board of education, and the sectional school boards, nor involve in any way the merits of the original controversy which came to this Court in Com. *ex rel.* Sherry *v.* Jenks *et al.*, 154 Pa. 368.

What we have now before us is the power of the councils of Philadelphia to make the appropriation to Miss Sherry, and to do it by a transfer of an item from one appropriation to another. On this subject the main question is the right of councils to recognize a moral obligation as a good consideration for the payment of public money.

The facts are not in dispute. Miss Sherry was elected by the sectional school board as supervising principal of the John Moffet Combined Grammar and Secondary School, in October, 1891, and began the performance of her duties as such on January 4, 1892. The board of education on February 10, refused to confirm her election, and on March 8, 1892, regraded the school so as to dispense with the office of supervising principal. Miss Sherry and the sectional board which had elected her, claiming that her title was complete by the election, and did not require to be confirmed by the board of education, she brought suit by mandamus to compel the board of education to certify her name on the roll of teachers to the city controller. This suit was decided against her by this Court on April 24, 1893. The councils of the city inserted in the appropriation to the board of education for 1894, an item, No. 56, to pay Miss Sherry "the amount of salary in dispute," but the board refusing to draw a warrant for this item it was transferred by ordinance June 18, 1894, to a new item, 8½, in the appropriation to the clerks of councils "to pay Miss Margaret Sherry said salary."

This appropriation is, on the face of it, to pay for services rendered. Whether it is accurately called salary or not is unimportant. Nor is it material that the services may not have included all the work of a supervising principal for the full period. That was not Miss Sherry's fault. She held herself in readiness to perform, and if councils had a right to compensate her at all, the amount was within their discretion so long as it was exercised in good faith and without abuse. Miss Sherry not only held herself ready to render the services, but claimed the right to do so. That right depended on a question of authority under the law between the sectional school board and the board of education, and the real contest in the matter was between those two bodies and was fought over Miss Sherry's head. For that she was not responsible. The contest terminated adversely to Miss Sherry's right by the decision of this Court in April, 1893, and no compensation was claimed by her or granted by councils for any period after that date.

While the contest was pending the legal question may fairly be said to have been in doubt. The title of certain teachers to office would seem to be complete by an election by the sectional board, under the law as stated in the opinion of the city solicitor of Philadelphia, March 2, 1888 (Append. to Ord. 1888, p. 17), while the qualifications, etc., and the title of others depended

Digitized by Google

on the action of the board of education. How far supervising principals belonged to one class or the other was open to question. Had the city councils, while Miss Sherry's claim was pending and undecided passed an ordinance to pay her in settlement of her claim there could have been no doubt of their authority to do so. The right to compromise and settle an existing and asserted claim does not depend on the ultimate decision for or against its validity. If it did, compromise instead of being an end of litigation which the law favors, would be only an additional complication in the progress of it. How far does the law prescribe as mandatory, any different rule, when the settlement is not made until after the question of right is decided? Undoubtedly the legal claim of Miss Sherry was at an end when this ordinance was passed. She had no right which could have been enforced by action. But it does not follow that her claim was without merit. The committee of councils reported on the contrary, after investigation, that it was founded on services rendered under claim and color of right and title, and was meritorious. Does the law prohibit the city from recognizing the moral obligation arising from these circumstances? We do not find anything that compels us to so hold. A moral obligation in law is defined as one "which cannot be enforced by action, but which is binding on the party who incurs it, in conscience and according to natural justice," and again, a "duty which would be enforceable by law, were it not for some positive rule, which, with a view to general benefit, exempts the party in that particular instance from legal liability": 15 Am. & Eng. Encyc. of Law, 716. In this State it is held that such an obligation will sustain an express promise to pay, and *a fortiori*, an actual payment: Hemphill *v.* McClimans, 24 Pa. 367; Stebbins *v.* Crawford Co., 92 Pa. 289; Leonard *v.* Duffin, 94 Pa. 218; Brooks *v.* Bank, 125 Pa. 394; Holden *v.* Banes, 140 Pa. 63; Kelly *v.* Eby, 141 Pa. 176. If a mere promise to pay under such circumstances would be enforced by law against an individual, certainly an actual payment, or its equivalent, an order by the councils on their ministerial officer who has no duty in reference thereto but obedience, should be sustained against a municipal corporation. Councils it is true are trustees and the law limits their expenditure of public money to public purposes, but they are also representatives of their constituents, and delegates of the city's legislative powers, and there is nothing in the law or in sound public policy to prohibit the city from being honest, and paying its *bona fide* debts which are good in conscience and justice, though for sufficient other reasons, there is a general rule which prevents them from being enforceable by law.

The opinion of the learned Judge below calls attention to some recent instances of similar municipal action, among them, that in regard to Mr. Oellers, who acted as city treasurer for a time under an election by councils to a vacancy which was subsequently decided should be filled by the appointee of the Governor: Com. *ex rel.* Att'y-Gen. *v.* Oellers, 140 Pa. 457. Councils passed an ordinance making compensation to him for his services. It would have been a very doubtful public policy which would have compelled councils to proclaim in advance that the officer to be elected would get no compensation for his eight months or more of labor and responsibility unless he could maintain his title *de jure* to the office, the mode of filling which was then known to be in dispute. With such an announcement it is not likely that the office would be accepted by any man of the character and abilities suited to that responsible position, but rather that it would go to some one who wanted it, in the language of the day, for "what there was in it."

The other objections are to the method of payment adapted. The item was originally contained in the appropriation to the board of education, and when that department refused to draw the warrant, it was transferred to the appropriation to the clerks of councils. Transfer of items is expressly recognized by the Act of June 1, 1885, Art. VII., P. L. 45, which provides that the city controller "shall not suffer the appropriation for one item of expense to be drawn upon for any other purpose, or by any department other than that for which the appropriation was specifically made, except on transfers made by the ordinance of councils."

Article VI. of the same Act provides that "no money shall be drawn from the city treasury except by due process of law, or upon warrants signed by the head of the appropriate department," and it is argued that this item belongs properly to the department of education. But "appropriate department" in this section means the department to which the appropriation is made, and whose head is to draw the warrants. It is the general direction which is embodied again specifically as to the controller in section seven already quoted prohibiting that officer from countersigning any warrant drawn by "any department other than that for which the appropriation was specifically made." It is not intended to interfere with the discretion of councils over the department to which appropriations should properly be assigned. How far councils might under this discretion appropriate to one department funds the control of which was within the objects and jurisdiction of another, we need not consider, as no such case is before us. This appropriation is not an interference with

Digitized by Google

the functions of the department of education, for it does not assume to determine any question of title in Miss Sherry as a teacher, or her legal right to salary as such. It is a recognition and payment of an obligation of the city for services rendered, and the department in which they were rendered is not in any way material on this question. If the obligation had been binding in law and a judgment had been obtained upon it, there would have been no compulsion on the councils to assign the appropriation to pay such judgment to the department of education because the original cause of action arose there. It might appropriately be assigned to the law department, which has the control and supervision of the city's lawsuits. So in the present case the appropriation is one of the miscellaneous class which councils may commit to the care of any department they see fit. Nor is the objection that the clerks of councils are not a department of the city government any more forcible. There are many expenses of the city which are not directed by a technical department, and appropriations are annually and regularly made among others to the district attorney, the clerk of the Quarter Sessions, the coroner, the sheriff, and other officers who form no part of the city government strictly so called, and are certainly not departments thereof under the Act of 1885. The words "appropriate department" in that Act, therefore, must be held to include all officials charged with duties pertaining to the city government, for whose expenses the city is obliged to provide. The clerks of councils are such officials as to all miscellaneous matters which councils may devolve upon them, though they are not technically heads of departments.

This case was heard in the Court below on a motion to dissolve a preliminary injunction, but as the whole controversy is involved, the parties have agreed that it shall be treated here as upon final hearing.

The order dissolving the injunction is affirmed and the bill dismissed with costs.

W. M. S., Jr.

Oct. '93, 230. Nov. 2, 1893, October 22, 1894.

Bradford v. Boley.

Liquor selling—Act of May 8, 1854, sec. 3, P. L. 663—Proximate cause—Interest of wife in earning capacity of husband—Husband and wife—Property.

The earning capacity of a husband is not property of the wife, and she cannot maintain, during his life, an action for its impairment by the deed or neglect of another.

The damages recoverable by virtue of the Act of May 8, 1854, P. L. 663, from one selling liquor to a person of known habits of intoxication, are those only of which the act of selling or furnishing the liquor is the proximate cause.

A wife whose husband, a man of known habits of intoxication, has been furnished with liquor and while under the influence thereof commits a crime for which he is sentenced to prison, cannot recover, from the liquor seller, damages based on the loss to her through her husband's inability to work for his family during his imprisonment.

Appeal of Samuel C. Boley, defendant, from the judgment of the Common Pleas No. 2, of Allegheny County, in an action of trespass by Ella L. Bradford, wife of John Bradford, in her own right, and for the use and benefit of Daniel Freeman Bradford, minor son of said John Bradford.

This was an action brought under the Act of May 8, 1854, P. L. 663. On the trial of the cause, before EWING, P. J., the facts appeared as follows:—

John Bradford was employed as a "rougher" in certain mills, earning on the average $40 per month; he was a drinking man; his wife testified that when he was out of work "it was just a continual spree, for instance, from Saturday noon a continual spree until Monday morning;" his habit on receiving his wages was to deposit the same with his wife, and when he wanted money for drink or other purposes he received it from his wife.

On June 30, 1892, the mill in which Bradford was employed shut down for repairs. In the morning he obtained a dollar from his wife, the plaintiff, drank some during the day, and about 5 o'clock in the afternoon went into the defendant's bar-room and drank several times, some of the times with the defendant. The defendant admitted that he was previously acquainted with Bradford, but denied knowing further of his habits than that he would take a drink and said that he did not think him intoxicated when he came in. While in the room he became engaged in a dispute about labor troubles with a man named Floyd, in the course of which Bradford received a blow, and while drunk drew a revolver and killed Floyd. Bradford was arrested, indicted, tried and convicted of manslaughter and was sentenced to twelve years imprisonment.

The defendant submitted, *inter alia*, the following points:—

5. The consequential imprisonment of Bradford, brought about by his own unlawful act, is too remote to be the ground for his wife's, the plaintiff's, recovering any damages in this action; which was answered as follows:—

"The 5th point is refused. The imprisonment

Digitized by Google

was the legal sequence of the crime, and if the crime was caused by the liquor the defendant illegally furnished, the liability follows."

6. The word "property" in the 3rd section of the Act of the 8th of May, 1854, does not include a claim such as is set up by the plaintiff; nor is the plaintiff an aggrieved person within the meaning of said act, she being the wife of the said John Bradford and he being yet alive.

7. The plaintiff cannot maintain this action and your verdict under all of the evidence should be for the defendant.

These points were reserved by the Court.

Verdict for plaintiff $2,800. The Court afterwards overruled a motion for new trial and one for judgment *non obstante veredicto*, delivering the following opinion:—

"At trial of this case, on first impression, the imprisonment of plaintiff's husband as a consequence of crime committed by him while under the influence of liquor furnished him illegally by plaintiff, seemed to be too remote a consequence, but on consideration of the reason and the authorities we came to the conclusion that the jury could fairly find it the proximate result of the illegal act.

"This conclusion is squarely ruled in the case of Beers *v.* Walhizer, 43 Hun. 255. The case was an aggravated one in this: The plaintiff's husband was a man of well-known intemperate habits—having a fixed habit whenever off work and an opportunity offered of getting drunk, and this habit was undoubtedly well known to the defendant.

"Bradford came to defendant's saloon under the influence of liquor, and remained there a considerable time, and got several drinks—both from Boley and his bar-keeper in Boley's presence. Bradford became noisy and quarrelsome and without cause drew a revolver and fired it off in the saloon—and after that, with notice and knowledge of all these facts, Boley furnished Bradford still more liquor. The result was that a peaceful stranger coming in the saloon soon after was shot and killed; and the legal consequence of the conviction and imprisonment of Bradford for a term of twelve years followed.

"If the law permits the wife to recover in any such case there is no ground for a new trial. If there be a defence it is not on the merits—but on the legal defence—raised in the question of law reserved.

"A new trial is therefore refused.

"Does the Act of Assembly give the wife a right to recover in such a case?

"The Act of Assembly of 1854, P. L. 663, Pur. Dig., sec. 3, p. 1082, provides:

"'That any person furnishing intoxicating drinks to any person in violation of any existing law or of the provisions of this Act shall be held civilly responsible for any injury to person or property in consequence of such furnishing, and any one aggrieved may recover full damages against such furnishing by action on the case instituted.'

"The question of law reserved by the verdict is the question raised by the 6th and 7th points of defendant's counsel, to wit: 6th point. 'The word "property" in the 3rd section of the Act of May 8, 1854, does not include a claim such as is set up by the plaintiff, nor is the plaintiff an aggrieved person within the meaning of said Act, she being the wife of said John Bradford and he being yet alive.'

"7th. 'The plaintiff cannot maintain this action.'

"In Veon *v.* Creaton, 138 Pa. 48.—A father who had expended money in caring for an adult son was held not to be entitled to recover—as his legal liability—was only a contingent one to the guardians of the poor—his actual expenditure was voluntary. This case is relied on by defendant as against a recovery in this case. It is not necessary to spend words discussing the question as to whether, or not, the wife is 'a person aggrieved' within the words of the statute. Whoever has been 'injured in person or property' is a person aggrieved. The vital question then is has the wife such a fixed legal present interest or right in the earnings of her husband for her support as to constitute that right, a property within the meaning of the Act of Assembly. In New York and some of the other States the statute includes expressly—injury to the 'means of support' as one of the grounds of an action. In Veon *v.* Creaton the deprivation of the wife's means of support by the death of her husband is recognized as the property of the wife. So in Fink *v.* Garman, 40 Pa. 95. The term property, in such statutes has not been construed in its strict literal use, but to include a fixed pecuniary interest. The wife has a fixed present pecuniary interest in her right of support by the husband. It is enforceable by a statutory proceeding in the Court of Quarter Sessions. It is enforceable by sundry civil remedies. If the deprivation of the wife's support by her husband's death by an illegal act is an injury to her property, why is not such deprivation for a fixed term of twelve years an injury to her property? One is just as real as the other. That for a fixed term of years is more easily determined in value than that for life.

"It is argued that the right of action is in the husband. We doubt his right of action, but it does not necessarily follow that the wife has no right of action. Certainly, at common law, the wife would have no right of action in this case, whether the husband had or not, but the Act of Assembly was intended to give a right of action

Digitized by Google

for causes and to persons when an action would not lie at common law.

"The logical result of the reasoning in Fink *v.* Garman, *supra*, and of Davies *v.* McKnight, 146 Pa. 610, is to maintain the plaintiff's right of action in this case.

"And now, 8th July, 1893, after argument, and upon consultation, the Court being of the opinion that the law is with the plaintiff on the question reserved, it is ordered that upon payment of the verdict fee, judgment be entered on the verdict in favor of the plaintiff. PER CURIAM."

The defendant took this appeal, assigning as error, *inter alia*, the answer to his fifth point and the entry of judgment upon the points reserved.

The case was argued first in October term, 1893, by *R. S. Martin*, (*Henry Meyer* with him), for appellant, and *K. T. Meade*, (*James C. Doty* with him), for appellee, McCOLLUM, J., being absent. A re-argument was ordered which was now had.

R. S. Martin, (*Henry Meyer* with him), for appellant.

A defendant is liable for those consequences which he might have foreseen as the result of his conduct; not for those he could not have foreseen. Besides which, a test of whether a given thing is the proximate cause of damage is this, "did the alleged cause produce its effect without another cause intervening or was it made operative only through and by means of this intervening cause." If there was such an intervening cause the original act is not a proximate cause.

Tweed *v.* Ins. Co., 7 Wall. 44.
Schmidt *v.* Mitchell, 84 Ill. 195.
Pa. R. R. Co. *v.* Kerr, 62 Pa. 353.
Fairbanks *v.* Kerr, 70 Id. 86.
Krach *v.* Heilman, 53 Ind. 517.
Fink *v.* Garman, 40 Pa. 106.
Davis *v.* McKnight, 146 Id. 610.

Here besides the furnishing of liquor, before any damage accrued to plaintiff two acts intervened over which the defendant had no control, (*a*) the killing of Floyd by Bradford, (*b*) the act of the law in imprisoning Bradford.

The husband is the statutory party to bring suit for injuries under the Act.

Act of April 15, 1851.
Act of April 26, 1855.
Act of May 8, 1854.

During the lifetime of the husband, the right of action is in him for injuries to his person or his property, and a recovery by both husband and wife, in separate suits for the same cause of action, was of course never contemplated.

Veon *v.* Creaton, 138 Pa. 48.

The plaintiff's husband is the injured party, in person and property, and is yet living, and is not under disability to sue because the common law doctrine as to the effect of a conviction of felony on the right to bring suit is removed by section 11 of Article I. of the Constitution of this State, which provides, "and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law."

The rights of a wife are not "property" under the Act while the husband survives the injury to him. Two things must concur to vest any rights of property to a married woman when the injury is to her husband. 1st, the injury must result in the death of the husband. 2nd, as his widow the law recognizes that she has sustained an injury in the death of her husband which is to be compensated.

It must also be remembered that the Act of 1854 is a penal statute and must be construed strictly, and when it has not by express terms provided a remedy to a wife for an injury to her husband, during his life, it cannot be supplied by implication.

James C. Doty, (*K. T. Meade* with him), for appellee.

The selling of the liquor was the proximate cause of the plaintiff's injury.

Under the finding of the jury the crime was committed because of Bradford's intoxication, on liquor unlawfully sold by defendant, and the arrest, conviction and sentence was a result to be anticipated, and naturally followed by force and operation of the law of the land.

Beers *v.* Walhizer, 43 Hun. 256.
Davies *v.* McKnight, 146 Pa. 610.

The Act allows a recovery by "any one aggrieved." Any one injured in person or property is aggrieved.

Deprivation of support is an injury to property of the wife. This is acknowledged in case of the husband's death.

Veon *v* Creaton, 138 Pa. 48.
Fink *v.* Garman, 40 Id. 95.

Why not where the deprivation is by imprisonment for a fixed term of years? One is just as real as the other.

April 29, 1895. McCOLLUM, J. This is an action brought by a wife to recover damages for the imprisonment of her husband for the crime of voluntary manslaughter. It is based on section 3 of the Act of May 8, 1854, which provides that "any person furnishing intoxicating drinks to any other person in violation of existing laws, or of the provisions of this Act, shall be held civilly responsible for any injury to person or property in consequence of such furnishing; and any one aggrieved may recover full damages against such person so furnishing, by action on the case instituted in any Court having jurisdic-

Digitized by Google

tion of such form of action in this Commonwealth."

The facts which were regarded by the learned Court below as sufficient to sustain the action are substantially as follows: John Bradford, the husband of the plaintiff, was an industrious man and capable of earning good wages. It was his custom on receiving his wages to deposit the most of them with his wife for family uses and for safe keeping. For several years preceding the occurrence in question he was in the habit of drinking to excess on Saturday evenings, on Sundays, and whenever he was out of employment. While he had work to do his excesses in this respect were limited to the evenings and days mentioned. Frequently when about to enter upon a spree, or in the midst of one, he applied to his wife for money to carry it on, and she, comprehending his purpose, let him have it from the deposits he made with her as above stated. On the 30th of June, 1892, the mills in which he was employed were closed for repairs, and thenceforth until and including the day of his arrest he was idle, and the most of the time under the influence of liquor. The afternoon and evening of that day he was in the saloon of the defendant. He bought and drank liquor and was intoxicated there. While in a state of intoxication for which the defendant was, at least, partially responsible, he became involved in a quarrel with Floyd, in which he received a blow in the face and shot his antagonist, who died in consequence of the injury thus inflicted. Bradford was arrested, indicted and tried for murder, convicted of voluntary manslaughter and sentenced to imprisonment for twelve years.

The important question before us on these facts is whether the imprisonment of the husband can be regarded as a consequence of the unlawful act of the defendant for which the statute has given the wife a right of action. It is settled that the furnishing of intoxicating liquor to a person of known intemperate habits, or obviously intoxicated at the time, is an act of unlawful negligence, and if it results in the death of such person as a proximate consequence of it, his widow, children or parents may maintain an action against the party so furnishing the liquor and recover from him compensation for their loss to the extent of their pecuniary interest in the life of the deceased: Fink *v.* Garman, 40 Pa. 95. To the same effect are the other cases referred to by the learned Court below as supporting its conclusion in this case. It must be borne in mind, however, that these were actions for injuries caused by unlawful negligence and resulting in death, and that they were based on the Act of April 15, 1851, which "created a cause of action wholly unknown to the common law," and the plaintiffs in them were persons who under the Act of 26th April, 1855, were "entitled to recover damages for an injury causing death." But these Acts did not give a wife an action for negligence resulting in the imprisonment of her husband or the impairment of his earning power, nor did she have it by the common law. It is therefore incumbent on her in the assertion of a claim of this character to point to the statute which gives her an action for it. In the case under consideration the plaintiff relies on the Act of May 8, 1854, the material part of which we have already inserted in this opinion. That she may by virtue of its provisions maintain a suit against the defendant for an injury to her person or property in consequence of his unlawful negligence is clear, but it does not expressly or by necessary implication give her an action for an injury to the person or property of her husband. Is her interest in his earning power "property" within the meaning of the statute? Does it give her an action for an injury to him which for a time impairs or prevents the exercise of this power? It seems to us that these questions should be answered in the negative. If the statute is construed as giving her an action for such an injury its results are neither logical nor harmonious. It does not, standing by itself, authorize an action for an injury which destroys her pecuniary interest in her husband, but it gives her an action for an injury which merely detracts from its value. It makes the furnishing of intoxicating drinks to him, if he is of known intemperate habits, or when he is drunk, an act of unlawful negligence, and if his earning capacity is injuriously affected by it, gives her a suit against the wrong-doer for damages, when, for any other act of unlawful negligence having precisely the same effect upon her pecuniary interest in him, she has no action by the common law or by statute. That the Legislature may give her an action for an injury which impairs his earning power and thereby partially deprives her of the support he should afford her, is not denied, but that it has done or intended to do so in the statute we are considering is not apparent. In no case brought to our notice has it been held that an action for injury to property embraced a claim of this character. In all the statutes relating to damages occasioned by the unlawful furnishing of intoxicating drinks that have come under our observation, except the one now before us, actions are given for injuries to the person, to property, and to means of support. The law applicable to these actions and pertinent to our question is thus summarized in Am. & Eng. Ency. of Law, vol. 3, pages 261 and 262: "Where damages are claimed for injuries to the person actual injury must be proved. Where no actual violence by the husband, no physical injury to the person or health of the wife is shown, she

Digitized by Google

cannot recover. Where a person squanders money or chattels, or destroys or injures other property belonging to his wife or any other party, while intoxicated, an action for damages by the owner of the property will lie against the party who sold the liquor which produced the intoxication to the amount of the value of the property destroyed, or the amount of the injury. Wherever anyone is legally under obligation to support another, as a husband his wife, or parents their children, the statutes provide that if in consequence of intoxication or habitual drunkenness of the husband or parent those dependent on them for support are injured in such support the persons so injured shall have a right to an action for damages against the seller of the liquor producing the intoxication or habitual drunkenness." The cases cited as sustaining this summary show that while the injuries proceed from the same negligent act, the subjects of them are distinct and independent, and that actions given for injuries to person or property do not include injuries to means of support. It may be affirmed as a general proposition that the right of action for an injury to person or property is in the party whose person or property is injured, and that the statute which gives to another person an action for the consequences of such injury must do so in plain terms or by necessary implication. It is a strained and unjustifiable construction of the Act in question which allows a wife in the lifetime of her husband to maintain a suit for an injury to his person which diminishes his capacity for labor.

There is another objection to the plaintiff's claim which appears to us to be well taken. It is that the imprisonment of her husband is not the proximate consequence of the unlawful negligence of the defendant. It is the act of the law—the direct result of the intervention of an independent agency or force. True, Beers *v.* Walhizer, 43 Hun. 254, appears to conflict with this view and was regarded by the learned Court below as a sufficient answer to the objection that the furnishing of the liquor was not the proximate cause of the imprisonment. But that case was based on a statute which in plain terms gave the wife an action for an injury to her means of support, and was construed as extending to and embracing the remote as well as the direct consequences of the unlawful negligence. The decision in Beers *v.* Walhizer is therefore not only opposed to the common law rule on this subject, but to our construction of the Act of May 8, 1854. In Fink *v.* Garman, *supra*, this Court, speaking of the defendant's unlawful negligence in the sale of the liquor, said: "His act must be what we call the proximate cause of the injury complained of. If the proximate cause was compounded of his act and the unlawful act of the decedent the civil liability is gone." For these reasons we decline to assent to the proposition that this case is governed by Beers *v.* Walhizer.

We do not think that, in view of the evidence in this case, there was any error in the refusal of the defendant's first point.

In accordance with these views we overrule the first specification of error, and sustain the other specifications.

Judgment reversed. H. B.

Oct. '94, 147. Oct. 26, 1894.

Richardson v. Atlas National Bank.

Bills of lading—Delivery without endorsement—Sale for advances and charges—Order of Court not necessary—Act of June 13, 1874.

The delivery of bills of lading without endorsement, or with an improper endorsement, is sufficient, when made, accepted, and intended as a pledge of the property as security for the sum advanced or paid on the draft to which they are attached, to accomplish the purpose for which they are delivered.

After such delivery of the bills of lading the holder must be deemed and taken to have been the owner of the property for the accomplishment of the purpose for which they were pledged.

A sale of the property, or so much thereof as may be necessary to satisfy liens for advances and for freight and storage charges is evidently contemplated by the Act of June 13, 1874.

After seizure and prior to the dissolution of an attachment, the property represented by bills of lading is *in custodia legis* and cannot lawfully be sold without an order of Court, but after the attachment is dissolved the rights and powers of the pledgee are the same as before the seizure, subject only to the duty of retention imposed by the bond given on the dissolution of the attachment.

Appeal of Atlas National Bank of Chicago, defendant, from the decree of the Common Pleas No. 1, of Allegheny County, in a suit wherein John H. Richardson, trading as John H. Richardson & Co., was the plaintiff.

The plaintiff, having a claim against Marks Nathan of Chicago, on November 28, 1890, by writ of foreign attachment attached certain steel rails and ends in the hands of the Pennsylvania Company, a common carrier. The Atlas National Bank of Chicago, having previously discounted a draft of said Nathan, to which the bills of lading issued by said carrier for said rails had been attached, petitioned the Court for leave to give bond and be made a garnishee in accordance with the provisions of an Act of Assembly passed June 13, 1874 (P. L. 285), entitled "A further supplement to an Act entitled 'An Act relating to goods, wares and merchandise in store

Digitized by Google

and in transit, and to make receipts and bills of lading therefor negotiable,' approved 24th September, A. D. 1866." The bond was given and judgment was subsequently entered against Nathan in default of an appearance and a sci. fa. issued thereon to the bank as garnishee. At the trial the jury found a verdict for the plaintiff for $375.05, subject to the opinion of the Court on a question of law reserved. This not being deemed a clear and good reservation of the question, the parties made the following case stated in the nature of a special verdict:—

"The facts in evidence admitted and agreed upon by counsel as if found by the jury and upon which the question of law was reserved are as follows:—

"Two car loads of iron, amounting to 890,700 lbs. were seized while in the possession of the Pennsylvania Railroad Company by the sheriff of Allegheny County on an attachment of J. H. Richardson & Co., the plaintiff herein named, against Marks Nathan, at No. 956 December term, 1890, Common Pleas No. 1, of Allegheny County; the said iron was shipped by Marks Nathan to himself as consignee at Pittsburgh; that two bills of lading were issued for the same which were not endorsed 'Not negotiable,' and which were made 'to the order of Marks Nathan, notify J. H. Richardson & Co.'; that said bills of lading were endorsed 'Deliver to the order of J. H. Richardson & Co.,' signed, 'Marks Nathan H.;' that they were thus endorsed when the attachment was served, but were afterwards returned to Chicago when said endorsement was erased and they were endorsed in blank by Marks Nathan personally. That on November 24, 1890, the Atlas National Bank received from Marks Nathan, the above defendant, a draft for $531.41, on J. H. Richardson & Co., payable on demand to the order of the Atlas National Bank, to which draft were attached the above described bills of lading, issued by the Pennsylvania Railroad Company, a common carrier, for which draft with bills of lading attached as aforesaid, as collateral security, the Atlas National Bank paid on the day aforesaid the sum of $531.41. That said draft and bill of lading were duly forwarded to the Pittsburgh National Bank of Commerce for collection and presented to J. H. Richardson & Co., the plaintiff, on November 28, 1890. That at the time of said presentation the bills of lading were endorsed 'Deliver to the order of J. H. Richardson & Co.,' and signed 'Marks Nathan,' but that plaintiff refused to accept or pay for the same, but on the same day issued this foreign attachment, which was served by the sheriff and the Pennsylvania Company aforesaid, summoned as garnishee, and said scrap, etc., placed in the warehouse of Union Storage Company at Pittsburgh. That the draft and bills of lading were returned to Chicago, and said endorsement to J. H. Richardson & Co. erased, and they were then and there endorsed in blank by Marks Nathan and again returned to the Pittsburgh National Bank of Commerce and presented to plaintiff, J. H. Richardson & Co., who again refused to accept or pay the same.

"That the Atlas National Bank on December 20, 1890, presented its petition to said Court, with such representations, as by reference to said petition hereto attached will be observed, and prayed that the name of said Atlas National Bank might be added to the record as garnishee, that a rule might be granted upon the plaintiff to appear and show cause why said attachment should not be dissolved upon its giving security, in accordance with the provisions of the Act of Assembly of June 13, 1874, to which plaintiff appeared and made answer *prout;* whereupon the Atlas National Bank entered security in the sum of $1000, conditioned to wit: 'If so much of the said scrap steel, rails and ends as shall remain after the settlement or payment thereout of any lien upon any of the said scrap steel rails and ends created by the advance of money or credit by the said bank, and also all prior liens for storage, freight, and all charges shall be retained by the hands of said bank, to answer if plaintiff shall have execution of any judgment of the effects of defendant in the action attached as aforesaid, or to abide the further order of the Court; then the bond to be void.' That the property was then taken by the Atlas National Bank, which was made garnishee as prayed, and the said property was subsequently sold by the said bank at public sale, without order of Court, but with notice to plaintiff of the time and place of sale, and was sold for the price or sum of $523.03, which garnishee received and applied; first to the payment of freight and other charges of storage, etc., to the amount of $107.11 and the remainder $416.03, upon its claim, leaving no balance in its hands; that the property attached and thus sold at the time it was attached was of the value of $880.98; that a verdict was taken by the Court for $375.05 in favor of the plaintiff, subject to the opinion of the Court whether plaintiff was entitled to recover in this suit."

The Court entered judgment on the reserved question; STOWE, P. J., filing the following opinion:—

"When the defendant undertook to sell the property attached by it without authority from the Court, it did that which it had no right to do, even with notice to plaintiff, and thus so doing it rendered itself liable for the actual value of the goods sold, and not merely what they sold for at public sale. From this it had a right

Digitized by Google

to have deducted the amount of its lien and proper charges, which, by this finding of the jury leaves defendant liable for $375.05, for which sum it is now ordered that judgment be entered upon the question of law reserved in favor of plaintiff, with costs on payment of the verdict fee."

Whereupon this appeal was taken and the following errors assigned:—

(1). The Court erred in directing judgment to be entered in favor of the plaintiff upon the question of law reserved;

(2). The Court erred in not directing judgment to be entered in favor of the defendant upon the question of law reserved, *non obstante veredicto;* and

(3). The Court erred in entering judgment for the plaintiff on the case stated.

Charles P. Orr (*Thomas C. Lazear* with him), for appellant.

The attachment being dissolved by order of Court under the Act of 1874, the goods were no longer subject to the control of the attaching creditor, the sheriff or the Court. A dissolution of an attachment is a determination of the plaintiff's right to hold the goods. The recognizances given by the pledgee were a security to the plaintiff in place of the goods. The condition of the recognizance as provided by the Act is that the pledgee "shall retain so much of the goods, or of the proceeds thereof, after the sale of the whole or any part thereof, as shall remain after the settlement or payment thereout of the amount of any lien, created by the advance of money or credit" by the holder of such bill of lading, and also of all prior liens for storage, freight, etc. This clearly implies that the pledgee shall not only have the right to the possession of the pledge, but have and exercise all the rights of a pledgee in regard thereto, which include the right to sell the same for payment of the lien upon the failure of the pledgor to make payment. The only obligation resting upon it is to retain the remainder of the proceeds after payment of its lien, the freight and other charges to answer if the plaintiff shall have execution, or to abide the further order of the Court.

The attaching creditor having the right to such remainder of the proceeds, was interested in the sale of the goods and therefore received notice of the public sale thereof. His rights are no higher or greater than the pledgor's. "An attaching creditor occupies no higher position than his debtor."

Good *v.* Grant, 76 Pa. 52.

Prior to the passage of the Act of 1874, it was held that where a factor made advances to the consignor, on goods sent to him to sell, an attachment by a creditor of the consignor did not arrest the power of the factor to sell, leaving the goods tied up in his hands, and that the attaching creditor stands upon no higher footing than his debtor in relation to the garnishee and could not arrest a sale, without tendering him his advance.

Baugh *v.* Kirkpatrick, 54 Pa. 84.

Having paid for the draft, the bank became the owner of the rails until it was reimbursed its advancement.

Dows *v.* Nat'l Exchange Bank, 1 Otto, 618.
Tilden *v.* Minor, 45 Vt. 196.
Marine Bank *v.* Wright, 48 N. Y. 1.

The insertion of the consignee's name in the bill of lading, gives him no right to the goods, which can be asserted against the superior equity of a *bona fide* advance to the consignor upon the security of the bills of lading, even though the consignor be indebted to the consignee upon a general account in a sum greater than the value of the goods. To this effect see

Bank of Rochester *v.* Jones, 4 N. Y. 497.
Allen *v.* Williams, 12 Pick. (Mass.) 297.
First Nat'l Bank *v.* Crocker, 111 Mass. 163.
Holmes, Lafferty & Co. *v.* German Security Bank, 87 Pa. 525.
Holmes, Lafferty & Co. *v.* Bailey, 92 Id. 57.
Harrison *v.* Mora, 150 Id. 490.

If there need be no endorsement, how can the right be changed by a mistake in the endorsement? The property contained in the bills of lading ceased to be the property of Marks Nathan when he negotiated the draft to which they were attached as security. He could not have disposed of it, or made title to another person, even if the bills of lading were not properly endorsed by him, he could not exercise any control over the property until he first paid back the *bona fide* advance of money made to him by the bank. His attaching creditors had no higher right than he. The bank should first receive the amount of its advancement, and have a surplus, before it can be chargeable in this present action.

A. Leo Weil, for appellee.

This case involves the construction of the Act of Sept. 24, 1866, P. L. (1867) 1363, and the supplement of June 13, 1874, P. L. 285. The Act in terms is limited to bills of lading for goods in transit to warehousemen, wharfingers or other persons, but the other persons must be *ejusdem generis* and would not embrace parties not engaged in a storage business of some kind. The Act was evidently intended to facilitate the business of public warehousemen and storage companies, and bills of lading between private business houses were not in contemplation. There being no evidence to show that this was a proper

Digitized by Google

case for the application of the Act, defendant was rightfully held liable upon its bond to hold the proceeds "to abide the further order of said Court" and on this ground alone judgment was properly entered for plaintiff on the point reserved. The Act makes the transferee the owner for some purpose not for all; he is only owner so as to give validity and security to his lien. A pledge is different from a lien. In the one case, the title passes, in the other it does not. This Act of Assembly was intended as a short cut, in place of the longer, more cumbersome and tedious feigned issue. The sheriff having seized the goods, the lienor, by virtue of the transfer of the bill of lading, is in the manner provided by the Act given the opportunity to have his name entered as garnishee and on giving bond to immediately get possession of the goods, not as his own, but to answer to Court. It is not an unreasonable restriction to insist that he should not be permitted to sell the goods thus secured, unless by permission of the Court, from which he obtained them. The condition of the bond in this case so provides, for the "remainder of the scrap," not the remainder of the proceeds of the sale of the scrap. This condition is not so broad as the Act and implies no power to sell. The Act contemplates the incident of sale (but not as appellant argues, without an order of Court) when it speaks of "the proceeds thereof after sale of the whole or any part thereof," etc. The recognizance was conditioned to hold the goods to answer plaintiff's execution, or abide the further order of Court; not the proceeds of sale of the goods.

The appellant did not hold the goods in accordance with its bond and there was no order of Court excusing it from so doing. Having elected to proceed under this Act of Assembly, appellant was bound to continue that possession in accordance with the Act or become liable upon its bond and it will not do after such possession had been thus obtained to ignore the provisions of the Act which made that possession solely for the purpose of "giving security and validity to any lien created" upon said goods and treat the property thus secured as a pledge and proceed under the general law relating to pledges. The bills of lading were not endorsed to appellant, nor were they endorsed in blank, until after the attachment of appellee was laid.

Several days elapsed between the attachment of the goods and the cancellation of the endorsement to Richardson. It is evident that at the time the attachment was laid upon these goods, appellant was not the person to whom said "bills of lading were transferred by endorsement and delivery," and at that time could not come under the description, "and any person to whom the said receipt or bill of lading may be so transferred" (*sic*, by endorsement and delivery) "shall be deemed and taken to be the owner of the goods, wares and merchandise therein specified, so as to give security and validity to any lien created on the same."

Until the special endorsement, "Deliver to the order of J. H. Richardson & Co.," was cancelled, and the blank endorsement was placed on these bills of lading, the bank could claim no title except through Richardson & Co. It is conceded upon the authority of Holmes *v.* Bank, 87 Pa. 525, and Holmes *v.* Bailey, 92 Id. 57, that when a bill of lading is attached to a draft, although not endorsed, it is an appropriation by the consignor of the proceeds of the goods to meet the draft; but it is submitted this presumption will not overcome an express endorsement to the contrary. The right to proceeds of goods consigned to another or to a lien on the price, gives no lien on the goods.

Chilton *v.* Carrington, 15 C. B. 95, 106.
Holland *v.* Humble, 1 Starkie (Eng. Ed.) 143.
Bryans *v.* Nix, 4 M. & W. 775.

It is not disputed that the bank received these bills of lading as collateral security only. The bank was not in consequence the owner of the "scrap steel rails and ends" but the same belong to Marks Nathan, the consignor. The bank claimed only a lien. That defendant cannot under the plea of *nulla bona* prove a lien only is held in—

Bissell *v.* Steel, 67 Pa. 443.
Allen *v.* Bank, 57 Id. 139.
Reed *v.* Penrose's Exrx., 36 Id. 214.
1 Troubat & Haley, p. 700, sec. 1202.

April 29, 1895. McCollum, J. We think the endorsements on the bills of lading cannot under the circumstances shown by the special verdict, be justly considered as injuriously affecting the rights of the appellant to the property specified in the bills. The delivery of them was obviously made, accepted and intended as a pledge of the property as security for the sum advanced or paid on the draft to which they were attached. The purpose of the parties being evident, delivery without endorsement was sufficient to accomplish it: Holmes, Lafferty & Co. *v.* The German Security Bank, 87 Pa. 525. The endorsements which are thought by the appellee's counsel to afford his clients some advantages and to abridge the rights of the appellant in this contest, were in the following words, to wit: "Deliver to the order of J. H. Richardson & Co." These endorsements were probably regarded by the consignor as nothing more than a direction to the pledgee to deliver the property specified in the bills, to the appellees on their acceptance and payment of the draft, together with charges for transportation, storage, etc. His cancella-

Digitized by Google

tion of the endorsements on their refusal to honor his draft is in accord with this view and with what we have seen was his purpose in delivering the bills. The endorsements were not intended to qualify the rights of the pledgee and we cannot assent to a construction of them which would defeat the common purpose of the parties to the transaction, which, we think, should be considered in the determination of this issue as if the endorsements had not been made. Thus considered, the effect of it was to invest the appellant with the rights of a purchaser of the property, so far as it might be necessary to exercise such rights for its protection: 2 Am. & Eng. Ency. of Law, p. 243, and cases there cited. In other words, the appellant after the delivery of the bills must be deemed and taken to have been the owner of the property for the accomplishment of the purpose for which it was pledged: Act of Sept. 24, 1866, P. L. 1363, Purd. Dig. p. 145. Having acquired this position by virtue of the delivery to it of the bills of lading it was made a garnishee of the property under the Act of June 13, 1874, P. L. 285, Purd. Dig. p. 146, and as such applied for and obtained in conformity with its provisions, a dissolution of the attachment. The dissolution thus effected released the property from the grasp of the attachment and the garnishee sold it at public auction after having given due notice to the appellees of the time and place of sale. The latter alleging that the property was worth more than it was sold for were allowed to recover in this proceeding a judgment for the difference between the sum obtained for it and its actual value, on the ground that the sale was made without an order of Court. Was such an order necessary to authorize and validate the sale? We think it was not. A sale of the property or so much thereof as may be necessary to satisfy liens for advances and for freight and storage charges is evidently contemplated by the Act under which the appellant became a party to the suit. The bond required on the dissolution of the attachment is in accord with this view. It provides for the retention by the garnishee for the purpose stated in it of so much of the property or its proceeds as shall remain after the sale of the whole or part of it and the payment of such liens. After seizure and prior to the dissolution of the attachment, the property was in *custodia legis* and could not be lawfully sold without an order of Court, but after the attachment was dissolved the rights and powers of the appellant to and over it were the same as before the seizure, subject only to the duty of retention imposed by its bond. It follows from what has been said, that we regard the sale made as valid, and that the appellees cannot recover from the appellant the difference between the value of the property, and what it sold for. Ample opportunity was afforded them to become bidders at the sale and if they had availed themselves of it, they would have acquired the property for less than its value or compelled the successful bidder to pay a fair price for it.

Judgment reversed.

W. C. S.

Common Pleas.

C. P. No. 1. July, 1891.

City of Philadelphia v. Goudey.

Municipal claim for cost of abating nuisance consisting of "a foul privy well"—Right of board of health to fill up well.

Rule to strike off municipal claim.

This was a claim filed by the City of Philadelphia for the cost of removing a nuisance by the board of health. The claim stated that the "nuisance consisted of a foul privy well."

The bill contained in the lien was as follows:—

PHILADELPHIA, Feb. 11, 1891.

GOUDY TO THE BOARD OF HEALTH, Dr.

Abating Nuisance.

332	2824 and 26 W. York St., 28th Wd.	
8195	Filling well with sand,	$5.00
	Proportion for 2824,	2.50

Edwin O. Michener, for the rule.

The board of health has no power to fill a privy well for the removal of a nuisance.

City of Phila. *v.* Provident Trust, etc., Co., 132 Pa. 224.

E. Spencer Miller, (*Charles F. Warwick* with him), contra.

In the case cited the property owner had paid the cost of filling the well, and the point decided was that he could not be charged with the cost of proper water closets and connections with the sewer.

A privy well may be a nuisance, for the permeations may have extended so far as to endanger health. The finding of the board of health is conclusive.

Kennedy *v.* State Board of Health, 2 Barr. 366.

The only question therefore is on the rule to strike off the lien, whether it is conceivable that the conditions indicated in the lien could constitute a nuisance.

THE COURT. Rule discharged.

[See following case.]

Digitized by Google

C. P. No. 3. September, 1894.

City of Philadelphia v. Glading.

Municipal claim for cost of filling up privy well—Extent of the authority of board of health in such cases to file lien therefor.

Rule to strike off lien.

On the twenty-fourth day of March, 1894, notice by order of the board of health was served upon the defendant, to abate a "certain nuisance on premises situated Nos. 339 and 341 Brown street and Nos. 336 and 338 York avenue, arising from a filthy, foul privy well, by cleaning said well to the bottom, abandon as a privy, fill with clean earth to grade, remove seat and rizers and floor over space." Said notice contained an extract from the Act of Assembly of January 29, 1818, section 29, 7 Smith's Laws, 24, relative to privy wells.

Immediately upon receipt of said notice a permit was obtained from the board of health to clean said well, and it was promptly cleaned to the bottom as required by said notice, but the defendant refused to fill up the said privy well with earth. The proper officer of the board of health decided that the city had the right to require said well to be filled up with earth, after having been satisfactorily cleaned to the bottom by the defendant. The defendant appealed to the board of health to prevent the filling of the well, who, after hearing and considering the objections of the defendant, referred the matter to the committee on house drainage, who dismissed the appeal and required the owner to abate the nuisance in compliance with said notice.

The defendant refused to fill up the well with earth, and the board of health then had it done and presented to the defendant for payment a claim for $9, for filling up the well with earth and nailing down the seat and rizers. The defendant refused to pay and the following claim was filed :—

"Whereas, the board of health of the city of Philadelphia, by due proceedings, removed a nuisance which they have found to exist upon a lot of ground on the east side of Brown street, notice given May 9, 1894, abating nuisance Nos. 339 and 341 Brown street and Nos. 336 and 338 York avenue, 12th ward, filling well with earth, nailing down seat and rizers, $9."

James D. Bennett, for rule.

The Act of 1818 authorizing the existence, regulation and use of privy wells, requires only that the "contents be emptied, or corrected with lime." The board of health has no right to declare the privy well or hole in the ground itself a nuisance, after it has been cleaned to the bottom by the defendant, and to cause a lien to be entered against the premises for the cost of filling said well.

In City of Philadelphia *v.* Provident Life and Trust Company, 132 Pa. 224, the Court in discussing the Act of April 5, 1849, said that the hole itself was not a nuisance. When, therefore, the well was cleaned and purified the cause of the nuisance was removed.

David Lavis, assistant city solicitor (*Charles F. Warwick*, city solicitor, with him), contra.

1. The Act of January 29, 1818, sec. 29, 7 Smith's Laws, 24, gives the city of Philadelphia authority to remove filth from cesspools.

2. The Act of April 5, 1849, invests the city of Philadelphia with power to remove the cause of nuisances.

3. The Act of June 30, 1885, section 1, P. L. 250, provides for the construction of house drainage and cesspools, but has no reference to the question involved in this case.

4. The city of Philadelphia, under warranted circumstances, has the right to fill up cesspools by reason of a nuisance resulting from filth contained therein.

5. In the case of City of Philadelphia *v.* Provident Life and Trust Co., 132 Pa. 224, the Court in considering the question of the cause of nuisance as contemplated in the Act of April 5, 1849, declared that a cesspool itself was not a nuisance, yet if it is true that the condition of the cesspool itself by reason of its continued use becomes dangerous to the health of the community, that would constitute a nuisance.

THE COURT. Rule discharged.

Orphans' Court.

July, 1894, 63.

Worsley's Estate.

Lapsed legacies—The word "heirs"—Equitable conversion.

A testamentary gift to a person will lapse if the legatee dies in the testator's lifetime, even though the gift is expressed to be to him and "his heirs;" but it may be so worded or the context may be such as to show that the word "heirs" was meant to describe not the estate, but the takers.

An equitable conversion is not to be presumed beyond the intention shown in the will.

Exceptions to adjudication.

The facts are sufficiently stated in the opinion.

Joseph F. Lamorelle, for exceptions.

William B. Crawford, contra.

Digitized by Google

March 16, 1895. ASHMAN, J. These exceptions were taken upon the theory that the case is an exception to the rule which governs as to lapsed legacies and devises. A testamentary gift to a person will lapse if the legatee dies in the testator's lifetime, although it is expressed to be to him and "his heirs," because the added words simply describe the extent of the gift. But the gift itself may be so worded or the context may be such as to show that the word "heirs" was meant to describe not the estate, but the takers. The distinction between the cases is often and necessarily a nice one. In that cited in the adjudication, the gift was to "the children or legal heirs" of the testator's brother. One child died before the will was written, leaving issue, and at that date, therefore, two classes of persons, children and heirs of deceased children, were living. It was held that the will referred to both classes when it gave to both children and heirs: Sorver *v.* Berndt, 10 Barr, 213. The decision was exceptional, because the rule in general is equally operative, whether the legatee is alive or dead at the execution of the will, provided he dies before the testator: Maybank *v.* Brooks, 1 Bro. C. C. 84. The gift to the heirs might have been upheld as a substitutional gift, by reason of the use of the disjunctive "or," which, under many authorities, implies that the heirs are to take not concurrently with the legatee, but as his alternates: Crooke *v.* De Vandes, 9 Ves. 197; Penley *v.* Penley, 12 Beav. 547. The rule as to lapses is so clear that, to escape from it, the intent must be equally clear, that the legal representatives were meant to take not by representation, but as purchasers in their own right. In illustration of this principle, the text-books cite as the leading authority the case of Elliot *v.* Davenport, 1 P. Wms. 83, where the bequest was to A., his executors, administrators and assigns, of a debt due by A. to the testator. A. died in testator's lifetime, and his debt was held to be recoverable by the estate. A similar decision was reached in Maitland *v.* Adair, 3 Ves. 231. It will be observed that in these instances the debt was not released, but was recognized as existing by being made the subject-matter of a bequest. The gift lapsed and the indebtedness remained. According to Lord Hardwicke, even an express proviso against lapsing will not avail, unless the will nominates a substitute for the deceased legatee: Sibley *v.* Cook, 3 Atk. 573; Johnson *v.* Johnson, 4 Beav. 318; Pickering *v.* Stamford, 3 Ves. 493. In the case before us the gift was of one-third each of a fund to testatrix's sister and nieces, by name, "and to their heirs and assigns, respectively, forever." One of the nieces died before the testatrix and before the execution of the will, leaving three children. Beyond a direction to sell and convert the realty, no other provision accompanied the gift, and nothing therefore appeared from which an inference could be drawn that the heirs were intended as substitutes, in any event, for the original legatees. We think that the auditing Judge correctly held that the share of the niece lapsed. We concur with him, also, in his award of the lapsed share to the heirs as against the next of kin. The real estate was devised to the husband for life, and was ordered, at his death, to be sold, and thereupon the proceeds were given in equal parts to the three legatees. The conversion which was thus worked, dated back, regardless of the postponement of the actual sale, to the death of the testatrix: Roland *v.* Miller, 100 Pa. 47. But it had only one possible object—the division of the estate between the sister and nieces—and the purpose failed as to the niece who died. Equity, therefore, requires that so much of the estate as represents her interest shall be treated as still unconverted and still impressed with its original character. The question is put succinctly in King *v.* King, 13 R. I. 501: "Did the testator intend to have his real estate, out and out, converted into personalty? If he did, the Court will give his intention effect by treating the real as personal property from the time of his decease. Or did he intend to have it converted for certain purposes only? If so, the Court will treat it as converted for those purposes, but beyond what is required for those purposes as remaining unchanged." In one word, an equitable conversion is not to be presumed beyond the intention shown by the will. "Where the testator merely directs the real estate to be converted into money for purposes directed in his will, so much of the estate or the money arising from it as is not effectually disposed of by the will (whether it arise from some omission or defect in the will itself, or from some subsequent accident which prevents the devise from taking effect) results to the heir-at-law:" Per WASHINGTON, J., in Craig *v.* Leslie, 3 Wheat. 581.

The exceptions are dismissed and the adjudication is confirmed.

F. B. N.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, MAY 17, 1895.* [No. 14.

Supreme Court.

July, '94, 185. January 25, 1895.

Ingersoll's Estate.
Maury's Appeal.

Conversion—Sales by trustees under powers given in a will—Effect of.

Where real estate is converted into personal estate, by trustees in pursuance of powers granted to them by will, such conversion is actual and legal, and upon the death of the *cestui que trust*, the property passes according to its actual status at that time.

I. by his will gave one-eighth of his estate to trustees for his grandson C. until he reached the age of twenty-one. He gave his trustees power to sell and convey all or any part of his estate, and to purchase real estate, and sell and convey the same. He further authorized his daughter A. at any time before C. became twenty-one to revoke the devises and bequests for his said son, and to declare trusts for their lives. This A. did. Subsequently C. died, having executed his will leaving certain pecuniary bequests, but not disposing of his real estate. J., the trustee of C., having filed his account, it appeared at the audit that the purchase and sale of real estate belonging to the account left a small balance of personal property converted into real estate:

Held, that this balance was real estate, and did not pass under the will of C.

Appeal of Francis F. Maury, from the decree of the Orphans' Court of Philadelphia County, dismissing exceptions to the adjudication of the account of John M. Thomas, acting trustee, under the will of Charles Ingersoll, deceased, for Charles Ingersoll Maury, deceased.

The facts of this case were as follows: Charles Ingersoll, by his will, gave one-fourth of his estate both real and personal, after payment of his debts and legacies, to trustees for his grandsons, Charles I. Maury and Francis F. Maury, a moiety of the principal to be paid to each on attaining the age of twenty-one years. He further authorized his daughter Ann Hutchinson in her discretion to revoke the said devises and bequests and to appoint the share of either of said grandchildren in trust. His will contained the following provision:—

"And I authorize the said trustees to sell and convey all or any part of my estate or property which they may hold under this will, and to receive and receipt for the purchase money, and from time to time to call in and change any investments. And in making investments I direct that their discretion shall not be limited or restricted to such securities as trustees may be restricted to by law, but they may, with consent of the respective *cestuis que trustent* select any stocks or other securities they may deem advisable, and with the consent of their respective *cestuis que trustent* they may purchase real estate and sell and convey the same and give receipts for the purchase money."

In pursuance of the power thus vested in her by her father, Mrs. Hutchinson by deed poll made appointment of her nephews' shares in trust, and authorized the trustees "to invest and change investments whenever they shall think advisable, without being restricted to what are known as 'legal' securities, and to sell and convey real estate now held or hereafter acquired." Upon the death of either of her said nephews, she appointed his share, should he leave no descendants him surviving, then alive, to such persons and for such uses as he, by his last will or writing in the nature thereof, shall appoint. Charles I. Maury died on April 6, 1893, having attained the age of twenty-one, unmarried, and leaving to survive him only one brother, Francis F. Maury, as his heir and next of kin. By his testament, dated April 3, 1893, he made three pecuniary bequests (aggregating a larger amount than the personal estate which he had the power to dispose of), but he did not attempt to dispose of his real estate. John M. Thomas, acting trustee under the will of Charles Ingersoll, and the deed of Mrs. Hutchinson, having filed his account as to the estate of Charles Ingersoll Maury in his hands, it appeared at the audit of his account that the trustees of the will of Charles Ingersoll, under the powers conferred by his will had made certain purchases of land, and had sold some real estate and converted it into personalty; and that the net result of the purchases and sales of land by the trustees was that personal property to the value of $687.89 had been converted into real estate. The Orphans' Court held the land so bought was still to be regarded as personal property, and passed under the will of Charles Ingersoll Maury, and that his brother Francis F. Maury could only acquire title to the said real estate by paying to the legatees of Charles I. Maury the net amount of personal property which had been used in the purchase of real estate. A decree was entered accordingly.

Whereupon Francis F. Maury took this appeal, assigning for error this action of the Court.

William M. Meigs and *John Samuel*, for appellant.

Where a change in the nature of property is made by trustees, in pursuance of an authority

Digitized by Google

given them by the will, the property is to be considered as that which it actually is.

Wharton *v.* Shaw, 3 W. & S. 124.
Willing *v.* Peters, 7 Pa. 287.
3 Pomeroy's Equity Jurisprudence, p. 1769.
1 Jarman on Wills, *530.
Stoner *v.* Zimmerman, 21 Pa. 394.
Lackey's Appeal, 149 Id. 7.
Fletcher *v.* Ashburney, Leading Cases Eq., Vol. 1, *826.

This same rule has been established both in England and in other States.

Atwell *v.* Atwell, L. R. 13 Eq. 23.
Rich *v.* Whitfield, 2 Id. 583.
Cole *v.* Wade, 16 Vesey, 27.
Walter *v.* Maunde, 19 Vesey, 424.
Crump *v.* Leicester, 56 Law Times, (N. S.) 83.
Brown *v.* Bigg, 7 Vesey, 280.
Polley *v.* Seymour, 2 Younge & Collyer, Exchequer, 708.
Wright *v.* Rose, 2 Sim. & Stuart, 323.
Lucas *v.* Brandreth, 28 Beav. 273.
White *v.* Howard, 46 N. Y. 144.
Kouvalinka *v.* Geibel, 40 N. J. Eq. 443.

This case is to be distinguished from those in which the conversion has been effected "by paramount authority," as, a taking for public use, partition, or by order of Court.

3 Pom. Eq. sections 1161-4, page 1770, and section 1167, page 1776.
Davis' Appeal, 60 Pa. 118.

In this case the conversion is made by the testator himself acting through the trustees.

Jarman on Wills, 1531-3.
Atty-Gen. *v.* Mangles, 5 M. & W. 120.
Hobson *v.* Neale, 17 Beav. 178.
Atty-Gen. *v.* Ailesbury, L. R. 16 Q. B. Div. 408.

Frank R. Savidge, for one of the legatees under the will of Charles I. Maury. For argument see next case, Ingersoll's Estate—Lindenberger's Appeal.

April 29, 1895. MITCHELL, J. The will of Charles Ingersoll gave his trustees very ample control over the estate committed to their charge, including power to "sell and convey all or any part of my estate or property which they may hold under this will," and with the consent of the *cestui que trust*, to "purchase real estate and sell and convey the same." These words show his intention. The trusts he had particularly in contemplation were for his two grandsons during their minority and for three married daughters. The latter had the prospect of many years of life before them, and the trusts as to them at least were therefore likely to be of long duration. His intent was manifestly to commit the estate as amply as possible to the management and discretion of the trustees, and in so doing he directed that they should not be restricted to such securities as trustees may be restricted to by law, and intended that they might convert from one kind of property to another.

Mr. Ingersoll's will also gave power to his daughter Mrs. Hutchinson to revoke the devises to his grandsons, and to declare trusts for their lives. In the exercise of this power, Mrs. Hutchinson gave to the same trustees "power to retain all investments legal or otherwise, and to invest and change investments whenever they shall think advisable without being restricted to what are known as legal securities, and to sell and convey real estate now held or hereafter acquired." This language, as emphatically as that of her father's will, shows Mrs. Hutchinson's intention that the trustees under her appointment should have a power of conversion between real and personal estate. The power to sell the realty is express and the power to purchase is necessarily implied in the phrase "hereafter acquired."

The will of Mr. Ingersoll, being concerned only with the limitations on the estates and trusts to be declared by her, does not in terms give his daughter authority to direct the trustees whom she may appoint, as to their investments. Whether it should be implied from the large powers given for the creation of the trusts it is not necessary to decide, for whether the authority of the trustees of C. I. Maury's estate over investments be considered as arising from the terms of Mr. Ingersoll's will, or from the language of Mrs. Hutchinson's deed, in either case, their powers are derived from the testator, and are ample to change investments from personalty to realty, and *vice versa*, and whatever they did in this respect worked an actual conversion as effectually as if it had been done by the testator himself.

This result not only follows from the intention of the testator and the transmission of powers from him to the trustees, but is also in accord with the decisions. In Wharton *v.* Shaw, 3 W. & S., 124, the rule was thus expressed by KENNEDY, J., "The estate though real at the time of the making of the will, as also at the death of the testator, was certainly changed afterwards by the sale made of it, into personal estate. And being so changed by an authority given by the testator himself in his will to his executors, it can no longer be considered real estate, unless from his will it clearly appears to have been his intention that the money which might arise from the sale should be considered real estate, or be again invested in the purchase of other real estate." See also Lackey's Estate, 149 Pa. 7.

The conversions therefore made by the trustees from real to personal estate, or *vice versa*, in pursuance of their powers, during the life of C. I. Maury, were actual and legal, and upon

Digitized by Google

his death such property passed according to its actual status at that time.

The decree is directed to be modified in accordance with this opinion. S. H. T.

[See next case.]

Jan. '95, 11. January 25, 1895.

Ingersoll's Estate.
Lindenberger's Appeal.

Equitable conversion—Powers of sale—Effect of—Sale under such powers and under paramount authority—Distinction between—Ground rent.

Equitable conversion only arises by operation of law or by the intention of the testator.

Mere discretionary powers of sale given to the trustee will not work conversion, until the sale is actually made.

While a sale and conversion by executors or trustees, under an authority in a will, even though merely discretionary, are equivalent to a sale by the testator, and work an actual and legal conversion, unless the will shows the testator's intention to the contrary, such is not the case where the conversion is effected by the act of a stranger, under some legal right.

Where a ground rent in the hands of trustees is paid off and extinguished, there is no conversion by the exercise of the powers of the trustees, and the money so received, retains its character of real estate for the purposes of devolution.

Appeal of Lilian Lindenberger, from the decree of the Orphans' Court of Philadelphia County, dismissing exceptions to the adjudication of the account of John M. Thomas, acting trustee under the will of Charles Ingersoll, deceased, for Charles Ingersoll Maury, deceased.

For the facts of this case, see preceding case, Ingersoll's Estate, Maury's Appeal. In pursuance of the power vested in her by her father's will, Mrs. Hutchinson, aunt of C. I. Maury, executed a deed poll, in which she declared:

A. That she revoked and annulled all the provisions in her father's will in favor of her nephews, the children named therein, "as are inconsistent or at variance with the uses, trusts and powers" she by her said deed declared and created.

B. She directed the shares of said children shall be paid over, etc., to three trustees named, to be held upon the uses, trusts and purposes and with powers following:—

1. To divide the same into two equal parts and hold one share in trust during the life of her nephew, Charles, etc., and to pay over to him the whole income, free from his debts, etc.

2. Upon his decease, leaving no descendants surviving him, to pay over the principal of his share to such persons and for such uses as he by his last will shall appoint, or if shall leave descendants him surviving, or if he shall not exercise said power of appointment, to pay over the principal of his share to the persons entitled to take it had he died the owner thereof.

Charles I. Maury died after he had attained his majority, unmarried and without issue, his nearest of kin being his brother, Francis F. Maury, who is still living. By his will he appointed to A. C. Maury $13,000 for the payment of his debts; to Lilian Lindenberger, the appellant, $5,000; and to Elizabeth Carter Coles, $5,000. Upon his death, John M. Thomas filed his account. At the audit it appeared that the personal property was not sufficient to pay these legacies; and further, that in pursuance of the powers conferred on them by the will of Charles Ingersoll, and the deed of appointment, executed by Mrs. Hutchinson, to sell and invest in real estate, the trustees had sold and purchased sundry lots of real estate, with the net result that the purchases of real estate exceeded the sales of the same in value about $687.89. It further appeared that in the lifetime of Charles I. Maury, a certain ground rent had been paid off and received by his trustee. Lilian Lindenberger, one of the legatees of Charles I. Maury, claimed that under the will of Charles Ingersoll and the deed of appointment executed by Mrs. Hutchinson, the whole estate, real as well as personal, over which C. I. Maury had power of appointment, passed by his will in proper execution thereof; and that the proceeds of the ground rent above referred to were personalty, and to be distributed proportionately to the legatees under the will of C. I. Maury. The Orphans' Court, ASHMAN, J., delivering the opinion, held that there was no direction to sell in the will of Charles Ingersoll, such as would work conversion, and that the appointment by Mrs. Hutchinson had no greater efficiency than the will, and a decree was entered awarding to the legatees of Charles I. Maury, his personal property, so far as it would go in proportion to the amounts of their legacies. Whereupon, Lilian Lindenberger appealed, assigning for error the action of the Court in holding that the real estate belonging to C. I. Maury did not pass under his will, and in excluding the proceeds of the above mentioned ground rent from his personal estate.

Frank R. Savidge, for appellant.

Conversion is a question of intention, and the language of both the will of Charles Ingersoll and the appointment by Mrs. Hutchinson shows clearly an intention to treat the estates of his grandchildren, as personalty, capable of a formal division.

Erisman *v.* Poor Directors, 47 Pa. 509.

Digitized by Google

Roland *v.* Miller, 100 Id. 50.
Laughlin's Estate, 131 Id. 337.
Bispham's Equity, §§ 310, 311, and cases cited.
Chew *v.* Nicklin, 45 Pa. 84.
Edwards' Appeal, 47 Id. 153.

The ground rent was extinguished and the money actually received by the trustee in the lifetime of the testator. It is very clear that here was an actual conversion, and the cash in the hands of the trustee passed by the will.

Sayer's Appeal, 79 Pa. 431.
Shepherd's Estate, 8 Pa. C. C. 520.
Squire's Estate, 10 WEEKLY NOTES, 119.
Huff's Appeal, 2 Barr, 227.

William M. Meigs and *John Samuel*, for appellee.

There can be no question here of equitable conversion. The language used in the will is as applicable to real estate as to personalty, and there is neither a direction to convert, nor anything to show that Mr. Ingersoll intended to convert his realty into personalty.

There is nothing in the deed of appointment by Mrs. Hutchinson indicating an intention to effect a conversion; and even if there was, it would be of no efficacy, for Mr. Ingersoll gave her no authority to convert his estate, and the donee of a power has no powers but such as the donor has conferred.

Wickersham *v.* Savage, 58 Pa. 365.
Horwitz *v.* Norris, 49 Id. 213.

April 29, 1895. MITCHELL, J. The first assignment of error, that the learned Court below erred in not finding that the whole estate over which C. I. Maury had a power of appointment passed by his will, rests on the argument that by the will of Charles Ingersoll or the deed of declaration of trusts by Mrs. Hutchinson, one or both, the whole share of C. I. Maury, in his grandfather's estate, had become personalty. There is nothing in either of these papers which will sustain such contention.

The estate of Mr. Ingersoll at his death consisted of both realty and personalty, and his will not only treats it as such, but contemplates that it shall continue in both forms as he left it, unless changed by the trustees under the powers given them for that purpose. The will gives and devises all his "estate, real and personal" on an active and continuing trust, with authority to "make partition," to buy and sell real estate, and "convey" the same. The testator was a lawyer, and must be presumed to have used these terms in their proper legal sense, as applicable to real estate. There is nowhere any direction to sell, but only a discretionary power to do so. Nothing in the will indicates an equitable conversion, either by operation of law or by the intention of the testator.

Nor is there any such effect due to the deed of appointment of trusts by Mrs. Hutchinson, even supposing she had authority to direct a conversion. The estate as to which she appointed the trusts under the power in her father's will consisted of both realty and personalty, and her intent was to pass it under the trust just as it was, with large discretionary powers of management and conversion. These powers have been discussed in Maury's Appeal, opinion filed herewith, and need not be enlarged upon here.

The other assignment of error is to the refusal of the learned Court below to treat the money representing the principal of a ground rent paid off, as personalty. The subject of the conversion of the estate of C. I. Maury, from realty to personalty or *vice versa*, by the trustees, has been considered in Maury's Appeal, *supra*, and all we need do here is to point out the distinction which produces different results in the two cases. It was there held that a sale and conversion by executors or trustees, under an authority in the will, even though merely discretionary, were equivalent to a sale by the testator, and worked an actual and legal conversion, unless the will showed the testator's intention to the contrary. In the present case the element of the trustees' discretion and intention is wanting. The ground rent was paid off not by choice of the trustees but by the ground tenant by virtue of his legal right. The change therefore was not the act of the testator, or his representatives. The act of a stranger cannot change the property's heritable qualities. It was real estate in the testator's hands and passed as such by his will. There was no conversion by the exercise of the powers of the trustees, and the money came into their hands as trustees for C. I. Maury with the quality of real estate as the rent had been which it represented. It remained so until the time of his death, and was real estate for the purposes of his will. This however was the first devolution, and ended its temporary quality as real estate. When it passes under the will of his grandfather to Francis F. Maury (see Thomas's Appeal, opinion filed herewith) it resumes in his hands its normal character of money.

The principle in this case, the controlling effect of the absence of the trustees' exercise of their delegated power, distinguishes it from the line of cases of which Wharton *v.* Shaw, 3 W. & S., 124, and Lackey's Estate, 149 Pa. 7, are types, followed in Maury's Appeal, *supra*. Though we have not reached it by the same process, we are of opinion that the result arrived at by the learned Court below was right.

Decree affirmed at the costs of the appellant.

S. H. T.

[See preceding case.]

Digitized by Google

July, '94, 184. January 24, 1895.

Ingersoll's Estate.
Thomas' Appeal.

Wills—Construction of—Powers of appointment—Limitations of.

I. by his will gave one-fourth of his estate in fee in trust during the minority of his two grandsons, C. and F., with cross remainders in case either died during minority and without issue, and remainder over if both so died, but as each arrived at twenty-one his estate was to go to him in severalty. He further gave his daughter A. power to revoke the aforesaid devises and bequests and to appoint trusts for either or both, either deferring the time at which they should receive the principal, or reducing the estate to one for life, under a spendthrift trust, with or without testamentary power of appointment, "and with remainders to the persons who would be entitled if the child as to whose estate this power is exercised died owner of the same." Before either of the grandsons had attained their majority, A. in the exercise of the power under the will, revoked the devise to her nephew C. and declared a spendthrift trust for life for him, with a power of testamentary appointment in case he left no descendants surviving, and if he should have descendants or fail to exercise his power of appointment, then remainder, in the language of her father's will, to the persons who would be entitled to take if said child died owner thereof. She then added the following proviso: "that to the extent it is lawful for me to do so, and only to that extent, I direct that any share of said principal passing by virtue of said child's decease to his brother F. shall be held by said trustees upon the same trusts hereinafter directed by me as to the original share of said Francis." C. died after attaining his majority, leaving a will in which he failed to dispose of his real estate. The trustees under the will of I. claimed to hold the real estate belonging to C. in trust for F., who claimed that the said real estate passed to him absolutely free of all trusts:

Held, that the limitation sought to be imposed by A. upon the property passing from C. to F. was in excess of the power given to her by I. in his will.

Held, also, that F. took the real estate absolutely and unfettered by any trust.

Appeal of John M. Thomas and Arthur Amory, surviving trustees under the will of Charles Ingersoll, deceased, from the decree of the Orphans' Court of Philadelphia County, dismissing exceptions to the adjudication of the account of John M. Thomas, acting trustee under said will for Charles Ingersoll Maury, deceased.

The facts of this case are fully set forth in the opinion of the Supreme Court. The trustees claimed that, under the proviso in the deed of appointment executed by Mrs. Hutchinson, the share of the estate which passed to F. F. Maury was clothed with the same trust as attached to his original share under his grandfather's will. F. F. Maury, on the other hand claimed the whole estate of his deceased brother, without any qualification, or trust of any kind annexed to its enjoyment. The Court, ASHMAN, J., delivering the opinion, held that the real estate of C. I. Maury, being undisposed of by his will, passed absolutely to his brother F. F. Maury without qualification, or trust. A decree was entered accordingly. Whereupon the trustees under the will of Charles Ingersoll took this appeal, assigning for error this action of the Court.

George W. Biddle, for appellants.

William M. Meigs and *John Samuel*, for appellee.

April 29, 1895. MITCHELL, J. It is conceded that the interest of Chas. Ingersoll Maury in his grandfather's estate did not pass to him directly in fee on coming of age, under the devise in the latter's will, but was changed under the proviso giving Mrs. Hutchinson the power to revoke the devise and make new appointments or trusts as to the shares of the two grandsons. The simplest way therefore of getting to the question raised in this case, is to ascertain first, what was the state of facts or circumstances existing at the death of C. I. Maury; secondly, what was Mrs. Hutchinson authorized by her father's will to do in such contingency; and thirdly, what had she actually done.

First, C. I. Maury was of full age, unmarried, and without descendants. His heir and next of kin, who in the language of his grandfather's will "would be entitled if he had died owner of the estate," was his brother Francis. C. I. Maury left a will which was held by the learned Court below to be a valid exercise of a power of appointment as to personalty, and this adjudication not being objected to must be taken to be correct for the purposes of this appeal. None of these facts is disputed.

Secondly, Mr. Ingersoll's will gave each of his grandsons a fee in one-eighth of his estate. The two parts were to be held together in trust during the minority of the grandsons, with cross remainders in case of the death of either during minority and without issue, and remainder over if both so died, but as each arrived at twenty-one his estate was to go to him in severalty. It is important to observe that there is no indication anywhere in the will that the estates were to be joint or in common. But as the testator was somewhat advanced in years and his grandchildren infants, he gave his daughter, Mrs. Hutchinson, power to revoke the devises and bequests to them and to appoint trusts for either or both, first, deferring the time for the receiving of the principal, or secondly, reducing the estate to one for life without right of anticipation or subjection to creditors, and lastly, with or without testamentary power of appointment. There is a further power of revocation and new appointment which is not material to this case. These are all the powers that are given to Mrs. Hutchinson, and while

Digitized by Google

they are very large, they do not include any authority to direct the disposition of the estate of either grandson after his death. On the contrary this is expressly provided for by the testator himself in the next part of the same sentence where after giving his daughter power to grant or withhold a testamentary power of appointment, he continues, "and with remainders to the persons who would be entitled if the child as to whose estate this power is exercised died owner of the same."

It is manifest that the testator did not intend that the estates of his grandsons should be fettered beyond their respective lives. As they were young when his will was written, and their future development and circumstances uncertain, he delegated his discretion during their infancy to his daughter in whose judgment he had confidence. If she should not exercise this discretionary power, each grandson on attaining his majority would come into full possession of his estate at once under the direct gift of the testator's will. If, however, the time of enjoyment was deferred, or a trust created by Mrs. Hutchinson as to either, (and it is to be noted as already said that they are treated throughout both the will of Mr. Ingersoll and the deed of Mrs. Hutchinson as separate), then the remainder was to be to the persons who would be entitled if the child died owner of the estate. Such remainder would become effective only in case Mrs. Hutchinson withheld the power of testamentary appointment, or in case such power though given was not exercised. In either contingency the testator himself directed to whom the remainder should go. He was an experienced lawyer, and he had probably observed that while the prudence and foresight of age are a valuable protection to the young, yet the wisest can see but a little way into the future, and the attempt to guide the course of events too far ahead not infrequently causes more loss than letting the future take care of itself. Whether this was the testator's thought or not, it is plain that he did not contemplate that his control, either direct or delegated, should continue beyond the life of each grandson.

Thirdly, Mrs. Hutchinson in the exercise of her power under the will, revoked the devise to her nephew, C. I. Maury, and declared a spendthrift trust for life for him, with a power of testamentary appointment in case he left no descendants surviving and if he should leave descendants or fail to exercise his power of appointment, then remainder in the language of her father's will to the persons who would be entitled to take if said child died owner thereof. To this declaration of trust, however, she added a proviso, "that to the extent it is lawful for me to do so, and only to that extent, I direct that any share of said principal passing by virtue of said child's decease to his brother Francis F., shall be held by said trustees upon the same trusts . . . . hereinafter directed by me as to the original share of said Francis F." From what has been already said under the second head, it follows that this limitation was in excess of the power given by testator's will. C. I. Maury having exercised his power of testamentary appointment as to his personalty only, his real estate at his death passed to his brother Francis directly under his grandfather's will, free of all trusts.

Decree affirmed.

S. H. T.

Jan., '95, 117. March 27, 1895.

Conshohocken Tube Co. v. Iron Car Equipment Co.

Foreign attachment—Rule to show cause of action—Certiorari, not appeal—Jurisdiction of State Courts over receivers appointed by U. S. Courts.

A certiorari brings up for review the record only, and regularly it can bring nothing not upon the record proper unless there is an allegation that the Court below has been guilty of an abuse of discretion.

Where a rule to show cause of action is taken before the plaintiff has declared, no judgment can be asked for until a disclosure of the demand sued on is made.

Only when the liability of the defendant to respond to the plaintiff is established, and the indebtedness of garnishees to defendant is determined, can the question be considered whether the judgment rendered by the State Court will protect garnishees, who are receivers appointed by a federal Court, in the payment of the money in their hands, or whether leave to pay should first be obtained from the federal Court having control of their accounts; the mere fact that garnishees are such receivers will not prevent a judgment against them for the amount admitted, although they have been summoned as garnishees without leave of the federal Court having been first obtained.

Appeal of Iron Car Equipment Company, defendant, from the judgment of the Common Pleas No. 3, of Philadelphia County, discharging the defendant's rule to show cause of action and dissolve foreign attachment, wherein Conshohocken Tube Company was plaintiff.

This was a proceeding in foreign attachment, in which the receivers of the Philadelphia and Reading Railroad Company and the receiver of the Western New York and Pennsylvania Railroad Company were summoned as garnishees. The Iron Car Equipment Company, defendant, appeared and entered a rule upon the plaintiff to show cause of action and to dissolve the at-

Digitized by Google

tachment. The question raised by the rule was whether the receivers, who were appointed by the Circuit Court of the United States, could be brought into the Court of the Common Pleas of Philadelphia County as garnishees. During the pendency of the rule, and before it was disposed of, the plaintiff filed its statement of claim, and on July 23, 1894, took judgment against the defendant for want of an affidavit of defence for $6,868.40. The rule to show cause of action and to dissolve the attachment was discharged on November 2, 1894, and from this decision the Iron Car Equipment Company, defendant, took this appeal. Other facts appear in the opinion of the Supreme Court, *infra*.

Joseph S. Clark, for appellant.

Court officers cannot be summoned as garnishees and that property which is *in custodia legis* cannot be attached by garnishee proceedings. These receivers are clearly officers of the United States Court which appointed them and the funds in their hands are clearly *in custodia legis*.

Shewell *v* Keen, 2 Whar. 332.
Gochenaur's Exrs. *v*. Hostetter, 18 Pa. 414.
Adams' Appeal, 47 Id. 94.
Drake on Attachment, sec. 509 a.
Glenn *v*. Gill, 2 Md. 1.
Taylor *v*. Gillian, 23 Tex. 508.
Tremper *v* Brooks, 40 Mich. 333.
Jackson *v*. Lahee, 114 Ill. 287.
McGowan *v*. Myers, 66 Iowa, 99.
Drake on Attachment, sec. 511.
Lloyd *v*. Brisben, 1 WEEKLY NOTES, 230.
Riley *v*. Hirst, 2 Pa. 347.
Robinson *v*. The Atlantic & Great Western Ry. Co., 66 Id. 160.
U. S. Trust Co. *v*. O. & St. Louis Ry. Co., 61 Fed. Rep. 531.

The Act of Congress of 1888, which reads, "That every receiver or manager of any property appointed by any Court of the United States may be sued in respect of any act or transaction of his carrying on the business connected with such property without the previous leave of the Court in which said receiver or manager was appointed. But such suit shall be subject to the general equity jurisdiction of the Court in which said receiver or manager was appointed, so far as the same shall be necessary to the ends of justice," (Supplement to the Rev. Stat. U. S. page 614), does not make funds which are *in custodia legis* liable to attachment nor allow creditors to summon officers of the Court as garnishees. The purpose of the statute is plain. Before its enactment a receiver could not be sued without the consent of the Court which appointed him. The statute simply allows suits to be brought against the receivers without first securing such consent, but the only suits which can be brought without first securing consent are those "in respect of any act or transaction of his (the receiver) in carrying on the business connected with such property." This suit is not within the class covered by this statute, and the statute has no application.

Henry M. Tracy, for appellee.

The action of the Court in "discharging its rule on the plaintiff to show cause of action and why attachment should not be dissolved," is a matter directed to the discretion of the Court below and is not reviewable. There is nothing on the record but the bare motion for summary relief, which is addressed to the discretion of the Court.

Holland *v*. White, 120 Pa. 228.

A rule to show cause of action and dissolve attachment cannot be taken advantage of after judgment or after the third term.

Morris *v*. Turner, 3 Clark, 423.
Whiteside *v*. Oakman, 1 Dallas, 294.

Especially is this so where the defendants have caused their appearance to be entered, as they are then bound to defend as any other litigants. A judgment may be entered against the defendant under the Act of May 25, 1887, in an action of foreign attachment for want of an affidavit of defence.

Allen *v*. Allen, 23 WEEKLY NOTES, 371.
Smith *v*. Eyre, 26 WEEKLY NOTES, 314.

The defendants having had an opportunity to defend this case on its merits and having failed to do so, they have lost their day in Court and they cannot under the rule entered in this case in the Court below now raise the question set up by the garnishees in the answers filed, to wit, that the money is not attachable except through a process of the United States Courts appointing the receivers. That is a defence for the garnishees to raise and which they did raise in the Court below. The books are full of authorities prior to the passage of the Act of Congress of March 3, 1887, that receivers could only be sued or attached by permission of the Court appointing them. But this Act made a radical change in the law in this respect.

Dillingham *v*. Anthony, 37 Am. & Eng. R. case 1.

We are entitled to our judgment; the enforcement of the payment of it lies with the United States Court which appointed the receivers. There is nothing in this case showing these goods were furnished to the Philadelphia and Reading prior to the appointment of the receivers, but on the contrary the goods were furnished subsequent to their appointment as appears by the second set of answers filed by the garnishees. If the receiver appears to the action, such an appearance is an admission that they have been regularly brought into Court and he cannot afterward move to dismiss on the ground

Digitized by Google

that the plaintiff had not obtained leave to sue.

Hubbell *v.* Dana, 9 Howard (N. Y.) 424.
In re Young, 7 Fed. Rep. 855.

April 29, 1895. WILLIAMS, J. This was an action against the Iron Car Equipment Company, begun by foreign attachment, to recover interest due and unpaid upon certain of the bonds of the company held by the company plaintiff. The Philadelphia and Reading Railroad Company, and the Western New York and Pennsylvania Railroad Co., both of which were in the hands of receivers appointed by the U. S. Courts, were made garnishees. The writ was issued in January, 1894, returnable to the March term. On the fourth of June the defendant appeared by attorney and moved for a rule on the plaintiff to show cause of action and why the attachment should not be dissolved. In compliance with this rule the plaintiff filed a formal statement, showing a good cause of action, on the ninth of June, and obtained judgment therefor on the twenty-third day of July for want of an affidavit of defence. This action involved an adjudication that the rule had been complied with, and a good cause of action shown. The rule remained, however, upon the argument list until the following November, when it was discharged, as of course, under the rules of Court. From this order the present appeal was taken.

It is not an appeal in the ordinary sense of the word, but a certiorari. It brings up the record for review and, regularly, it can bring nothing not upon the record proper unless there is an allegation that the Court below has been guilty of an abuse of discretion. This is not asserted in this case. There is no suggestion of the existence of a defence to the plaintiff's claim, or of any irregularity in the proceedings on which the judgment rests other than that the garnishees are not subject to an attachment issued by the State Courts. This is a question that has no significancy so far as the defendant is concerned. It has appeared to the action and suffered judgment for the amount of the plaintiff's demand.

The question of the extent of the jurisdiction of the State Courts over receivers appointed by the United States Courts may be of importance to them and, since the Act of Congress of 1888, upon their suggestion we might feel it our duty under some circumstances to remit them to the proper Court for a direction whether to pay or not. But their situation is for them to determine. There are demands which they might pay with safety, which it would be their duty to pay, and which upon business principles it would be to their interest to settle without delay or expense. In such cases they would naturally prefer to raise no question not necessary for their own protection; and we do not see upon what principle the defendant should be allowed to decide for them or to control their action. But if his right to do so was clear he has not attempted to exercise it. His rule was taken before the plaintiff had declared. It called for a disclosure of the demand sued on. No judgment could be asked for until this was made. When it was made its sufficiency was not questioned but judgment was suffered. Then came the question as to the business relations between the defendant and the garnishees, and their liability to respond to the plaintiff to the extent to which they were indebted to the defendant. Then and not till then, came the question whether the judgment rendered by the State Court would protect them in the payment of the money in their hands, or whether leave should first be obtained from the U. S. Court having control of their accounts.

This question could not have been determined on the rule to show cause of action taken by the defendant. The rule was properly discharged when cause of action was shown and we see no irregularity in the record that requires us to interfere with the action of the Court below.

The judgment is affirmed.

W. C. S.

Jan. '95, 119. March 27, 1895.

Conshohocken Tube Company v. Equipment Company, Defendant and Receivers of P. & R. R. R. Company, Garnishees.

Foreign attachment—Answers of garnishees—A sum must be admitted—Receivers as garnishees—Act of Congress of 1888.

The answers of a garnishee are not to be construed with the same strictness as an affidavit of defence, and judgment will not be entered on the answers, unless they by fair interpretation admit an indebtedness due to the defendant for some specific amount, or at least for a sum sufficient to cover the plaintiff's demand.

It is not incumbent on garnishees, who are stakeholders merely, and who allege that the fund in their hands is claimed by some one other than the defendant, to show that the claimant has a good title to the money; but if they set up a claim, judgment on answers should be refused and the case sent to a jury to determine the facts with reference to the adverse claim.

Semble. Since the Act of Congress of 1888 an attachment may issue against a receiver as garnishee, but if it becomes necessary for his protection to withhold judgment until the opinion of the proper federal Court can be taken upon the propriety of the payment to the attaching creditor this should be done.

Appeal of Joseph S. Harris, Edward M. Pax-

Digitized by Google

son and John Lowber Welsh, receivers of the Philadelphia and Reading Railroad Company, garnishees, from the judgment of Common Pleas No. 3, of Philadelphia County, wherein the Conshohocken Tube Company was plaintiff and the Iron Car Equipment Company, defendant.

The facts are stated in the opinion of the Supreme Court, *infra*.

Judgment was entered against the garnishees for the sum of $4935.67 upon their answers, and an appeal was taken assigning for error this entry of judgment.

John G. Lamb, for appellants.

It is proper for a claimant of the fund to notify the garnishee of his claim, as has been done here, and it is then the duty of the garnishee to set it up in his answers.

Allison *v.* Elberson, 1 WEEKLY NOTES, 388.

The claimant cannot intervene and defend the suit. His rights must be worked out through the garnishee by means of a notice to them, setting forth the particulars of his title.

Thistle Mills *v.* Watson, 2 Pa. C. C. 271.
Elberman *v.* Bloom, 10 Id. 413.

The Court should not give judgment upon the answers where there are adverse claims to the fund. The rights of third parties are not to be decreed upon the answers.

Moore *v.* Moore, 34 Leg. Int. 12.
Sheetz *v.* Leech, 2 WEEKLY NOTES, 291.
Bank *v.* Gross, 50 Pa. 224.
Troubat & Haly's Practice, section 1201.

The Court should not enter judgment against a garnishee on his answer unless upon a clear and unqualified admission of assets, express or implied, and the admission should be such as to leave no doubt of the nature and extent of the indebtedness and to whom it is due.

Savings Bank *v.* Meyer, 59 Pa. 361.
Fithian *v.* Brooks, 1 Phila. 260.
Ferguson *v.* Craig, 1 WEEKLY NOTES, 153.
Lancaster Co. Bank *v.* Gross, 50 Pa. 224.

The attaching creditor stands in no better position than the defendant. Had suit been brought by this defendant against the garnishees, this notice would have been sufficient to entitle the garnishees to an interpleader. The admission of the garnishees without notice of this claim cannot bind the claimant.

Bank *v.* King, 57 Pa. 202.

Henry M. Tracy, for appellee.

All these questions the garnishees failed to answer, after every opportunity offered them to do so. Doubtful, indefinite and sweeping statements will not satisfactorily supply the omission of details and particulars.

Barker *v.* Osborne, 71 Me. 70.
Smith *v.* Chicago, &c. Ry. Co., 60 Iowa, 312.

The doubtful statements will be received as indicative that the garnishee could not make any that would relieve the case from doubt, and no presumption will be indulged in his favor.

Lamb *v.* Franklin Mfg. Co., 18 Me. 187.
Ripley *v.* Severance, 6 Pick. (Mass.) 474.

If a garnishee can defeat an attaching creditor by merely setting out that the money in his hands is claimed to belong to some one else, without stating who the claimant is, and how his claim is established, and utterly failing even to set forth that the claimant, whoever he may be, served notice of his claim on him, or sought to defend in any way, then there is no possible case where an attaching creditor could recover on answers filed.

In every case referred to in appellants' paper book the garnishees set up in their answer the claimant and the nature of their claim. Here they do not. Where a debt is attached after it has been assigned, the garnishee may give notice of the attachment and the assignee and he must come in and defend for his interest.

Wilcock *v.* Neel, 1 Phila. 129.
Irwin *v.* P. & C. R. R. Co., 43 Pa. 488.
Philson *v.* Barnes, 50 Id. 230.

The cases referred to in appellants' paper book, viz:—

Allison *v.* Elberson, 1 WEEKLY NOTES, 388.
Thistle Mills *v.* Watson, 2 Pa. C. C. 271.
Elberman *v.* Bloom, 10 Id. 413,

decide the principle that the claimant must serve a full notice of his claim, setting forth the particulars of his title, upon the garnishee, and the garnishee is then bound to set the claim up fully in his answers or ask for an interpleader, or the claimant must ask to come in and defend against the attachment. None of these things have been done in this case, and there is nothing of record to show that there is, or ever has been, a claimant for this money.

April 29, 1895. WILLIAMS, J. The appellants are garnishees in a foreign attachment against whom a judgment has been entered "for amount admitted." The question to be now decided is whether the answers support the judgment.

Looking at the answers and the several amendments as they stood when the judgment was entered, their formidable proportions may be reduced to three brief statements. First, the receivers of the Philadelphia and Reading Railroad had purchased railroad supplies that were unpaid for to the amount of four thousand nine hundred and thirty-five dollars and sixty-five

Digitized by Google

cents, by orders sent to the defendant and filled apparently by them.

Second, that they are informed by the counsel of a company known as the Railroad Equipment Company that these orders were in fact filled by that company and not by the defendant, and that the money due for said materials belongs to, and is claimed by, the Railroad Equipment Company, and does not belong to the defendant.

Third, that the receivers were appointed as such by the Circuit Court of the United States for the Eastern District of Pennsylvania, and that they are advised by counsel that the amount due by them for materials "cannot be the subject of attachment in this proceeding."

The answers admitted an indebtedness for materials, and set up two reasons why judgment should not go against the garnishees in this attachment proceeding. The first of these which set out the claim of the Railroad Equipment Company to have filled the orders made by the receivers and to be entitled to the money due therefor was a sufficient reason for refusing the judgment. It was not incumbent on the garnishee to show that the claimant had a good title to the money. They were stakeholders merely and were not bound to determine at their peril to whom the money in their hands should be paid: Lancaster County Bank for use *v.* Gross *et al.*, 50 Pa. 224. The answers of a garnishee are not to be construed with the same strictness as an affidavit of defence, and judgment will not be entered on answers unless the answers do by fair interpretation admit an indebtedness due to the defendant for some specific amount or, at least, for a sum sufficient to cover the plaintiff's demand: Allegheny Savings Bank *v.* Meyer *et al.*, 59 Pa. 361. A garnishee is entitled to the protection of the Court, and a judgment should not be rendered against him where there is doubt as to the defendant's title to the fund attached: Biddle *v.* The Bank, 41 L. I. 15. In such cases the rule for judgment should be discharged and the title to the fund determined by an issue tried before a jury.

The second reason was not sufficient as it was stated by the garnishees. They alleged no reason for thinking that the judgment of the State Court would not afford them a sufficient voucher upon the circumstances of this case. They did not so much as express a fear upon that subject. They simply set up the advice of counsel that the debt due by them "cannot be subject to attachment in this proceeding." We think it can be; but whether judgment should be rendered in any given case must depend upon circumstances. The accounts of the receivers must be settled in the Court which appointed them, and if the transaction out of which the indebtedness grew was such as that Court could not approve, or the payment of the money attached would be a withdrawal of it from the proper purposes of the trust created by the appointment, then in any such case upon the suggestion of the receivers the State Court would suspend the proceedings until the consent of the proper Court be asked and obtained. Since the Act of Congress of 1888 we think an attachment may issue against a receiver as garnishee, but if it becomes necessary for his protection to withhold judgment until the opinion of the proper U. S. Court can be taken upon the propriety of the payment to the attaching creditor this should be done. In this case we put our reversal of the judgment wholly upon the other ground.

The judgment appealed from is now reversed and the record remitted with instructions to the Court below to discharge the rule for judgment against the garnishees and proceed to determine the right of the claimant, the Railroad Equipment Company, to the fund attached by an issue to be tried before a jury. W. C. S.

Jan., '94, 445. January 8, 1895.

Kinsloe v. Davis, Defendant, and Penna. R. R. Co., Garnishee.

Attachment execution—Relief fund payable to beneficiary—Condition precedent.

A stipulation assented to by a member of a beneficial society, that benefits should be paid to those named by him as beneficiaries after his death, only upon execution by them of a release of all claims against a certain contributor to the benefit fund, is not contrary to public policy and, if contained in the regulations of the company, the execution of the release becomes a condition precedent to any payment by the company.

Where a condition is to be performed by a defendant personally it cannot be performed for him by a creditor who has attached the sum which would become payable to the defendant upon his performance of the condition.

Appeal of the Pennsylvania Railroad Company, garnishee, from the judgments of Common Pleas No. 4, of Philadelphia County, in a proceeding in attachment sur judgment wherein R. M. Kinsloe & Son were plaintiffs and Thomas B. Davis, defendant.

The facts of this case are fully stated in the opinion of the Supreme Court, *infra*.

Judgment was entered against the garnishee for the sum of $37.50 upon the answers filed. The garnishee took this appeal, assigning as error the action of the Court in deciding that the fund in the hands of the garnishee belonged to

Digitized by Google

the defendant and was subject to attachment by his creditors.

John Scott, Jr., for appellant.

The plaintiffs seek to compel the garnishee to pay to them money out of a fund created in part by the appropriation of the wages of the defendant's father, and in part by the contributions of the garnishee, the father's employer. These moneys, under the contract between the dead father and the garnishee, are payable only upon condition precedent, which has not been performed by the plaintiffs. The rights of the defendant arise only under the contract under which his father became and continued to be a member of the relief department. It is text book law that the attaching creditors can have no higher rights than the defendant. The condition is of such a character that it must be performed by the defendant and cannot be performed by the plaintiffs on behalf of the defendant. It is that the defendant execute a full release of all claims against the garnishee. The reasonableness of the condition is not here questioned, is not involved in this case as it stands, and the garnishee is not called upon to defend the requirement. It is sufficient that it is required by the garnishee and that it was a term and condition of the agreement under which the fund was created.

Johnson *v.* Railroad, 163 Pa. 127.
Graft *v.* R. R. Co., 8 Atl. Rep. 206.
Ringle *v.* R. R. Co., 35 WEEKLY NOTES, 379.

The general question of the reasonableness and public policy of such general regulations as are here involved has been passed upon in numerous cases and the rules have been uniformly upheld as reasonable.

Johnson *v.* R. R., *supra.*
Graft *v.* R. R., *supra.*
Ringle *v.* R. R., *supra.*
Owens *v.* R. R. Co., 35 Fed. Rep. 715.
State to use *v.* R. R. Co., 36 Id. 655.
Martin *v.* R. R. Co., 41 Id. 125.
Fuller *v.* R. R. Co., 67 Md. 433.
Fuller *v.* R. R. Co., 10 Atl. Rep. 237.
Spitze *v.* R. R. Co., 23 Id. 307.

Nor can we assent to the proposition that the garnishee is fully protected by the judgment. It is a protection *pro tanto* (Beatty *v.* R. R. Co., 134 Pa. 294), but it is only that. It is not such a general release of all possible claims as was contemplated by the agreement under which William Davis was a member of the relief department and under which only the defendant is entitled. It would be no bar to any other cause of action which the defendant might have or might think he had against the garnishee.

B. & O. R. R. Co. *v.* McCullough, 12 Grattan, 595.

It is respectfully submitted that the action of the Court below is in fact permitting the attaching creditor to assert "other and higher rights" than the defendant has against the garnishee. If the defendant be not in position to demand this payment, how can the attaching creditor compel it, save by the allowance of "other and higher rights"?

Peter Boyd, for appellees.

The appellant's argument is based entirely upon the assumption of a contract or agreement of some kind existing between the dead father and the garnishee, in reference to the manner of paying benefits due to beneficiaries. The answers, however, do not allude to any contract or agreement of this kind. They state emphatically and distinctly that "there is now due to the said defendant from the garnishee" a certain amount, but that "under the regulations and practices" this sum is payable only to the defendant, and upon the condition precedent of a release being given "of all claims whatsoever that might or could be had by said defendant against said garnishee." Whether or not the regulations—they were not even called rules—are written, is not stated, and what is meant by the "practices" is left entirely to conjecture. Yet the assumption of a contract or agreement lies at the very root of the argument. The answers in this case, however, are not only evasive, but indirectly negative the existence of any contract, stipulation or rule agreed to or assented to by the defendant or his dead father. The answers merely set up a one-sided regulation or practice, made for the convenience and protection of the railroad company, that before the money due to a beneficiary from a fund to which he or his ancestor contributed shall be paid to him, he shall give a release to the company of all claims whatsoever that might or could be had by him against that company. No more unreasonable regulation than this could be conceived. Furthermore, the answers are argumentative. The regulations referred to should be set forth in the answer in order that they may be construed by the Court. The garnishee has not done this, but has placed its own construction upon them, and has left the Court in the dark concerning the exact phraseology of the regulations invoked. As this is a case where the garnishee will be fully protected by a judgment of the Court, and only seeks to evade payment by insisting upon a release in which they alone are interested, the answers ought to have been full and complete, not inferential and argumentative.

April 29, 1895. WILLIAMS, J. The judgment in this case was entered "on answers" made by the garnishee. The complaint now made is that the answers were misunderstood, or their legal effect mistaken, by the Court below.

The plaintiff alleged that the railroad company

Digitized by Google

was indebted to Thos. B. Davis the defendant, and sought to reach the alleged debt by an attachment execution in which the railroad company was made garnishee. Interrogatories were served and the answers on which the judgment was entered were made in response to them. These answers deny any indebtedness to the defendant and any business transactions with him, but proceed to state that his father was for many years in the employ of the railroad company and became in March, 1886, a member of the Pennsylvania Railroad Relief Fund. This fund, made up from fees and dues of members and donations made by the railroad company, is administered by the company in accordance with certain fixed rules and regulations. One of these appears to be that the member may name the beneficiary to whom at his death the sum named in the certificate shall be paid. Another requires the company to pay only to the person or persons named as beneficiaries, and upon the execution of a release to the company from all claims that might or could be made by such beneficiary for or on account of the death of said member. The answers further set forth that William Davis, the father of the defendant, named his five children as his beneficiaries, so that the defendant would be entitled to receive from the company upon the execution of the release required, one-fifth of two hundred and fifty dollars less by one-fifth of the funeral expenses; but that under the "regulations and practice of the said relief department" this sum would be payable to the defendant only, and not to him until the execution and delivery of the release.

Such associations organized for the relief of members in case of injury, and of their families in case of death, are not against public policy: Johnson *v.* The Phila. & Reading Railroad Co., 163 Pa. 127; and the regulations adopted in order to secure the contemplated relief to the persons entitled to it should be upheld unless they are contrary to law. The regulations set up in the answers were not contrary to law, and although no copy of them has been appended, the correctness of the answers in this respect has not been excepted to or denied.

Accepting them as true, as the motion for judgment "on answers" does, the question raised is, do these answers show a fund in the hands of the garnishee liable to seizure under the attachment? We think they do not. They show the existence of a fund belonging to the Pennsylvania Railroad Relief Association in the hands of the garnishee. They show that this fund is administered for the relief association by the garnishee and under the regulations which the relief association has adopted. They show that under these regulations the sum due to a beneficiary is payable only to him or her in person, and upon the execution of a release to the railroad company for all liability growing out of the accident or death by reason of which the money is payable. An attaching creditor is not within the mischief against which the relief association was intended to afford protection. He does not fall within the description of the person or persons entitled to take. He can neither execute, or compel his debtor to execute, the release to the railroad company. The answers do not support the judgment, and for this reason it is reversed.

The record is remitted and a procedendo awarded.

W. C. S.

Common Pleas.

C. P. No. 4, Dec. '94, No. 890. May 4, 1895.

Prospect Building and Loan Ass'n v. George B. Russel.

Mortgage of land in two counties—Foreclosure—Sheriff's sale in one of such counties—Act of March 23, 1877.

A mortgage of real estate in two or more counties may be foreclosed in either county, under the Act of March 23, 1877, and it is not necessary that the real estate should be adjoining tracts divided by the county line.

Rule to set aside sheriff's sale of real estate situated in Delaware County.

This was an action of scire facias on a mortgage of a house and lot in the City of Philadelphia and another house and four lots in Prospect Park, Delaware County. The mortgage was foreclosed in Philadelphia County and both properties were sold separately by the sheriff in Philadelphia. The properties do not adjoin each other, but are several miles apart.

On the petition of David Garrison, executor of D. A. Hall, a creditor of the defendant by a judgment recovered in Delaware County before the sheriff's sale, a rule was granted to show cause why the sale of the real estate in Delaware County should not be set aside.

V. Gilpin Robinson, for the rule.

This Court has no jurisdiction to authorize the sale in Philadelphia of real estate in another county. The Act of March 23, 1877, P. L. 26, which provides that where the real estate bound by the lien of a mortgage shall be situated in two or more counties, it shall be lawful to commence foreclosure proceedings in either of the counties where the mortgage may be recorded,

Digitized by Google

does not apply where the properties are separate and distinct tracts. The Act applies only to the case of one tract situated partly in one county and partly in another, the same as the Act of June 13, 1840, sec. 12, P. L. 692, which authorizes the sale of lands which lie in adjoining tracts in different counties. Suppose we were in Erie County, it would be a great hardship to compel us to attend a sheriff's sale in Philadelphia.

THAYER, P. J. Your complaint should be made to the Legislature and not to us. The Act is a remedial statute, passed to give a remedy where one was needed.

ARNOLD, J. If you will read the whole of the Act you will find that the Act was passed to meet just such a case as this. It provides that the sale under the writ of levari facias issued on the judgment in the county where it was obtained, shall vest in the purchaser the entire estate of the mortgagor, as well in the county where the scire facias was issued as in the other counties where the mortgage was recorded; provided that an exemplification of the record shall be entered in the other counties, and advertisement of the sale shall be made there.

John M. Ridings, contra.

We have complied with the Act by filing an exemplification in Delaware County and advertising the sale in that county.

Robinson in reply. Section 3 of the Act supports our contention as it authorizes the Court to order and direct that the lands may be sold in parcels as divided by the county lines or otherwise, as may best suit the interests of parties having liens in different counties. Our lien is in Delaware County, and we ought not to be compelled to come to Philadelphia to attend a sheriff's sale.

THE COURT. Rule discharged.

[NOTE. The omission of the plaintiff to file an exemplification in the adjoining county as required by the Act of June 13, 1840, will not destroy the jurisdiction of the Court or prejudice the title of the purchaser, although it may affect the plaintiff's lien: Elliott *v.* McGowan, 22 Pa. 198.]

C. P. No. 2. June, 1893; 214 M. L. D.

Clymer Paving Company v. Donegan.

Mechanics' liens—Work and materials for paving—Act of 1836—Curbing.

A pavement cannot be regarded as laid in the "erection and construction of" the building itself, and, therefore, work done and material furnished for the paving are not the subjects of a mechanic's lien.

Section 29 of the Act of 1836 provides a lien for curbstones only.

The lien is contrary to common law, and is entirely a creature of statute, and unless it can be shown to be within the Act, it does not exist.

Sur rule to strike off mechanic's lien.

The facts are fully stated in the opinion, *infra*.

George E. Johnson, for the rule.

Edwin O. Michener, contra.

April 25, 1895. PENNYPACKER, J. The lien, filed against nineteen houses and lots, on the north side of Dennie street, at the distance of 126 feet 1⅜ inches southwest from the southwest side of Germantown avenue, in the 28th ward, set out: "The said debt or sum of $195.70 is the agreed price and value of certain materials, work and labor furnished, done and performed in laying cement sidewalks, pavements and copings on the premises at, in and about the said buildings, by the said claimant, for and about the erection and construction of said several adjoining buildings, in accordance with one entire contract therefor, which contract consisted of a written proposal made by said claimant, and the verbal acceptance thereof by said owner and contractor, a copy of which written proposal is hereto attached."

The written proposal attached was as follows:—

"We propose to lay cement pavement and coping, at the nineteen houses you are now building on the north side of Dennie street, west of Germantown avenue, as follows: Do no grading or filling in with cinders; put down a three-inch concrete, with one-inch top finish, making in all a good, substantial four-inch artificial stone pavement, five feet wide, with an entrance to step and running to curb in front of step; use good material, such as crushed stone or slag and sharp gravel, with imported Portland cement, and a three-inch coping around grass plot near house, for the sum of $380."

It appears, therefore, from the proposal which, when accepted, constituted the contract, that the work done was to lay a five-feet wide cement pavement in front of the houses, with an entrance to the step of each and running thence to the curb of the street, and to put a three-inch coping around a grass plot in the yard. Are such work and materials the subjects of a mechanic's lien? Upon this question there has been a diversity of opinion, and there have been a number of contradictory decisions. In Edelkamm *v.* Comly, 1 District Reps. 505, the Court of Common Pleas No. 3, of this county, held, that a mechanic's lien could not be sustained for materials furnished for sidewalks laid in front of buildings at the

Digitized by Google

time of their erection. In Cloud *v.* Kendrick, 1 WEEKLY NOTES, 601, the Court of Common Pleas No. 4, ruled in the same way. In Church *v.* Allison, 10 Barr, 413, the Judge in the Court below instructed the jury that if the bricks in controversy were furnished to be used for the pavement and for the walls enclosing the church, they could not be the subject of a lien. While his judgment was affirmed in the Supreme Court, the affirmation was based upon other grounds, and this question was not decided in that Court. In Barclay's Appeal, 1 Harris, 495, a lien was filed against a building and appurtenances, and, in the Supreme Court, the lien was stricken off, upon the ground that an appurtenance might be a yard or an out-house, and was therefore not within the purview of the statute. In Yearsley *v.* Flanigen, 10 Harris, 489, the Court below held, that the pavement was no part of the building, and that consequently work done upon it within the six months was not sufficient to preserve the lien. The judgment was reversed in an opinion in which the learned Judge of the Supreme Court does not succeed in making very clear just what was his thought. However, it was there decided that where there was an entire contract to do all of the brick work upon a building, and this contract included the bricks of the pavement, the laying of bricks upon the pavement, within the six months, was sufficient to preserve the lien for the whole work. As to the effect of a contract to lay pavement alone, no suggestion is made. In Webster *v.* Wakeling, 2 WEEKLY NOTES, 111, Court of Common Pleas No. 2, refused to strike off a lien filed for "paving bricks;" but there is nothing in the report to show whether or not these bricks were furnished on the credit of the building, or whether or not they were intended to be used for a pavement. In Dobbins *v.* McGonigal, 20 WEEKLY NOTES, 21, Court of Common Pleas No. 3, made absolute a rule for judgment for want of a sufficient affidavit of defence, where the affidavit set up that a large portion of the bricks for which the lien was filed were paving bricks, and were used in laying the footway in what was a public highway. The affidavit failed to show what proportion of the bricks were so used, and to show that they were not furnished upon the credit of the building. In Hershey *v.* Gohn, 1 Pennyp. 40, the Supreme Court held, that the Court below were right in refusing to instruct the jury that, if all the bricks furnished within six months were furnished for pavements, gutters and walling up a privy, the plaintiff could not recover, putting the decision on the ground, that it mattered not what the bricks were furnished for, if they were furnished on the credit of the building before it was finished.

The same question arose in the case of Paving Co. *v.* Weir, 3 District Reps. 32, in the Court of Common Pleas No. 4, and that Court, without referring to its previous decision in Cloud *v.* Kendrick, *supra*, reached a different conclusion and sustained the lien. Judge ARNOLD, who filed the opinion in that case, says, that were it not for section 29 of the Act of June 16, 1836, giving a lien for curbstones, he would be inclined to doubt whether a lien has been conferred for work done and materials furnished for, as well as used in, the construction of sidewalks and pavements, as applied to that part of the street which the adjoining owner is bound to pave and repair. He considered, however, that it was not to be presumed that the Legislature meant to confer a lien for a curbstone, unless it was understood that a claim for constructing the pavement was included within the lien law. If, as the learned Judge seems to concede, the language of the Act does not in itself bear this construction, the reasoning does not appear to be very satisfactory. The lien is contrary to the common law, and is entirely the creature of statute, and, unless it can be shown to be within the Act, it does not exist. A curbstone is, in fact, a part of the pavement, intended to mark the limits of the pavement and support the rest of it. If there was a lien for the pavement, there was also a lien for the curbstone, and no necessity for special legislation with respect to it. The fact that section 29 of the Act of 1836 provides for a lien for curbstones, shows that the Legislature considered that, without this section, there would have been no such lien. The argument is therefore, at least fully as strong when turned the other way. We are compelled to look at the Act to see whether work and materials furnished for and used in the construction of a pavement are anywhere included within its terms. The words of the Act are, that "every building" shall be subject to a lien for work done and materials furnished "for or about the erection or construction of the same." Is the pavement which is laid in front of a building in any sense a necessary part of the erection and construction of the building? Is not the building complete though no pavement be laid at all? It is no doubt an important means of getting access to the building, but in this respect no more important than the board-walk which often leads from country houses to the railroad station. The pavement is, in fact, a part of the highway, over which the adjoining owner has no exclusive right and control as he has over the building. He may be required to lay the pavement and keep it in repair, by direction of the municipality, whether there is any building upon the adjacent ground or not. What difference is there between the

Digitized by Google

asphalt street and the brick pavement, except that the one is used by wagons and the other by foot-passengers? Since, then, the building may be complete without any pavement, and the pavement may be and often is required to be laid without reference to the building, and since, when it is laid, it becomes a part of the public highway, we think it cannot be properly regarded as laid in the erection and construction of the building. The question of the coping in the yard is covered by the case of Barclay's Appeal, *supra*. We regret that the conclusion here reached differs from that of a Court so apt to be right as Common Pleas No. 4, and hope that this case may be taken to the Supreme Court, so that the question so diversely treated may be definitely settled. The rule is made absolute. F. B. N.

Orphans' Court.

April, 1881, 481.

Brolasky's Estate.

Commissions of executors, etc.—Compensation for unusual care and skill.

A generous compensation will be allowed to executors and other trustees whenever through their skill, personal service and unusual endeavors, a large and unexpected profit is earned for the estate. And this is so, even when the executor or trustee has an undivided interest in the estate, for his management has inured to the benefit of the other parties interested.

Exceptions to adjudication.

The adjudication, which is the subject of the present exception, is that of the fourteenth account of Henry C. Brolasky, executor and trustee under the will of Simon Brolasky, deceased. The subject of the account is the proceeds of the sale of the property, 1235 Chestnut street, Philadelphia. In 1838 the testator bought the property for $14,000. In 1882, the present accountant refused $50,000 for it. The aggregate rent of the Chestnut street building and of the building on the rear of the lot was $3100. By securing William Boothby as tenant and through his success, the accountant had increased the rent in 1888 to $6,250. After a great deal of careful manipulation—including the securing of the sale of the property on the east to Boothby and his partner for a moderate figure, the accountant sold 1235 Chestnut street to them for $119,500. The accountant was a real estate broker, but did not make any charge for his services as such. At the audit, before Penrose, J., he claimed five per cent. commission, which was allowed, the auditing Judge saying that, although two and a half or three per cent. would have been the usual commission, that the services performed showed unusual care and skill.

The exceptions relate to the allowance of this commission.

Silas W. Pettit, for exceptants.

F. Carroll Brewster, for the accountant.

March 30, 1895. Hanna, P. J. The Courts are always disposed to treat executors and other trustees with fairness and liberality, especially where their conduct and management of the trust have been to the interest and advantage of the estate: Shinn's Estate, 166 Pa. 121. And a generous compensation is uniformly allowed to them whenever it appears that, through their skill, personal service and unusual endeavors, a large and unexpected profit is earned for their *cestuis que trust*.

And it matters not whether it be from a sale of personalty or realty a trustee receives the compensation he earns and deserves. And from reasons of public policy, his services and labor performed should not be regarded with a spirit of illiberality or false economy. It is always for the benefit and advantage of the parties interested that faithful conduct and skill in management be liberally rewarded, and such an appreciation is an incentive to every trustee to regard the interests of his *cestui que trust* paramount to every other consideration.

In the present case, the accountant has acted, not only as a trustee, but in the line of his own occupation—that of a real estate broker—and sold, at a very handsome advance, the parcel of real estate from the sale of which arises the present controversy. He thus has saved the expense of a real estate agent, who would be entitled to the usual compensation. In addition, he has exercised great skill in the management of and given personal services and attention to the sale, the result of which is largely to the benefit of all the parties interested.

It is true he has an undivided interest himself; but, still, all that he has done largely inures to the advantage of the other parties interested. Under all the circumstances of the case, he not only is clearly entitled to the usual and ordinary rate of compensation, but fairly and equitably entitled to additional compensation for much more than the ordinary services rendered by him. And it comes with ill grace from the parties interested to complain that he has placed an exorbitant value upon his services. All in excess of the usual rate may well be allowed to him as additional compensation; and in this view, it is properly allowed by the

Digitized by Google

auditing Judge. All the facts are clearly stated in the adjudication, and the reasons given by the auditing Judge fully justify his conclusion. As we agree therewith, the exceptions are dismissed, and the adjudication confirmed.

F. B. N.

October, 1893, 217.

Richard's Estate.

Wills — Codicils — Revocation by — Residuary gifts—Inconsistent bequests.

A residuary gift by codicil revokes a residuary gift by will.

The doctrine that the Court, whenever possible, will reconcile two dispositions which are apparently inconsistent, does not apply as between a will and codicil. Between a will and codicil the argument is stronger in favor of revocation, and the words of revocation need not be as clear as the words of the original gift.

A codicil is part of the will; therefore, when, in a later codicil, a testator refers to his will, he will be held to have referred to earlier codicils as well.

Petition for review.

The facts are clearly stated in the opinion of ASHMAN, J.

Leoni Melick and *Sheldon Potter*, for petitioners.

Theodore F. Jenkins, contra.

April 27, 1895. ASHMAN, J. The will gave to Mary Rose (Lady Superior of the hospital) and to testatrix's sister and two nieces, each $500. The first codicil gave one of the nieces $500, revoked the legacy to the sister, and instead gave her the residue of the estate. The second codicil revoked "all former bequests or legacies to all persons mentioned in the will," and gave to Mary Rose "all the residue of my estate, if any be left after my death, for her personal use, provided she keeps me in the hospital until I die. Sister Rose will give my body, when dead, a proper Christian burial."

It was shown that the testatrix remained and was cared for in the hospital until her death, and was decently buried therefrom. The auditing Judge awarded the fund in the hands of the executor to Mary Rose.

We think there is no doubt as to the correctness of this decree. It was very clearly the intention of the testatrix to revoke all the legacies which preceded the gift in the second codicil. She expressly revoked "all legacies to all persons mentioned in her will." The sister and the niece were among the persons who were so mentioned, and if they are entitled to the legacies bestowed by the first codicil, then "all legacies" to them are not revoked. The residuary bequest to the sister was, unquestionably, revoked, because the final codicil gave the residue to Mary Rose. A residuary gift by codicil revokes a residuary gift by will: Earl of Hardwick *v.* Douglas, 7 C. & Finnelly, 795. Both gifts in the former codicil stood on the same footing, and if one fell, the other fell likewise. It is true that, whenever possible, the Court will reconcile two dispositions which are apparently inconsistent. Thus, where the same property was given to two persons, in different parts of the same will, they were decreed to take as joint tenants: Paramour *v.* Yardley, Plow. 541; see Kiver *v.* Oldfield, 4 De Gex. & J. 30; Colt *v.* Colt, 32 Conn. 422. But this doctrine does not apply as between a will and codicil (Evans *v.* Evans, 17 Sim. 107), because, between a will and codicil, the argument is stronger in favor of revocation (Kermode *v.* Macdonald, L. R. 1 Eq. 457), and the words of revocation need not be as clear as the words of original gift: Wallace *v.* Seymour, 20 Week. Rep. 634. Thus, where property was given to A. for life, with remainders over, and only the gift to A. was revoked, but the property was given absolutely to B., the whole original gift was held to be revoked: Fry *v.* Fry, 9 Jur. 894. So, where the revocation, taken literally, applied only to a devise of real estate to one to whom personal estate was also given, the codicil was determined to have revoked both the devise and the legacy: Read *v.* Backhouse, 2 R. & Myl. 546. If we have recourse to the familiar principle, that the codicil is part of the will, we shall reach the same result. Under that doctrine, when, in the later codicil, the testatrix spoke of her will, she must be held to have referred as well to the prior codicil. How far the principle is here applicable, may be seen by referring to Sherer *v.* Bishop, 4 Bro. C. C. 55, and Hall *v.* Severne, 9 Sim. 515, where the question is discussed from different standpoints. The petition is dismissed.

F. B. N.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, MAY 24, 1895.* [No. 15.

Supreme Court.

July, '94, 175, 202. January 28, 1895.

Assigned Estate of Edward S. Handy, Jr.

Larned & Haas's Appeal.

Philadelphia Trust Co. et al.'s Appeal.

Sale of undivided interest of debtor—Act of February 17, 1876, P. L. 4—Advancement—Loan—Charge on realty—Blending realty and personalty—Assignment of personalty to creditor as security—Right of lien creditor to use lien in bidding—Act of April 20, 1846, P. L. 411—Spendthrift trust—Will.

Where a testator by his will directs his executors "to advance by way of loan" to a son a sum of money, on the arrival of the son at a certain age, and the son reaching said age in the father's lifetime he himself gives to the son the said sum and takes the son's note therefor, which by a codicil to his will he directs shall bear interest, to be deducted from the son's income given him by the will, during the life of the testator's widow, and at her death the principal to be deducted from the share then payable to the son, the transaction is a loan, although made payable in a specified way, and not an advancement.

Where under such circumstances the testator has blended his entire estate, until partition shall be made by trustees, and bequeathed to his son a share in such blended estate, the loan to the son becomes a charge on his whole share including the real estate.

An assignment by a debtor of property to a creditor as security for a debt due him, is not such an assignment in trust for the benefit of creditors as must be recorded within thirty days, but is valid without record, at least so far as it concerns personalty.

Where a debtor owns an undivided interest in remainder in an estate which embraces several pieces of realty, and the assessed values of the properties show a small margin in the favor of the debtor after the payment of his debts, yet as his interest is not to be determined until after a life estate, there is a sufficient element of uncertainty to justify a Court in granting an order of sale, under the Act of February 17, 1876, P. L. 4, on the petition of an assignee for benefit of creditors.

While the Act of 1876 in terms applies only to real estate, yet as it is a remedial statute, it is to be interpreted liberally, and where an estate, in which the debtor has an interest, is composed of both realty and personalty, and it is within the discretion of the trustees of said estate to distribute the same in any way they may see fit, so that the share of the debtor may be assigned to him either in personalty or realty or partly in each, the Court may make an order of sale of the debtor's share.

The fact that such a sale deprives a lien creditor of his right under the Act of April 20, 1846, P. L. 411, to use his lien as money in bidding at the sale, does not prevent a sale by order of Court under the Act of 1876.

Before ordering a sale under the Act of 1876 it is the duty of the Court to ascertain and fix the priority of the liens which will be discharged by the sale.

A will bequeathing testator's estate in trust to allow his widow to occupy testator's houses with his children; pay half of the income of the estate to the widow, and the other half to the children; on the death of the widow to pay one-fourth of the income to each of testator's daughters for her separate use; upon the death of a daughter to pay three-fourths of the principal of her share to her issue, if any; when each of testator's sons attain twenty-one to advance him in the discretion of the trustees and with the widow's consent, a certain amount, and after the death of the widow to pay to each of the sons one-half of his share when he attains the age of twenty five, one-fourth when he attains the age of twenty-eight, and the remaining fourth to hold on a spendthrift trust for the son for life; creates a spendthrift trust for each son in the one-fourth only, and that particular trust is not extended to the whole share of a son by a codicil directing a division of the estate into four shares on the death of the widow and that one equal share shall be held by the trustees for each one of testator's children "upon the trusts and for the same purposes as are set forth in my will and for no other trust or purpose whatsoever."

Appeals of William H. Larned and Edwin J. Haas, co-partners, trading as Larned & Haas, and of the Philadelphia Trust, Safe Deposit and Insurance Company, and others, executors of and trustees under the will of Edward S. Handy, deceased, from the decree of the Common Pleas for the County of Philadelphia.

C. Berkeley Taylor, Esq., assignee for the benefit of creditors of Edward S. Handy, Jr., presented a petition to the Court of Common Pleas No. 4, setting forth that Edward S. Handy died in 1890, leaving a will dated May 27, 1874, and several codicils thereto, by which after certain bequests he devised all his property to the Philadelphia Trust, Safe Deposit and Insurance Company, Edward S. Handy, Jr., and Harry H. S. Handy, in trust, to dispose of the income during the life of the wife, R. A. Virginia Handy, and after the death of his said wife: "To pay to each of my sons, as he shall attain the age of twenty-five years, one-half of his share of my estate, his share being one-fourth part of my estate, and in the part now directed to be paid shall be included the sum of twenty thousand dollars, with interest, if there be any unpaid, and if it have been paid, then the principal sum only, and this sum with or without interest, as the case may be, shall be part of the sum directed to be paid to my sons as they respectively attain the age of twenty-five years; and further to pay to each of my said sons as he shall attain the age of twenty-eight years, one-half of the

Digitized by Google

remainder of their share of my said estate; and the remainder of each son's share the said trustee shall hold and invest and re-invest and pay the net income to my said sons during their respective lives, so as the same shall not be liable for their debts, or be subject to execution, attachment or sequestration for any debts or liabilities whatsoever; and upon the death of my sons respectively the said principal sum shall be paid to their children or the issue of deceased children, such issue taking the parent's share; and if my sons or either of them shall die without leaving such issue behind them, then to hold the same for my surviving children as if the same had formed part of their original shares, and until the payment of the principal sums to my sons, as herein provided, it is my will that my said trustees shall pay them the net income of their respective shares, but so as the same shall not be liable for their debts;" that by article fifth of said will, he did devise, as follows: "(5) When my sons Edward and Harry, or either of them, shall attain the age of twenty-one years, at the discretion of my said trustees, provided my wife consents, to advance to such son or sons, by way of loan, the sum of twenty thousand dollars, upon which interest shall be charged to the son receiving the same, and which interest, if not paid by such son, shall be taken and deducted from his income aforesaid, and this sum shall form part of the sums hereinafter directed to be paid to my sons;" that by a codicil dated the sixteenth day of March, A. D. 1883, he did devise as follows: "I further direct that the interest on any advance which I have made or may hereafter make to either of my said sons which shall be shown by their notes or any other evidences of indebtedness, shall be deducted from their share of the income of my estate during the lifetime of my wife, and upon her death the principal of said advance shall be deducted from their respective shares of my estate."

By a codicil dated November 3, 1887, the testator said: "I hold the notes of each of my sons for $20,000. If either of them shall die before the division of my estate, I hereby authorize them to dispose of this amount, $20,000, by will if they see fit to do so, and my trustees shall include said amount as a part of the share to which they may be entitled in my estate, say $20,000 if the interest has been paid on said notes, and if interest has not been paid it shall be added to said notes at the rate of five per cent. per annum."

The testator left surviving him his wife, R. A. Virginia Handy, two sons, Edward S. Handy, and Harry H. S. Handy, and two daughters; that prior to the death of the decedent he had advanced to E. S. Handy, Jr., the sum of $20,000, before mentioned, and the further sum of $22.057,13; that decedent died seized of a great quantity of real estate; that thirty-five houses comprised therein had been advertised for sale by the sheriff under a judgment of the Court of Common Pleas No. 3, J. T. 93, 640; that the personal estate assigned to your petitioner is insufficient for the payment of the debts of the said assignor, and the said real estate is encumbered with the above liens to such an extent as to render it difficult to determine whether the same can be sold for enough to pay all the liens as aforesaid.

Your petitioner therefore prayed an order authorizing and empowering him to make public sale of the interest of the said Edward S. Handy, Jr., in the estate of his father, or so much thereof as shall be deemed necessary at such time and place, "which sale having been confirmed by the Court, shall discharge all liens against the said real estate, except such as by law are preserved, and that all proceedings and executions, and upon the above-mentioned judgment, C. P. 3, J. 93, 640, together with all other proceedings and executions shall stay in the meantime."

An answer was filed by the trustees under the will of Edward S. Handy, deceased, uniting in the prayer of the petition. An answer was also filed by Larned & Haas, setting up that they had obtained a judgment, viz., the one set out in the petition, against E. S. Handy, Jr., for $16,275, and setting up that the prayer ought not to be granted because—

First. That in their said judgment the said defendant had expressly waived all stay of execution and that it is without the jurisdiction of your Honorable Court to postpone the execution of said plaintiff and allow said real estate to be sold by said assignee, the effect of which would be to impair the force and effect of the judgment of said plaintiff and postpone the collection of the amount of their said judgment.

Second. That while said petition recites that said real estate is encumbered with liens, it does not specify or mention any other lien upon said real estate except the judgment of the said respondents, nor does it appear that in any way whatever the said real estate is subject to any liens at all other than said judgment.

Third. That said petition is defective in this, that it does not attach a schedule of the debts of said petitioner for the purpose of informing your Honorable Court to what extent the same may be liens upon said real estate.

Fourth. While said petition avers that the personal estate is insufficient to pay the debts, it does not state of what amount the personal estate consists or how much the said assignor is entitled to receive from the estate of his late father, the said Edward S. Handy, upon a distribution made thereof.

Digitized by Google

The Court directed a stay of proceedings and referred the petition to a master, Angelo T. Freedly, Esq., before whom in addition to the facts set forth in the above-quoted petition and answer, facts appeared as follows: Larned & Haas recovered their judgment against E. S. Handy, Jr., on July 11, 1893. On the next day Handy made a general assignment to Mr. Taylor. At the time of the recovery of the judgment Handy's entire estate was his interest in the estate of his father, who died October 2, 1889, which estate at the time of E. S. Handy, Sr.'s death consisted of realty, assessed for taxation at $108,100, and personalty appraised at $237,481.63.

Under the will of his father, Edward S. Handy, Jr. was entitled to a three-sixteenths interest absolutely upon the termination of the life estate of his mother, Mrs. R. A. V. Handy, and one-sixteenth in trust for him, for life, and remainder to his children.

Edward S. Handy, Sr., before his death, about the fifth day of December, 1888, directed the Philadelphia Trust and Safe Deposit Company to allow his son, Edward S. Handy, Jr., to take from his box, wherein were deposited his securities, fifty shares of the capital stock of the Philadelphia Trust and Safe Deposit Company, upon which securities Edward S. Handy, Jr., secured on his individual notes a loan from the Philadelphia Trust and Safe Deposit Company, the balance of which remained unpaid at the date of the death of Edward S. Handy, Sr. On the twenty-ninth of April, 1893, the executors of the will of the father (the Philadelphia Trust and Safe Deposit Company and Edward S. Handy, Jr., being two of the executors), paid over to the Trust Company, as a creditor, the sum of $17,285.13, being the amount due by E. S. Handy, Jr. At the same time the Philadelphia Company, as executors, received the notes of Handy for $18,000 and the fifty shares of stock.

On the same day, E. S. Handy, Jr., assigned and transferred to the executors of his father's estate, all his right, title and interest in said estate as security for the amount of his indebtedness, which was recited as being $42,031.13. This paper was acknowledged May 2, 1893, but not recorded until the twenty-eighth of March, 1894, long after Larned & Haas had recovered their judgment.

The master reported a decree. Exceptions were filed, which were dismissed by the Court and the following decree was entered:—

"And now this fifteenth day of June, A. D. 1894, this cause coming on to be heard upon the petition of the assignee for the benefit of creditors of E. S. Handy, Jr., for directions to sell, it is ordered and decreed that E. S. Handy, Jr., is *inter alia* entitled under the will of his father, Edward S. Handy, Sr., to an undivided vested 3–16 absolute interest in remainder after the death of Mrs. R. A. V. Handy, now aged 71 years, in the real and personal estate, late of the said Edward S. Handy, Sr., and also subject so far as the Digby Homestead is concerned to the right of occupancy therein of R. A. V. Handy, Alice Baltzell (formerly Handy) and Virginia S. Handy; that the assignee for the benefit of creditors of the said E. S. Handy, Jr., shall sell said undivided 3–16 interest at public auction in the city of Philadelphia after twenty days' prior notice thereof published in two newspapers in the said city and also in the Legal Intelligencer, which said advertisements shall contain a full statement of the real and personal estate of Edward S. Handy, Sr., of which the said undivided 3–16 interest forms part; that the purchaser at said sale shall acquire the aforesaid undivided 3–16 interest in said estate free, clear and discharged of and from all liens or charges against the same imposed by the will of Edward S. Handy, Sr., or the acts of E. S. Handy, Jr., that all questions of the validity and amount of said liens or charges and their rights of priority shall be relegated to the fund to be produced by said sale; that 10 per cent. of the purchase money shall be paid in cash at the time of sale and the balance upon confirmation thereof; that prior to making said sale the assignee shall enter security in the sum of $40,000 to be approved by the Court; and that the assignee shall report said sale to the Court for confirmation thereof. And after said sale shall have been confirmed the assignee shall have liberty to apply to this Court for such further directions in regard to selling the contingent interests of E. S. Handy, Jr., in the real estate of Edward S. Handy, Sr., as the said assignee may be advised is necessary in the premises."

Appeals were taken by Larned & Haas and by the trustees under the will of E. S. Handy, Sr., deceased.

Joseph L. Tull and *William Drayton*, for Larned & Haas, appellants.

The Court below had no authority to stay appellant's execution, order the assignee to sell, and appoint a master, or enter the decree dated June 15, 1894.

There were but two creditors claiming liens on the assignor's realty. The first, the appellants, whose lien is admitted; the other, the trustees' claim, is disputed. The Court postponed the determination of "the validity and amount of said liens or charges, and their rights of priority" until after the sale. This was a clear disregard of the terms of the Act of February 17, 1876, under which the proceedings here originated. The words of the Act are, "Where the assignor

Digitized by Google

is the owner of a number of tracts of land *encumbered* to such an extent that it is impossible to ascertain definitely whether a sufficient amount can be realized to discharge all the liens," and "which sale or sales, after being confirmed by said Court, shall discharge all liens against the real estate so sold . . . . and the proceeds arising therefrom shall be appropriated to liens extinguished *by virtue of the sale according to their priority*."

The existence of encumbrances, their amount and priority, are of the very vitals of the Act. It is not the purpose of the Act to deprive a lien creditor from selling by the sheriff because there are doubts about the validity of the lien of another creditor. That is a question of distribution, and does not affect the manner of selling the real estate. The Act directs a sale to be made only when the amount of liens is likely to be in excess of the proceeds of sale. How is this to be determined unless the liens are ascertained?

See Tomlinson's Appeal, 90 Pa. 224.

The Act is not intended merely to substitute the assignee for the sheriff unless it appear that the sale by the former can be more advantageously conducted in the interest of all the creditors.

Kleckner's Estate, 150 Pa. 519.
Pairpoint Manufacturing Co. *v.* Philadelphia Optical and Watch Co., 161 Id. 17.

A lumping sale of real and personal property is manifestly *not* in the interest of all parties, for the appellants, who only have a lien upon the real estate, cannot compel the trustees, who have a lien upon both funds, to exhaust the personal estate first before coming upon the fund realized from the sale of the real estate. It will be impossible to marshal the assets so as to give the appellants their rights, unless the estate in both real and personal property be sold separately. To sell in a lump sale destroys the statutory right given to a record lien creditor by the Act of June 10, 1881, as follows:—

"Whenever the purchaser of real estate at an assignee's sale, shall appear from the proper records to be entitled as a lien creditor, to receive the whole or any portion of the proceeds of said sale, it shall be the duty of the assignee to receive the receipt of said purchaser for the amount which he would appear from the records to be entitled to receive."

The claims made by the trustees under the will of E. S. Handy, Sr., are not encumbrances upon the real estate of the assignor contemplated by the Act of February 17, 1876.

The amounts given by the testator in his lifetime to the assignor were advances not debts. They are expressly treated as advances by the testator himself. In the second codicil he states that he has made advances, which is the sum of $20,000 directed to be advanced in the will. The master is mistaken in saying that interest was to be charged upon these advances. By the second codicil the interest is directed to be *deducted* from his share of income, and by the third codicil, if interest be not paid on the $20,000 it shall be added to the note at the rate of five per cent. The trustees had no power to enforce payment of the interest. It could only be deducted from income, during the life of the widow, or be added to the note to be deducted upon distribution.

The will specifically states that the payment of $20,000 was an advancement. In clause five of the will, "to advance to each son or sons, by way of loan, the sum of $20,000, upon which interest shall be charged to the son receiving the same." In the third codicil the testator gives the power to each of his sons, upon their death before their mother, to dispose by will of this sum of $20,000, which the testator calls an advancement. The presumption is always in favor of an advancement as against a loan.

Patterson's Appeal, 128 Pa. 269.
Snyder *v.* Snyder, 169 Id. 362.

To create a charge the intention must be plain and manifest.

Duvall's Estate, 146 Pa. 176.
Shenk *v.* Shenk, 150 Id. 521.

The deed of Edward S. Handy, Jr., dated April 29, 1893, to the Philadelphia Trust Company, was void by reason of not having been recorded within thirty days, as required by the Act of 1843, and void as to judgment creditors in not being recorded within six months under Act of 1715 and within ninety days, as required by the Act of May 19, 1893.

There is no authority for a lumping sale to be found in the Act of 1876, and by the ordinary rule such a sale is bad.

Klopp *v.* Witmoyer, 43 Pa. 221.

Richard L. Ashhurst, (*Rowland Evans* with him), for Philadelphia Trust, Safe Deposit and Insurance Co. *et al.*, trustees.

The codicil of November 3, 1887, by which the sons are authorized to dispose of this amount of $20,000 by will, clearly shows that all of their shares were included in the trust. The will provided that as to the fourth of each son's fourth they should have no testamentary power, but the same should pass to their issue, or failing issue, to the issue of testator's other children, but as to the other three-sixteenths in each case they took absolute estates under the will. This having been changed, however, by the second codicil, so that the trust should apply to the whole

Digitized by Google

share of fourth, it might well have seemed to the testator necessary to insert this provision in the third codicil to prevent his executors and trustees being obliged to exact the repayment of these amounts from his sons' representatives. The right of the trustees of E. S. Handy, deceased, is not capable of discharge by sale.

What Edward S. Handy, Jr., is to receive from the trustees in the ultimate division of the estate under the said codicil is the balance remaining after deducting from the share coming to him the principal of the debts or advances in question which the trustees shall, after the deduction, award to him. Therefore his interest cannot be ascertained until the period of distribution; this deduction then to be made is virtually a part of the estate which must be then taken out, leaving the balance as all that will pass to the assignee. If the deduction could be now made the surplus could be now sold, but as it cannot, all that can be sold is the right to have the distributive share at the time of distribution, less the deduction of these debts then to be made, which debts are part of the share under second and third codicils.

Mohler's Appeal, 5 Pa. 419.
Bear *v.* Whisler, 7 Watts, 144.
Hart *v.* Homiller, 20 Pa. 248.

There was by the will and codicils such a blending of the real and personal estate as to make a sale of the undivided interests in both the only sale possible. There being a conversion Larned & Haas acquired no lien by their judgment, and the interest passed to the assignee in trust for all the creditors.

Allison *v.* Wilson, 13 S. & R. 330.
Neely *v.* Graham, 50 Pa. 458.
Roland *v.* Miller, 100 Id. 50.
Jones *v.* Caldwell, 9 WEEKLY NOTES, 459.

The deed of April 29, 1893, settled the amount of the indebtedness of E. S. Handy, Jr., to his father's estate at $42,031.13, tolled the statute of limitations, included the stock with the money debts, made a formal assignment and gave to the executors a power of sale. It was valid although not recorded within thirty days because it was not an assignment in trust if construed as an assignment at all, but an assignment direct to the creditor. The creditor was the estate of Edward S. Handy, Sr. The assignment was to the executors of that estate, its legal representatives, therefore direct to the creditor.

A direct assignment to one or more creditors violates no statute, and is not an assignment in trust which needs to be recorded under the Act of 1843.

Chaffees *v.* Risk, 24 Pa. 432.

John G. Johnson, for appellee.

LARNED & HAAS'S APPEAL.

April 29, 1895. MITCHELL, J. The appellants are lien creditors, having a judgment in the Court of Common Pleas No. 3, of Philadelphia, by virtue of which they issued execution and levied on the interest of their debtor in certain real estate. This execution was stayed by an order from Common Pleas No. 4, of Philadelphia, and a sale of the undivided interest of the debtor in the estate of his father, Edward S. Handy, Sr., both real and personal, as one whole, was ordered to be made by the debtor's assignee for the benefit of creditors.

I. The jurisdiction of the Court of Common Pleas No. 4, to thus interfere with the process of another co-ordinate Court must be found in the Act of 17 February, 1876, P. L. 4, and it is contended by the appellants that the facts of this case did not bring it within that Act because, first, there was but one encumbrance against the land, and secondly, because the figures show that there was no substantial doubt on the sufficiency of the estate to pay the liens on it. First, the liens claimed were the appellant's judgment, and certain claims by the trustees of the estate of E. S. Handy, Sr., arising under his will, and others arising out of the acts of the debtor, his son. Handy, Sr., by his will authorized his trustees under certain conditions to make a loan to his son, but subsequently during his lifetime gave his son the sum specified, and other moneys, and it is claimed by appellants that these were advancements not chargeable on the real estate. This contention, however, cannot be maintained. The moneys given by Handy, Sr., to his son were not advancements but loans, though payable in a specified and restricted way. The testator's words are "to advance by way of loan," and when the son arrived at the stipulated age during his father's lifetime, the father gave him the money, but took his notes for the amount, and by codicils to his will, directed that these notes should bear interest at five per cent., which should be deducted from the income payable to the son from the estate during the widow's life, and at her death the principal should be "deducted" from the share going to the son on final division and distribution. And lastly, the share of the son in the entire estate was an undivided interest in the real and personal estate blended, until partition should be made by the trustees. We think the loans made by the father were clearly charged by his will on the whole share left to the son, including the real estate. The other claims of the trustees arising out of the acts of the debtor, Handy, Jr., present a much more doubtful question. The son borrowed from his father fifty shares of stock of the Philadelphia Trust Company, and

Digitized by Google

with the father's consent pledged it as collateral security for a loan on his own notes. In April, 1893, the father's executors redeemed the stock and held the notes as a debt against the son, and on the same day the latter by deed poll assigned all his right, title and interest in his father's estate, to the trustees as security for the amount of all he then owed his father's estate, including the $17,285 paid by the trustees to redeem the stock above mentioned. As this was a pledge by the debtor to his creditor the learned master rightly held that it was not void for failure to record it within thirty days. So far as the interest pledged is personalty it was a valid and effective assignment. But the other question whether so far as relates to the interest in real estate (if the latter can be considered as severable at all from the blended interest) it was not postponed to appellant's judgment by the failure to record it until nearly a year later, was not determined by the master, as in his view of the case that question would not arise until distribution. For this reason, although it has been urged here by appellant, we do not decide it now, but leave it with the other matters that will require the attention of the master and the Court below. These matters will include the question back of much that has been argued here whether E. S. Handy, Jr., had any interest at all in the real estate as such, which could be the subject of lien. As will be noticed more fully hereafter no specific gift is made to him of any part of the estate, real or personal, but only a share in the sum total of the value of both, and it is open to argument that his interest in realty as such will begin only in the event of any realty being set apart to him in the division which the trustees shall make hereafter. That his interest in the estate as a whole is vested and liable for the payment of his debts, as the master held, does not settle the question of its present liability *as land* to the lien of a judgment.

The second ground of objection that the case is not within the Act of 1876, because of the absence of any difficulty in determining whether the property can be sold for enough to pay all the encumbrances, may be disposed of briefly. It is true that the appraised value of the personalty and the assessed value of the realty show a small margin in the amount of the debtor's interest over the encumbrances, but these figures are based on present values while the debtor's interest is in remainder after his mother's life estate. This feature of the case introduces an element of uncertainty and therefore of difficulty which the Court had a right to consider: Thompson's Appeal, 126 Pa. 467; Pauley's Estate, 149 Id. 196.

On the first branch of the case therefore we are of opinion that it was within the Act of 1876, and the jurisdiction of the Court properly attached.

II. But it is further objected that even if the Court had jurisdiction it was over the interest of Handy, Jr., in the realty only, and would not sustain the order to sell the blended interests in both realty and personalty in one block. It is true that the Act of 1876 applies only to real estate. But it is a remedial statute and should be construed in advancement of the remedy. There could be no better illustration of the usefulness of such an Act than the present case. The supplementary petition of the assignee shows that the estate of Edward S. Handy, Sr., includes thirty-five houses in the city of Philadelphia, and four tracts of land, amounting to nearly 175 acres, in the rural wards of the city, assessed for taxation at $108,100, besides something over double that amount in personalty. The interest of the debtor which is proposed to be sold, is in this estate as a whole, of blended realty and personalty, and is not only undivided but in remainder after the life estate of his mother and partly contingent on other remainders to his brother and sisters. Moreover, of what the debtor's share shall finally consist as to realty or personalty, is and must remain entirely uncertain and contingent until after the death of the life tenant, when the trustees are to make partition and distribution, in their unfettered discretion, so that they make "four equal shares," and until that time there is a power of conversion in the trustees as to a considerable portion of the realty by a sale which would under the will be paramount to any interest of Handy, Jr., or a purchaser of his title in any part of the realty. Nothing could be more utterly vain and speculative than an attempt to fix the value of the debtor's interest in the real estate under such circumstances. He may not have any real estate at all, for as the personalty is more than two-thirds of the whole the trustees may allot his entire share in personalty, or on the other hand they may put it all in realty with or without owelty. The one thing in all this maze which is capable of even an approximate estimation is the general value of his interest in his father's estate as a whole, real and personal combined. This is what the Court below have ordered to be sold. In so doing they have reached the most just, economical and convenient result, as is conclusively shown by the master in his very able report. For doing this, so far as the share may be regarded as realty, the Act of 1876 is ample warrant, and while that Act does not refer to or provide for sales of personalty, yet the supervision of the assignee as to such matters is part of the general jurisdiction of the Court, and there is nothing in the statute to prevent the exercise of the two jurisdictions in one order, where as

Digitized by Google

here it is in plain furtherance of the remedy intended.

The only serious objection to this conclusion is that the senior lien creditor may thereby be deprived of his privilege of using his lien as equivalent to money in bidding at the sale. This argument is not without weight, and has been very strenuously urged by appellants. But we do not think it can override the clear equities of the case in other respects. The right itself depends on the Act of April 20, 1846, P. L. 411, and is obviously not a right of substance, but of convenience only, to avoid the necessity of formal payment by the purchaser to the sheriff or into Court, of money which the sheriff or Court must return to him in settlement of his lien when distribution is made. It arises only in cases of clear *prima facie* title on the records to receive the money back. Where this *prima facies* is disputed the statute provides for the ascertainment of the facts, but where it does not appear clearly on the records the right does not arise at all. In the present case the balance not only of convenience but of the substantial equities is against the creditor's right, and not by any act of the law or which the law can prevent, but by the testator's act in giving his son an undivided remainder in the blended real and personal estate, so that the latter's interest in the realty alone, if any he has, is impossible of present ascertainment.

III. It is further objected to the proceedings that the Court postponed the consideration of the liens until after the sale. This objection we are obliged to sustain. The learned master was of opinion that the scope of the Act of 1876 did not extend to the determination in advance of the amount or priority of liens, but left these as questions of distribution merely. This view, while in accordance with the general practice of our legal system, represents one of its weak points, growing out of inherent difficulties in shaping equitable rights with merely common law instruments. A lien creditor who endeavoring to protect his claim has to bid in ignorance or doubt how much if any of the proceeds of the sale will come back to him upon his lien, necessarily has to leave a margin for the uncertainty. His bid is to that extent speculative, and therefore smaller than if based on exact knowledge. It is in the interest of justice to all parties that public sales should be upon ascertained rights not only as to title but as to the destination of the proceeds. The Act of 1876 was a remedial statute passed in aid of this interest. The authority it gives the Court having jurisdiction of the assignee to stay the hands of the sheriff, and of execution creditors proceeding in pursuance of their unquestionable legal rights, is an equitable power to direct the administration of a trust estate for the general benefit of all parties interested, according to their respective rights. In so doing the Court is required to marshal the liens in order to see which are to be discharged, and it is a legitimate and convenient, if not strictly a necessary part of this process, to ascertain their amounts and priority. Such ascertainment in advance is in furtherance of the purpose of the Act to enable assignees "to make advantageous sales of said real estate," and the Act without any strain will bear this construction. We are therefore of opinion that the sale should be preceded by an ascertainment of the liens, if any, which will remain, and of those which will be discharged, together with their several amounts and their respective rank or priority.

The order appealed from is directed to be modified as herein indicated. Costs of this appeal to be paid by the appellees, but to be reimbursed out of the fund produced by the sale.

PHILADELPHIA TRUST CO. ET AL.'S APPEAL.

April 29, 1895. MITCHELL, J. By the second codicil to his will Edward S. Handy, Sr., directed that upon the death of his wife his trustees should divide his "estate both real and personal into four equal shares, and one equal share shall be held by my said trustees for each one of my said children *upon the trusts and for the same purposes as are set forth in my will, and for no other trust or purpose whatsoever.*" It is claimed by the appellant that this last clause of the sentence establishes a spendthrift trust for the whole share of E. S. Handy, Jr., and puts it all beyond the reach of his creditors. It is necessary therefore to look carefully into the trusts and purposes set forth in the will. So far as concerns the children the provisions of the will are that the residue, being the bulk of the estate, is left in trust to the present appellant, 1, to allow testator's wife to occupy his city and country residences with the children, and after her death to allow the children to reside in his country house if they desire to do so without paying rent; 2, to pay one-half the net rentals and income to his wife, and to divide the other half in equal shares among his four children; 3, upon the death of his wife to pay one-fourth of the net income of his estate to each of his daughters during her life to her separate use; 4, upon the death of either daughter to pay three-fourths of the principal of her share to her issue, if any, or in default of issue then to testator's surviving children, and the other fourth as his said daughter may direct, etc.; 5, when each of his sons attains the age of twenty-one to advance him in their discretion with his wife's consent,

Digitized by Google

twenty thousand dollars; 6, after the death of his wife to pay each of the sons one-half of his share as he shall attain the age of twenty-five, and half of the rest or one-fourth of his whole share when he attains the age of twenty-eight, and the remaining fourth to hold on a spendthrift trust for the life of the son. It is thus seen that the will creates six separate trusts or duties on the part of the trustees, all of which require the whole estate except the sums authorized to be loaned to the sons, to be kept together during the widow's life, and four of which necessarily extend the duration of the trust as to the larger part of the estate, during the lives of the four children. This is evidently the result contemplated by the testator, and the only provisions made for a separation of the joint estate and a partition or division of any of the corpus, are after the death of the widow, upon the death of a daughter, or the attaining of the ages of twenty-five, and twenty-eight, by the sons. The will was made in 1874, the codicil in 1883, and in the interval both of the sons had come of age, but it does not appear if the younger had reached twenty-eight or even twenty-five. Turning now to the codicil, its first and main purpose is manifest at once, to provide for a division of his estate at an earlier period than he had contemplated in his will. He revokes the power to sell his real estate in the city of Philadelphia, and directs the trustees upon the death of his wife to divide his estate into four equal shares and to hold one share for each child "upon the trusts and for the same purposes as are set forth in my will, and for no other trust or purpose whatsoever." These last words are very significant, they express the intention to make no new trusts but to continue the old ones. Something was necessary to be said on this subject or it would have been fairly open to inference that the peremptory direction to divide, without restriction, had done away entirely with the trusts in the will after the widow's death. Let us look at what is left of these untouched by the codicil. All of them remain unchanged during the life of the widow. At her death the separate use trusts for the daughters, and the direction as to the devolution of their shares upon their respective deaths, remain, with the single alteration that the period of division or separation of the common estate is advanced from the death of the mother and daughter both, to the death of the mother only. As to the sons, except the provision for the loan at twenty-one, the trust by the will was to continue for the whole share during the mother's life and until each should reach twenty-five, then for one-half until he should reach twenty-eight, and then for one-quarter for his life to protect against creditors, anticipation, etc. No separation of his share from the common estate was to be made except as to the above named fractions at the periods specified. By the codicil the division of the estate in common into four shares in severalty is to be made upon the mother's death, but no change is made in the times of distribution. Each son under the codicil is to get as he did under the will, one-half at twenty-five, one-quarter at twenty-eight, and one-quarter to be held for his life. The trusts of the will continue under the codicil for the protection of this part of the testator's purpose.

It will thus be seen that there was a necessity for the testator in his codicil to refer to the subject to prevent the implied revocation of the trusts in the will; that what he expressed was an intention to preserve those trusts but not to create new ones; that there were amply sufficient of the trusts expressly created by the will, left unaffected by the codicil, to satisfy his direction that the shares of each child should be held upon such trusts; and that to construe the codicil as effecting an entire change in his provision for his sons by putting their whole shares under spendthrift trusts, is not only uncalled for, but would be subversive of his intent not to create any new trusts expressed in his direction that the shares were to be held for the same trusts and purposes as in his will, "and for no other trust or purpose whatsoever." The learned master and Court were therefore right in their construction of the will upon this question.

The matters in the third and fourth assignments of error have been disposed of in Larned's Appeal, opinion filed herewith, to which reference is made without further discussion here.

Appeal dismissed, costs of this Court to be paid by appellant. H. B.

Jan. '95, 283. March 1, 1895.

Fassett's Appeal.

Dower—Release of arrearages of—Parol gift—Sheriff's sale—Distribution.

A widow's receipt for arrearages of her dower, specifying the years for which it is given, is a gift to the tenant of the land upon which the dower is charged, and extinguishes her title to dower for the years specified, so that she will not be allowed to participate in the distribution of a fund arising from a sheriff's sale of the land on which the dower is charged.

Appeal of John B. Fassett and Mary J. Fassett, from the decree of the Common Pleas of Wyoming, in sustaining exceptions filed to the report of an auditor appointed to distribute a fund arising from the execution of certain writs of fieri facias real estate.

Digitized by Google

The fund in Court was derived from the sheriff's sale of real estate of H. C. Frost, and after deducting the cost of the sale it amounted to $1140.63. The land was formerly the property of Jason Frost, and after his death it was taken by his son H. C. Frost, in partition proceedings, charged with the sum of $2501.66⅔, the interest upon which ($150.10) was to be paid annually to the widow of Jason Frost, viz., Mary Frost. Afterwards H. C. Frost sold a portion of the land so allotted, to his brother Charles M. Frost, who was to pay $54.20 of the widow's annual charge to Mary Frost, who consented to this arrangement, so that the land sold by the sheriff was only charged with the annual sum of $95.90. On September 2, 1890, the appellants entered judgments Nos. 44 and 45, November term, 1890, which became the first liens on H. C. Frost's real estate next to the widow's annual charge. On these judgments the land was sold and the fund produced which was for distribution before the auditor. This fund was claimed by the appellants on their judgments; it was also claimed by subsequent judgment creditors of H. C. Frost, viz., N. H. Davis & Co. and Shaler & Clark, who also produced assignments from Betsy Frost, wife of H. C. Frost, who claimed the fund as assignee of the arrearages of the widow's annual charge, which they claimed had not been paid or satisfied.

To defeat this claim the appellants proved that Mary Frost, the widow, had given H. C. Frost a receipt for all arrearages down to and including the year 1888, and before she made any assignments thereof, and appellants contended that such receipt was a discharge or relinquishment thereof *pro tanto*.

The auditor sustained the appellants' contention and awarded to the assignees of Mary Frost the arrearages accruing after April 20, 1888, and the balance to the appellants as lien creditors of H. C. Frost. To this the appellees filed exceptions, which the Court sustained and awarded the whole fund to appellees. From that decree and distribution this appeal is taken.

Charles E. Terry (*E. J. Jorden* with him), for appellant.

The main question presented in this appeal is this: Can a holder of a non-negotiable instrument, during his ownership thereof, make a gift to the obligor of a portion of the money thereby secured, which will be binding upon an assignee?

Any act on the part of the owner of a chose in action showing a present intention to transfer it is sufficient.

Malone's Estate, 13 Phila. 313.
Crawford's Appeal, 61 Pa. 52.
Carpenter *v.* Soule, 88 N. Y. 251.
Green *v.* Langdon, 28 Mich. 221.

Therefore the assignees took the assignment subject to the receipts. They amounted to payment, of which the assignees were bound to take notice or make inquiry, the recognizance being a non-negotiable instrument.

Lane *v.* Smith, 103 Pa. 415.
Eldred *v.* Hazlett's Adm'r, 33 Id. 307.
Faull *v.* Tinsman, 36 Id. 108.
Todd *v.* Stokes, 10 Id. 155.
Frantz *v.* Brown, 1 P. & W. 257.

"The assignee of the assignee of a bond takes it subject to all the equities existing at the time of the assignment between the obligor and the first assignee, notwithstanding such equities may have arisen before the bond came into the hands of the first assignee."

Metzgar *v.* Metzgar, 1 Rawle, 227.

James W. Piatt (with him *Wm. Maxwell* and *Charles M. Lee*), for appellees.

The gift of a bond, note or any other chattel cannot be made in words *in futuro*, or by words *in præsenti*, unaccompanied by delivery of the possession which makes the disposal of the thing irrevocable.

Campbell's Estate, 7 Pa. 100.
Bell *v.* Bell, 12 Id. 235.
Withers *v.* Weaver, 10 Id. 391.

The gift must take effect at once and completely, and when it is made perfect by delivery and acceptance, it then becomes irrevocable to the donor. Gifts *inter vivos* have no reference to the future but go into immediate, absolute effect.

Smith's Adm'r *v.* Dorsey, 38 Ind. 454.
Smith *v.* Ferguson, 90 Id. 229.

A gift must be absolute and the donor must, at the time of the gift, part with all present and future dominion over it.

Allen Adms. *v.* Polereczky, 31 Me. 338.
Grover *v.* Grover, 24 Pick. 261.

No gift *inter vivos* is sustained as conferring title, unless the change of possession be positive, and the donor in no condition to re-possess himself of the subject matter of the gift or recall the same.

Little *v.* Willetts, 55 Barb. N. Y. 129.

In Coutts *v.* Acworth, Law Rep. 8 Eq. 558, it was held that a party taking a benefit under a voluntary settlement or gift containing no power of revocation, has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable.

Miskey's Appeal, 107 Pa. 629.

By the assignment the assignee becomes entitled to every remedy, lien or security that

Digitized by Google

could have been used or made available by the assignor as a means of indemnity or payment.

1 Am. & Eng. Encyc. 844.
Mehaffy *v.* Shore, 2 P. & W. 361.
Foster *v.* Fox, 4 W. & S. 92.
Donley *v.* Hays, 17 S. & R. 400.
Philips *v.* Bank, 18 Pa. 394.
Cathcart's Appeal, 13 Id. 416.

"One party is not estopped by declarations (and, we may add, receipts) by which the other party was not misled and upon which he did not rely."

McKnight *v.* Bell, 135 Pa. 158.
Albert *v.* Ziegler, 29 Id. 50.
Megargel *v.* Megargel, 105 Id. 479.
Walsh's Appeal, 122 Id. 177.

April 15, 1895. GREEN, J. The auditor found upon abundant testimony "that Mary Frost gave to her son Henry C. Frost a written receipt for all arrearages of dower due her up to April 20, 1888." It is beyond all question that by this action the widow intended to give, and did give to her son, absolutely and without any condition, all the arrearages of dower which were due her to the date mentioned. A title by gift is just as good as a title by deed and cannot be revoked after the gift is completed. In this case the donor has never revoked the gift or attempted to do so, and it is not in the power of any other persons to do so for her, nor could she do so herself after it was completed. The subject of the gift here was money due to the donor from the donee. If the money due had actually been paid by the donee to the donor and the receipt given, and then the donor had handed back the money to the donee, no possible question could have arisen as to the effect of the transaction. But the handing of the money back and forth was entirely unnecessary, and therefore the giving of a receipt was just as efficacious to extinguish the title of the donor to the money as if its bodily transmission from the one to the other and back again had actually taken place. The question arises only between the donor and donee. No rights of creditors of the donor are involved because there were none. As to any subsequent assignees they could not take what the donor could not give them, and they could only take what she had to give, that is, moneys due for dower after April 20, 1888.

These considerations are quite sufficient to dispose of the case. Some attempt is made to affect the quality of the gift by an effort to clothe it with a condition, but it is altogether futile. It is argued that because no money was actually paid and the recognizance was not surrendered there was no good legal gift. As to the surrender of the recognizance it was neither feasible nor essential to the gift. Further payments in the future would become due under it, and it could not be surrendered by the widow even if she had so desired. As to the payment of money for the receipt, if that were necessary, there could be no such thing as a gift of money due to the donor. If it had to be purchased and paid for it would not be a gift at all.

The effort to prove a condition is equally untenable. The argument is founded upon the testimony of the widow. She says, "I signed his receipt but I never received any money, but I supposed he would pay me when he got able." Of course her *supposition* on this subject is only a supposition and not a condition of the gift in the least possible sense. Again she testified, "He said if I needed it and he got able he would pay me notwithstanding I had given him this receipt." As it has not yet been proved that her son has ever been able to pay this money back, or that his mother needed it, this remark of the son would be utterly ineffectual to defeat the gift, even if it had amounted to a condition of the gift. But it never had any such quality. It was not exacted by the mother as a term of the gift, nor could it be pretended to be of any higher dignity than a mere casual remark of the son. It had nothing to do with the gift. The numerous authorities cited in the argument for the appellees are altogether wide of the mark. They are not relevant to the question at stake here. The subject of the gift was moneys due to the donor for arrearages of dower due to her by the donee. She gave them to him in the only way in which such a gift could be made, viz., by a receipt in full to a certain date. That act was absolute, unqualified, completed by a delivery of the receipt to the donee, never questioned by the donor, and completely efficacious to convey her title to the arrearages due. That is all that is necessary to make a complete and perfect gift of such a subject matter. The assignments of error are all sustained.

The decree of the Court below is reversed at the cost of the appellees and the record is remitted with instructions to distribute the fund in accordance with this opinion. W. D. N.

July, '94, 89. January 16, 1895.

McNeile v. Cridland.

Principal and agent—Representations by agent—Principal bound thereby—Misrepresentations, an offset to mortgage.

In a scire facias upon a purchase money mortgage testimony that in purchasing the mortgaged premises, the defendants relied on representations made by the plaintiff's agent, through whom the sale was negotiated, to the effect that the house was built on solid and not on made

Digitized by Google

ground, a well-built house, etc., that, instead, it soon became apparent that the house was erected on filled in or made ground, which gradually settled to such an extent as to cause the sinking, cracking and bulging out of the front wall and other resultant damages, and that an expenditure of seven or eight hundred dollars would be required to repair the damages thus occasioned, and put the building in proper condition, should be submitted to the jury with proper instructions as to the law applicable to such facts as the defendant's testimony tended to prove, and it is error when such testimony has been offered to direct a verdict for plaintiff for the full amount of the mortgage.

A principal is bound by the acts of his agent within the scope of the authority that he is held out to the world to possess, even if the latter acts contrary to instructions.

Appeal of Martha H. Cridland and Ella Cridland, defendants, from the judgment of Common Pleas No. 2, of Philadelphia County, wherein Hugh McNeile was plaintiff.

This was a scire facias upon a purchase money mortgage given by the defendants to the plaintiff, who was the former owner and builder of the house No. 2220 North 16th St., Philadelphia, Pa. The defendants gave evidence showing that at the time of the purchase of the house, one Locker, the agent of the builder and vendor, (plaintiff) told the defendants that the house was built on solid, and not on made or filled-in ground, and that the house was well built and first-class in every respect, and that everything not right would be made right; that the sale was made on Feb. 25, 1890, as the house was nearing completion, and the price was $4,400; that the representation of the agent was the inducement for their purchase of said house; that at the time of the trial the front wall of the house showed a bulge of three inches; large cracks appeared along said wall; the stairs were pulling out of their casings, and experts testified that the bulge in the front brick wall was caused by the sinking of the foundation, and that the sinking of the foundation was caused by the giving way of the filled-in, or made ground, upon which said house was built. There was no denial of the agent's authority or his representations, and no rebuttal of the expert testimony given by the defence. The Court, PENNYPACKER, J., directed the jury to find a verdict for the amount of the mortgage. Verdict and judgment accordingly. The defendants took this appeal. The assignment of error was that the Court erred in directing the jury to find a verdict for the plaintiff for the amount of the mortgage.

Joseph W. Shannon, for appellants.

Locker's representations to the defendants that the house was built on solid ground and not on made ground, was the actual inducement to the purchase of the property.

The defendants made a full and complete defence by proving through their experts that these representations were material and false in fact.

The plaintiff is bound by the declarations of his agent made to the defendants before the sale of the property to them.

Brooke *v* New York, Lake Erie & Western R. R. Co., 108 Pa 529.
Keough *v*. Leslie, 92 Id. 424.
McFeely *v*. Little, 19 WEEKLY NOTES, 97.
Caley *v*. Philadelphia & Chester County R. R. Co., 80 Pa. 363.

There was a want of consideration for the bond which was given, which is a legal defence to this suit.

Penn Natural Gas Co. *v*. J. W. Cook, 123 Pa. 170.
Hessner *v*. Helm, 8 S. & R. 178.
Stubbs, Administrator of Pyle *v*. King, 14 Id. 206.

The evidence offered by the defendants presented an issue of fact, which was a question for the jury.

German Insurance Co. *v*. S. A. Davenport, 9 Atl. 517.
Gates *v*. Watt, 127 Pa. 20.
McGrann *v*. Pittsburgh & Lake Erie R. R. Co., 111 Id. 171.
12 Am. & Eng. Ency. of Law, 926, 931.

H. Gordon McCouch, for appellee.

Chief Justice GIBSON in the case of Stubbs, Admr. of Pyle *v*. King, 14 S. & R. 206, has correctly stated the rule under which parol testimony is admissible to vary the terms of a written contract. Tested by this rule, the appellants under the plea of payment were obliged to give notice of such special matter as would have served for a declaration in an action of deceit. There can be no question that in an action of deceit the *scienter* must be both alleged and proved.

Dilworth *v*. Bradner, 85 Pa. 238.
McCandless *v*. Young, 96 Id. 289.
Duff *v*. Williams, 85 Id. 490.

It may well be doubted whether if there had been evidence of fraud, it could have been introduced under the notice given by the defendants. The fundamental error under which defendants' counsel labored in the Court below and which is apparent in his argument now presented to the Supreme Court, is in treating the alleged representations made by plaintiff through his agent, as though they constituted a warranty and in failing to recognize that the only defence admissible to vary the written contract is proof of fraudulent misrepresentations. No evidence whatever was submitted to show that either plaintiff or his agent knew or had reason to know that this statement was untrue, nor was there any evidence from which the jury could properly find that it was in fact untrue. Not a single witness testified he ever saw the ground before the houses were built or had any knowledge as to its character. This is significant.

Digitized by Google

There was not more than a scintilla of evidence from which it could be inferred that the representation made that the house was built on solid ground was untrue. There is no testimony at all from which it could be inferred that plaintiff knew, or had reason to know, that the house was not built on good solid ground, and as the *scienter* of the vendor at the time the misrepresentation was made, is the vital question, the trial Judge committed no error in giving binding instructions for the plaintiff. Fraud is a serious accusation not to be lightly inferred and it would have been doing violence to the conscience of the Court to have submitted that question to the jury on the evidence produced by the defendants.

May 6, 1895. STERRETT, C. J. In directing a verdict in favor of plaintiff for balance due on the purchase money mortgage in suit, the learned trial Judge evidently proceeded on the assumption that the testimony introduced by defendants was wholly insufficient to sustain any defence whatever to plaintiff's claim or any part thereof. This assumption we think was unwarranted. The testimony referred to presents questions of fact which should have been submitted to the jury. It tends to prove, among other things, that in purchasing the mortgaged premises the defendants relied on representations made by plaintiff's agent, Locker, through whom the sale was negotiated, to the effect that the house was built on solid and not on made ground, a well built house, etc., that, instead of being well built and on solid ground, it soon became apparent that the house was erected on filled-in or made ground which gradually settled to such an extent as to cause the sinking, cracking and bulging out of the front wall and other resultant damages described by defendants' witnesses, and that an expenditure of seven or eight hundred dollars would be required to repair the damages, thus occasioned, and put the building in proper condition.

It is unnecessary to refer in detail to the testimony tending to prove the allegations of fact relied on by defendants. It is sufficient to say that, if believed by the jury, they would have been warranted in finding that the alleged misrepresentations were in fact made by plaintiff's agent Locker; that they were not only untrue, but, in the circumstances, they were calculated to deceive and did deceive the defendants to their injury. This being so, the case should have been submitted to the jury with proper instructions as to the law applicable to such a state of facts as defendants' testimony tended to prove. It was the exclusive province of the jury to consider and pass upon the testimony, and, if they found defendants' allegations were substantially true, then to ascertain the damages sustained by them, and, if they were less than plaintiff's claim, to deduct the same therefrom, etc.

It is well settled that the principal is bound by the acts of his agent within the scope of the authority that he is held out, to the world, to possess, even notwithstanding the latter acted contrary to instructions. One who authorizes another to act for him, in a certain class of contracts, undertakes for the absence of fraud in the agent acting within the scope of his authority. Among other cases, recognizing this and kindred principles, are the following: Brooke *v.* Railroad Co., 108 Pa. 529; Smalley *v.* Morris, 157 Id. 349; Keough *v.* Leslie, 92 Id. 424; Caley *v.* Railroad Co., 80 Id. 363; Hessner *v.* Helm, 8 S. & R. 178; Stubbs *v.* King, 14 Id. 206; Penn Nat. Gas Co. *v.* Cook, 123 Pa. 170. In the latter it was said: "There is a long series of cases—some of them very recent, ... that when an agent exceeds his authority, his principal cannot avail himself of the benefit of his act and at the same time repudiate his authority. This principle rests upon the solid foundation of natural justice and common honesty."

It follows from what has been said that the learned trial Judge erred in directing a verdict for the plaintiff.

Judgment reversed and a venire facias de novo awarded.

W. C. S.

July, '94, 189. January 24, 1895.

Edison Co. v. Thackara M'f'g Co.

Act May 25, 1887, P. L. 271—Statement—Affidavit of defence—License of patent right—Judgment for want of sufficient affidavit of defence—Assessment of damages.

The requirement of the Act of May 25, 1887, P. L. 271, that the plaintiff's demand be stated "concisely," and the rule of Court that where damages are capable of liquidation it must contain an explicit averment that the amount claimed is "justly due," mean that the truth of the actual facts must be followed.

A judgment for want of a sufficient affidavit of defence will be reversed if the assessment of damages is irreconcilable with the amount claimed in the statement.

A license to manufacture patented articles is in the nature of a monopoly, and he who enjoys this right must pay the agreed consideration for it, though the patent may not be valid in law, but when it ceases to be a monopoly and others participate in the manufacture of the goods there is a failure of consideration and he is no longer obliged to pay.

Angier *v.* Eaton Co., 98 Pa. 594, followed; Hardwick *v.* Galbraith, 147 Id. 333, distinguished.

Appeal of the Thackara Manufacturing Company, from the judgment of the Common Pleas

Digitized by Google

No. 1, of Philadelphia County, entered for want of a sufficient affidavit of defence in an action of assumpsit wherein the Edison General Electric Company and George Maitland were plaintiffs and appellant was defendant.

The statement set forth a case to the following effect:—

Action was brought by the plaintiffs to recover the royalties claimed to be due under a license for the manufacture of certain electric light fixtures and other apparatus covered by certain letters patent of the United States specified in the license. The license agreement provided that the defendant should pay to the plaintiffs a royalty of three per cent. upon the net wholesale selling price of the fixtures manufactured and sold or imported and sold by the defendant. Plaintiffs averred that defendant failed to pay the royalty due under the agreement on the first day of October, 1891, or thereafter, and that the wholesale selling price of the fixtures made and sold and imported by defendant during each of the seven quarters from October 1, 1891, to the bringing of the suit amounts to $4,000 and upwards, and therefore claimed to recover the sum of $571.43 in each quarter.

The affidavit of defence averred that royalties were paid up to the 1st of April, 1892, and this was afterwards admitted. It denied that defendant had since the 1st of April, A. D. 1892, manufactured any apparatus which was covered by any of the letters patent specified in the license except those covered by two letters patent, Nos. 259,235 and 294,697, the device covered thereby consisting simply of running the wires for electric lamps between the gas pipe and the shell of the gas fixtures, and averred that it had repudiated the license and abandoned the same, and refused to pay the royalties specified therein, and had not since said 1st of April, 1892, manufactured these electric light fixtures under said license, but in hostility thereto; and further averred that the patents in question were void and invalid for reasons therein specified.

The affidavit further averred that in any event the defendant was not liable for the sum of $571.43 per quarter, claimed in the statement, as appeared by the face thereof.

And lastly it averred that at the time the agreement of license was made the defendant, with others, were members of an association known as the Gas and Electric Fixtures Association, and that part of the object, purpose, and intent of the formation of said association was that licenses similar to the one sued on should be granted to all the members thereof, but to no others. That the plaintiffs well knew this fact and agreed thereto, and as an inducement to signing and execution of the license here sued on made at that time, the plaintiffs agreed and undertook verbally that they would and should prevent all others, save licensed members of said association, from making, selling, or using fixtures covered by said letters patent, and relying thereon and in consideration thereof, the license was signed by the defendant; and the affidavit then avers that the said plaintiffs have not prevented others, not licensees or members of said association, from making, selling, and using said fixtures, covered by said letters patent, but, on the contrary, the same have been made, sold, and used by others in like business with defendant, not licensees or members of said association, naming ten such persons, and averring that thereby the defendant is unable to compete in its business with those selling the same fixtures without the payment of royalty, and the association has become disorganized and ceased to exist, and therefore the consideration for said license has failed. A rule for judgment for want of sufficient affidavit of defence was taken which after argument was made absolute and the damages were assessed at $2,582.85.

The defendant took this appeal.

H. B. Gill, (with him *John R. Read* and *Silas W. Pettit*), for appellant.

It may be admitted that where a licensee is enjoying the benefit of the supposed validity of a patent he is estopped from denying the same in an action for royalties due under the license, but it is not the law that under all circumstances the licensee, by merely becoming such, is bound to admit such validity and pay the royalties. If he is not enjoying the supposed validity of the letters patent, and has not covenanted not to contest it, he cannot be compelled to pay the license fee. He may repudiate, and, after notice to the licensor, manufacture in hostility to the patent and deny its validity.

Hayne *v.* Maltby, 3 Tenn. Rep. 438.
Marston *v* Swett, 82 N. Y. 526.
Lawes *v.* Purser, 6 El. & Bl. 930.
White *v.* Lee, 3 Fed. Rep. 224.
Kinsman *v.* Parkhurst, 18 How. 289.

In a case analogous to this the same defence was held to be good.

Hardwick *v.* Pollock, 51 Leg. Int. 94.

No argument was made in behalf of appellees.

April 29, 1895. MITCHELL, J. The plaintiffs' case comes before us in an exceedingly unfavorable light, from the apparent recklessness with which facts are sworn to which they should have known to be untrue. Plaintiffs in their statement "aver that there is justly due to them by defendants the sums of $571.43 with interest from October 1, 1891; $571.43 with interest from January 1, 1892; $571.43 with interest from April 1, 1892," and four other similar quarterly sums with interest from later dates, and this statement is sworn to. The affidavit of de-

Digitized by Google

fence avers explicitly that the defendant "has paid plaintiffs in full by check which was duly paid, for all royalties due up to the first day of April, 1892, *and has plaintiffs' receipt therefor*," and plaintiffs have apparently conceded the truth of this defence by taking judgment for the later sums only. Such looseness is not to be commended. When the Procedure Act of May 25, 1887, P. L. 271, substituted "a concise statement of the plaintiff's demand" for a common law declaration, and the rule of the Court below required the statement to be sworn to, and where damages are capable of liquidation to contain "an explicit averment of the amount claimed to be justly due," these matters ceased to be merely formal and became substantial with a resulting necessity to follow the truth of the actual facts.

This judgment must be reversed for the variance between the averment and the assessment of damages. The statement sets out that there is due under the agreement sued on "three per centum of the net wholesale selling price of the fixtures, etc., manufactured and sold by defendants," etc., and that plaintiffs are "unable to state the exact amount of royalties due . . . but believe that the net wholesale selling price . . . of the devices covered by the patents made and sold during each of these seven periods, amounts to $4,000 and upwards, and plaintiffs therefore claim to recover on this account the sums of $571.43 with interest" from each of the seven quarterly periods named. The amount claimed is certainly not three per cent. of the alleged selling price, but more than four times that much, and the principle upon which such result was reached nowhere appears. But plaintiffs upon the rule being made absolute for judgment, abandoning as already said the first three items of their claim, assessed the damages on the other four at the full sums claimed with interest. There is nothing on the record to sustain such an assessment.

Coming now to the substantial matters of defence to the whole claim, the affidavit avers that defendant has paid all royalties due up to April 1, 1892, and has not since that date incurred any liability for royalties or manufactured any of the articles named in the agreement except electric light fixtures claimed to be covered by patents Nos. 259,235 and 294,697, and as to these that the said patents are wholly void and invalid, and defendant has refused to pay royalty, repudiated the license, and manufactured in hostility thereto. And further that there has been a failure of consideration, in that the agreement was made on the inducement at the time of signing that plaintiffs would prevent all other parties not members of the Gas and Electric Fixtures Association (of which defendant covenanted that it was and should continue a member) from manufacturing or selling the articles named, and that plaintiffs have not done so, but that said articles are made, and sold by other parties named, not members of the said association and not paying royalty, and thereby defendant has been unable to compete in its business with such others selling without the payment of royalty. The merits of such a defence by a licensee have been settled by this Court in Angier *v.* Eaton Co., 98 Pa. 594, where it was said by the present Chief Justice, "the right was in the nature of a monopoly and so long as it was enjoyed the defendant was bound to pay the consideration therefor; but when by reason of something beyond the company's control it was deprived of that exclusive right, in other words when the consideration failed, why should it be compelled to pay? . . . The recognized principle applicable to such licenses is that while the patent is apparently valid, and the licensee is enjoying the benefit of its supposed validity, he is bound to pay the stipulated royalty, and cannot set up as a defence the actual invalidity of the patent; but when in addition to the invalidity of the patent by reason of a prior outstanding patent, it is shown that the owner of the prior patent is asserting his exclusive rights thereunder by supplying the market with the patented article, and the licensee under the invalid patent is deprived of the monopoly for which he contracted, and in consideration of which he agreed to pay the royalty, he may defend on the ground of actual failure of the consideration." In the present case the monopoly is not exclusive in the defendant, but was to be enjoyed with others who were also members of the association, and who also paid royalty. The difference is one of degree only, not of principle.

Subsequent cases have not disturbed these well settled principles. In Hardwick *v.* Galbraith, 147 Pa. 333, it was held that a license does not of itself import a monopoly, but in the present case it is expressly set up in the affidavit that there was to be a monopoly among the members of the association, all of whom paid royalty. In Jarecki Co. *v.* Hays, 161 Pa. 613, the pith of the decision, p. 617, is that a licensee *receiving the benefits* must pay the fees without regard to the validity of the patent; and in Hardwick *v.* Galbraith, *supra*, and Patterson's Appeal, 99 Pa. 521, it was held that the licensees could not set up the invalidity of the patent as a defence because they had agreed that the test on that point should be an adverse decision by a court of competent jurisdiction. All these cases are in entire harmony with Angier *v.* Eaton Co., *supra*.

The defendant was entitled to go to a jury on the defence set up in his affidavit.

Judgment reversed and procedendo awarded.

W. D. N.

Digitized by Google

Common Pleas.

C. P. No. 4. June, '88, 842.

Sweeting v. Wanamaker, Defendant, Hallowell, Garnishee.

Practice—Attachment execution—Additional interrogatories.

If the plaintiff takes judgment against the garnishee on his answers to interrogatories, he cannot afterwards require answers to additional interrogatories, but must issue a fresh attachment.

Rule to strike off interrogatories in attachment sur judgment.

The facts appear sufficiently in the opinion of the Court.

Jacob Snare, Jr., for the rule.

Robert N. Simpers, contra.

April 10, 1895. ARNOLD, J. On Sept. 14, 1888, judgment was entered in favor of the plaintiff against the defendant for $1,072.82, and on the same day a fi. fa. was issued, which was returned *nulla bona*, and at the same time an attachment execution was issued, by which Mr. Hallowell, executor and trustee under the will of John Hallowell, deceased, was summoned as garnishee. Interrogatories to the garnishee were filed Dec. 17, 1888, and on Jan. 8, 1889, answers were filed by Mr. Hallowell. On Feb. 2, 1889, on these interrogatories and answers, it was adjudged that the garnishee had in his possession $704.23 belonging to the defendant, and that the plaintiff have execution thereof, less a garnishee's counsel fee, taxed at $5. Nothing further was done in the way of execution or revival of the judgment until Feb. 16, 1895, when the plaintiff filed a new set of interrogatories to the garnishee and ruled him to answer, whereupon the garnishee entered a rule to strike off the interrogatories, and this raised the question now before the Court.

The writ of attachment sur judgment, or attachment execution, as it is commonly called, serves a double purpose; it is a writ of execution against the defendant and a summons to the garnishee: Wray *v.* Tammany, 13 Pa. 395; Strouse's Executor *v.* Becker, 44 Id. 206; Hays *v.* Lycoming Fire Insurance Co., 99 Id. 621; McCormac *v.* Hancock, 2 Id. 310. It must be served on the garnishee in the manner provided for the service of a summons in a personal action: Act of June 16, 1836, sec. 36, P. L. 768; Purves *v.* Lex, 19 WEEKLY NOTES, 392, S. C. The effect of it is to require the garnishee to withhold the property of the defendant in his possession from the defendant, and apply it to the satisfaction of the defendant's indebtedness to the plaintiff. The practice, after the service on the garnishee, is to file interrogatories to him inquiring what money or property of the defendant the garnishee has in his hands, and take a judgment, or rather an adjudication or finding, on the admissions in the answers, if the plaintiff is satisfied therewith, that the garnishee has certain money or property of the defendant in his hands subject to the attachment, describing it, and that the plaintiff have execution thereof; or, if the plaintiff is not satisfied with the answers of the garnishee, he may rule the garnishee to plead and go to trial on the issue made thereby. When either of these modes is pursued and judgment is entered, finding that the garnishee has in his possession money or property of the defendant, or in favor of the garnishee, the force of the attachment is spent, and the plaintiff cannot file new interrogatories or rule the garnishee to plead and have jury trials *ad infinitum*: Bradley *v.* Bradley, 3 Phila. 414; Excelsior Brick Co. *v.* Gibson, defendant, and Haines, garnishee, 21 WEEKLY NOTES, 32. It is true the plaintiff may file additional interrogatories at any time before taking judgment on the answers: Mullen *v.* Maguire, 1 WEEKLY NOTES, 331 and 577; Andress *v.* Lewis, 17 WEEKLY NOTES, 270. But after judgment the attachment execution has no more vigor; it is like a fi. fa. on which a portion of a judgment has been collected. A second attachment is necessary when satisfaction has not been obtained on the first: Pontius *v.* Nesbit, 40 Pa. 309; but an alias attachment, which is issued to the same garnishee before the original is disposed of, will be dissolved, unless the plaintiff discontinues the original: Rutter *v.* Ely, 4 Kulp, 348; although, from the act of issuing the second attachment and other acts, or delay by the plaintiff, an intention to abandon the original may be presumed, so as to divest the lien of the original: Wilkinson's Estate, 30 Pitts. L. J. 401. If the plaintiff takes judgment against the garnishee on his answers to interrogatories, he cannot afterwards require answers to additional interrogatories. He must issue a fresh attachment.

Rule absolute and interrogatories struck off.

C. P. No. 4. June, '88, 842.

Sweeting v. Wanamaker, Defendant, Hallowell, Garnishee.

Practice—Attachment execution—Sci. fa. to revive—Act of May 19, 1887, P. L. 132.

An attachment execution issued on a judgment more than five years old must be accompanied by a scire facias to revive the judgment.

Rule to set aside writ of attachment execution.

The facts appear sufficiently in the opinion of the Court, *infra*.

Jacob Snare, Jr., for the rule.

Robert N. Simpers, contra.

Digitized by Google

April 27, 1895. ARNOLD, J. Judgment was entered September 14, 1888, and fi. fa. and attachment sur judgment were issued the same day. The fi. fa. was returned *nulla bona*, and partial satisfaction of the judgment was obtained by the attachment execution. No writ of scire facias has been issued to revive the judgment, but on April 6, 1895, another writ of attachment sur judgment was issued to the same garnishee as in the first attachment. The garnishee moves to strike off this second attachment, because a sci. fa. to revive was not issued at the same time the attachment execution was issued, as required by the Act of May 19, 1887, P. L. 132; and this raises the question to be decided.

It was decided under prior Acts relating to the time of issuing executions, that an attachment execution might be issued after the time fixed by the statutes for issuing executions, if a fi. fa. had been issued within the time fixed by the Acts: Ogilsby *v.* Lee, 7 W. & S. 444; Gemmill *v.* Butler, 4 Pa. 232; Todd *v.* Lowe, 14 WEEKLY NOTES, 550; although there is a decision that a fi. fa. could not be issued on a judgment more than five years old, even if an attachment execution had been issued within the five years: Esser *v.* Smith, 15 Phila. 144. The decisions permitting an attachment execution after the time limited by the Acts of Assembly, were based on the fact that the writ of attachment execution contains a clause of scire facias to the defendant; which, while it was decided not to be error, was held to be surplusage in Layman *v.* Beam, 6 Wharton, 181 (1841); but I apprehend it is not surplusage since the decision in Corbyn *v.* Bolmann, 4 W. & S. 342 (1842), that the defendant must be served with a copy of the writ of attachment in order to make the proceeding effectual. To remedy the effect of this decision, it was enacted by the Act of April 29, 1844, P. L. 512, that if the defendant does not reside in the county, or a service of the attachment cannot be made within the bailiwick (as if the defendant's residence is unknown and he secretes or absents himself) the proceedings will be considered valid without a service of the writ on him; and by the Act of March 20, 1845, P. L. 189, it is provided that so much of section 36 of the Act of June 16, 1836, as requires service of the attachment on any defendant, be repealed, except where the defendant is a resident of the county in which the attachment issued; so that it is the duty of the sheriff to inquire for and serve the defendant if he can be found.

Another disputed matter was whether it was lawful to issue a fi. fa. on a judgment more than five years old, and it was decided that it was lawful if a previous fi. fa. had been issued within the five years: Baltz *v.* Monaghan, 15 WEEKLY NOTES, 501; Moyer *v.* Sekenger, 16 WEEKLY NOTES, 242 (1885); but not if the judgment was more than twenty years old: Davis *v.* McHenry, 11 WEEKLY NOTES, 304 (1882), or if there had not been a previous fi. fa. issued within five years after the date of the judgment: Marx *v.* Goldsmith, 14 WEEKLY NOTES, 173; Harmony Building Association *v.* Berger, 14 WEEKLY NOTES, 499 (1884); although there were good reasons given for a decision that it was not lawful in any case, unless the judgment has been revived, in Comstock *v.* Kilchenstein, 14 WEEKLY NOTES, 388 (1883).

No doubt these disputes led to the passage of the Act of May 19, 1887, P. L. 132, which provides that execution may be issued upon any judgment notwithstanding it has lost its lien on real estate, but not after the lapse of twenty years from its maturity or date, if at the same time execution is issued, a scire facias shall be issued to revive the judgment; and if the defendant files an affidavit of defence, it shall be lawful for the Court to stay the execution of the fi. fa. by an order preserving the lien thereof, and order the sci. fa. at the head of the list for trial at the next term of the Court. A writ of attachment sur judgment is an execution and so is a ca. sa. We do not think the provision for the stay of fi. fa. limits the scope of the word execution to fi. fas. only. This provision of the Act is intended to prevent a sale of the personal property of the defendant, while the right to levy upon it is in dispute, and it secures the plaintiff by preserving the lien of the execution until that dispute is settled. No such order is required on an attachment execution, because the interposition of a defence stays the proceeding until the defence is disposed of, as it may be in the trial of an issue between the plaintiff and the garnishee: Bohner *v.* Cummings, 91 Pa. 55. In the case of a ca. sa. on a judgment disputed by the defendant, the proceedings would have to be of a summary character; as otherwise the defendant might be deprived of his liberty during the delay in hearing his case. There is a difference between the sci. fa. clause in a writ of attachment execution and that in a writ to revive a judgment. One is a summons to show cause why the judgment should not be levied of the effects of the defendant in the hands of the garnishee, while the other is a summons to show cause why the judgment should not be revived preparatory to execution.

We are of opinion that the Act of May 19, 1887, furnishes the only mode of procedure by execution since its passage, and that it supersedes the former practice. It is a statute conferring a privilege not previously existing, and it must be taken with its burdens as well as its benefits.

Rule absolute. Writ of attachment set aside.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, MAY 31, 1895.* [No. 16.

Supreme Court.

Jan. '94, 505. January 9, 1895.

Heidenwag v. The City of Philadelphia.

Negligence—Independent contractor—Municipality—Fireworks—Act Aug. 26, 1721—Scaffolding.

A municipality which employs an independent contractor to do a piece of work which is not unlawful in itself is not responsible for injury occurring through the negligent performance of said work.

A municipality may lawfully make a contract for the preparation and setting off of fireworks within its limits.

The City of Philadelphia is not restrained from making a contract for an exhibition of fireworks by the Act of August 26, 1721.

The erection of a scaffolding necessary for the purpose of supporting set pieces of fireworks is within the contemplation of a contract for the display of fireworks, specifying such set pieces, and for the erection and care of such scaffolding the independent contractor for the display of the fireworks is responsible, and not a municipality which has engaged him to make such display.

A city may authorize a scaffolding to be erected on its highway or bridge for the purpose of the exhibition of fireworks, and such scaffolding is not a nuisance *per se.*

Appeal of John J. Heidenwag, plaintiff, from the judgment of the Common Pleas No. 3, of Philadelphia County, refusing to take off a non-suit entered in an action of trespass brought by said plaintiff against the City of Philadelphia.

This action was originally brought against the City of Philadelphia and the Consolidated Fireworks Company, to recover for the death of Albert Heidenwag, the minor son of the plaintiff, through the alleged negligence of the defendants. The sheriff returned *nihil habet* as to the fireworks company and the cause proceeded against the city alone.

On the trial, before FINLETTER, P. J., the plaintiff proved the following case:—

The Girard Avenue Bridge is one of the principal highways of the City of Philadelphia, crossing the Schuylkill river. The city entered into a contract with the company to give a display of fireworks on the bridge on the evening of July 4, 1893. The contract contained, *inter alia*, the following clauses:—

"The said party of the second part further agrees to fire or set off the said fireworks with accuracy and safety and to furnish the most expert artisans to do the said work of firing.

"The said party of the second part further agrees to be responsible for and pay for any injury or damage either to person or property that may occur by reason of the firing or setting off of the said fireworks, and to indemnify the said party of the first part against any loss, damage or expense that may in any manner accrue or arise to it by reason of the same."

For the purpose of displaying the fireworks a number of high derricks were erected on the south sidewalk extending the whole length of the bridge, they were formed in sections of about thirty feet each, the upright timbers 6 by 6 inches and forty feet high, with a capsill or cross piece at the top, were set in barrels filled with sand which stood on the sidewalk close to the curb, unsecured. Guy ropes extended from the uprights north and south, secured to the rails of the bridge; men had been at work erecting these derricks for four or five days previous to the accident.

On the afternoon of July 4, the entire south sidewalk was impassable by reason of these derricks, the north side was equally impassable by reason of the guy ropes fastened to the low rail of the bridge, and the fireworks standing ready to be raised on the derricks. The roadway on the north side was obstructed by piles of sand, bomb mortars, etc. Two railway tracks crossed the roadway, the northern one used by the cars going west, and the southern by those going east. There was a great mass of people, at least a thousand, crossing the bridge in two streams following the cars east and west, and as the cars would approach, the people going east were forced off the track on to the south side of the roadway near the derricks. Among these was Albert Heidenwag, eight years old, son of the plaintiff, in the custody of his uncle and aunt.

It was about three-thirty when Albert and his uncle and aunt started for home across the bridge. Following the current of people on the south roadway, they were about half way over, when one of the derricks, which some men were rearranging, fell, there being no supports for the barrel, struck the boy, crushed his skull, and caused death. The aunt, who at the time held him by the hand, was also struck and knocked down by the same piece of timber.

At the close of the plaintiff's case the Court entered a non-suit, which the Court in banc refused to take off.

The plaintiff took this appeal and assigned as error the entry of the non-suit and the refusal to take it off.

Edmund Randall, (*James A. Flaherty* with him), for appellant.

Digitized by Google

The erection of the derricks, etc., constituted a nuisance unless made for some proper municipal purpose, in which case the defendant should have properly guarded the public from danger.

Born *v.* Allegheny Plank Road Co., 101 Pa. 334.

The municipality was bound to keep the highway clear of obstruction.

Norristown *v.* Moyer, 67 Pa. 355.

The derrick was erected with the consent of the city, under a contract with it, to discharge fireworks, an unlawful purpose, the special license of the Governor not having been obtained.

Act Feb. 26, 1721, 1 Sm. L. 129.
Act Feb. 9, 1751, Id. 208.
Homer *v.* Com'th, 106 Pa. 221.
Ordinance of Phila., Sept. 23, 1864.

The city is therefore liable for the injury arising from the nuisance irrespective of negligence in its construction.

Dillon Mun. Corp. 1030, 1037.
Susquehanna *v.* Simmons, 112 Pa. 384.

Leonard Finletter, asssistant city solicitor, (*Charles F. Warwick*, city solicitor, with him), for appellee.

The Act of 1721 applies only to the city as it then existed, *i. e.*, to the territory lying between South and Vine streets and the rivers Delaware and Schuylkill. The Act of 1751 applies to towns and boroughs. There is no Act of Assembly which prohibits the display of fireworks upon a bridge over the river Schuylkill in a location which at the time of the passage of those Acts was a part of the County of Philadelphia outside of the city limits, and which was never either a town or a borough.

Acts of Assembly relating to the City of Philadelphia or its incorporated districts refer to the City of Philadelphia as it then existed, and can have no effect in the portions which have since been included in the city limits.

Craig *v.* City of Philadelphia, 89 Pa. 265.

The ordinance of 1864 is repealed by implication by the ordinance authorizing the exhibition on July 4, 1893.

The scaffold here was not dangerous *per se*, it could only become so through negligence, hence the city having employed an independent contractor is not liable for any negligence in the manner of construction.

May 13, 1895. GREEN, J. If the scaffolding erected on the Girard Avenue Bridge, from which the timber fell which killed the plaintiff's son, was an unlawful structure, the city was guilty of negligence in authorizing its erection, and cannot shield itself from liability by showing that the death of the boy was due to the negligence of an independent contractor. We are very clear that under the contract which was made between the city and the contracting company which did the work, the contracting company was an independent contractor. By the terms of the contract the company undertook to do the whole of the work, including the purchasing and setting off of the fireworks, for a designated sum to be paid for the entire service. It is true that nothing is said in the contract specifically, about the erection of a scaffolding, but the specification annexed to the contract does stipulate that the display is to be made from Girard Avenue Bridge, and the mere inspection of the list of pieces to be exhibited, proves conclusively that without a scaffolding the exhibition could not take place. The city under the contract could not exercise any control over the work to be done. None of its servants or agents could intervene to take any part in the erection of the proper works, or in the exhibition of the various pieces and designs. On the contrary the company agreed to furnish "expert artisans," to do the work of firing and they also agreed to pay all claims for damages for injuries to persons or property resulting from the fireworks.

In the case of Painter *v.* The Mayor, etc., of Pittsburgh, 46 Pa. 213, the subject of corporate municipal liability for work done, and the payment of damages for injuries inflicted by, independent contractors, was thoroughly reviewed in an exhaustive and able opinion by Mr. Justice STRONG. He showed most clearly that the city, in the circumstances of that case, was not liable. He said amongst other things, "Is the city liable? We think not. The wrong was not done by any servants of the defendants. There is no room for the application of the principle '*respondeat superior*.' The defendants had no control over the men employed by the contractors, or over the contractors themselves. They could not dismiss them or direct their work. The excavation was not illegal, and there was a superior to the workmen, to wit: the contractors. There can not be more than one superior legally responsible. . . . . It is now settled in that country (England) that defendants, not personally interfering or giving directions respecting the progress of a work, but contracting with a third person to do it, are not responsible for a wrongful act done, or negligence in the performance of the contract, if the act agreed to be done is legal."

In the case of Smith *v.* Simmons, 103 Pa. 32, this subject again came before us. A ditch was dug in a public street by the license of a borough to lay a water pipe for a citizen. The action was against the owner to recover damages for a personal injury suffered by a woman who fell into the ditch at night because it was insufficiently guarded, and the question was whether

Digitized by Google

the owner was liable or his independent contractor who did the work. We held that the contractor was liable and the owner not. Mr. Justice GORDON, delivering the opinion, said: "Was the digging of the ditch in the public street of the Borough of Susquehanna a nuisance *per se*? If not, if it was such a necessary work as was properly licensable by the borough council, then, as the second question, was the defendant chargeable with the negligence of his contractor who had charge of the work? . . . . If the ditch, dug for, and at the instance of, Dr. Smith was a public nuisance, then he and all engaged in sinking it were responsible for all damages resulting from it, and the doctrine of *respondeat superior* is out of the case."

It will thus be seen that if the work itself is without legal authority, the principal is liable as well as the independent contractor, and the question arises what is the character in this respect of the work which was being done? It is alleged for the plaintiff that the scaffolding was an unlawful structure, and being erected in a public highway was a nuisance *per se*. The basis of this contention is an ancient enactment passed in the year 1721, when the State of Pennsylvania was an English Province. By the 4th section of the Act of 26th August, 1721, Brightly's Purdon, 814, pl. 1, it is provided that, "If any person or persons, of what sex, age, degree or quality soever, shall fire any gun or other fire-arms, or shall make or cause to be made, or sell or utter, or offer to expose to sale any squibs, rockets or other fireworks, or shall cast, throw or fire any squibs, rockets or other fireworks within the City of Philadelphia, without the Governor's special license for the same, of which license due notice shall first be given to the mayor of the said city, such person or persons so offending, and being thereof convicted before any one justice of the peace of the said city, either by confession of the said party so offending, or by the view of any of the said justices, or by the oath or affirmation of one or more witnesses, shall for every such offence, forfeit and pay the sum of five shillings." The remainder of the Act provides a method of collecting the fine by distress and sale of the offender's goods, and if that is unavailable, then, by the imprisonment of his body. Doubtless there were reasons in those days, when Philadelphia was a small town and the Governor resided within its limits, for requiring that his special license should be obtained whenever fire crackers were to be exploded, or fireworks exhibited. But in the present state of our population and our business affairs it seems rather ludicrous than otherwise, that such a requirement should be considered necessary as preliminary to every display of fireworks that may be contemplated by the city or by private persons. It is doubtful whether any license under this antiquated statute has ever been issued in the history of our Commonwealth, and it is certain that it is universally disregarded. The subject is certainly a matter of mere police regulation, and is doubtless within the entire control of the municipal authorities, and it seems quite odd that when a municipal corporation sees fit to authorize such a display it should be reminded of its lack of power by a reading of this old law, which if it be in force, would subject the city to a fine of five shillings and a distress of its goods, and a possible imprisonment of somebody, for a violation of its provisions.

It is true that this Court has decided that this Act is still in force, and that its provisions must be observed. In the case of Homer *v.* Com'th, 106 Pa. 221, we decided that parties who engaged in manufacturing fireworks in the City of Philadelphia, without a license from the Governor to do so were guilty of a violation of this law and became subject to its penalties. But that decision related to another clause of the Act than the one in question, and it concerned only the action of individual persons who were transgressing the provisions of the law. In this case it is the city itself acting in its corporate capacity that is the subject of consideration. There is nothing unlawful intrinsically in the preparation and exhibition of fireworks by a city acting as a municipality. Unless, therefore, the terms of the Act of 1721 apply to incorporated cities and include them within the prohibitions designated, the erection of the scaffolding in question was not unlawful. We think it very clear that the Act was not intended to apply to cities when acting in their corporate capacity. The prohibition of the Act extends to "any person or persons of what sex, age, degree or quality soever." It will hardly be pretended that such a description embraces municipal bodies. It includes individual persons, living human beings, only. In providing the penalties the Act directs that "such person or persons so offending" shall be prosecuted and convicted before a justice of the peace and upon conviction shall pay a fine of five shillings. The Act further provides for the collection of the fine by a distress and sale of the offender's goods if he have any, and if not then by the imprisonment of his body. These penalties and their collection are entirely appropriate to the cases of individual persons, but entirely inappropriate in the case of cities or other municipal bodies. We therefore hold that the Act of 1721 does not, in this respect, apply to cities, and that exhibitions of fireworks when conducted under their authority are not unlawful, and hence the work of preparing for them is not unlawful.

It was claimed that the city was negligent in not having policemen or other agents at the bridge

Digitized by Google

to warn people off and protect them from danger. But unless it was the duty of the city to prevent any travel on the bridge while the scaffold was being erected, we can not see how negligence can be imputed in this regard. We certainly do not think it was the duty of the city to suspend all travel on the bridge because an ordinary wooden scaffold was being erected on one side of the bridge. If we should say that in this case, consistency would require that we should say the same thing as to the erection of scaffolds along the streets in any other part of the city, which of course could not be done without practically suspending all the building operations which require the use of scaffolds. The evidence shows that many thousands of persons passed to and fro over the bridge while the scaffolding was being erected, and yet no other accident than this is shown to have occurred. It certainly was not the duty of the city to have policemen on hand to conduct each foot passenger across the bridge. That would have been impossible on account of numbers, and it would have been ineffective to protect against this accident in any event. No policeman could know, any better than any other person, that this particular accident would or might happen, and therefore could not warn any body against it. The sidewalks were closed at the ends but the road ways were open, and both railway cars and foot passengers were constantly passing and repassing.

The stick that caused the death of the child fell in the roadway while it was being handled by the contractors' workmen. While this may be a very good reason for holding the contractors liable we can discover no reason for holding the city liable. The case bears no analogy to the cases in which permanent or dangerous obstructions to travel are permitted by city authorities to remain in positions where the safety of travellers is imperiled.

Judgment affirmed.

STERRETT, C. J., WILLIAMS and DEAN, JJ., dissented.

H. B.

Jan., '95, 298. March 1, 1895.

Burr v. Kase and Stone.

Parol defeasance — Evidence — Fraud — Lost paper—Evidence of contents—Laches.

In order to convert into a mortgage a deed absolute upon its face, executed prior to the Act of June 8, 1881, P. L. 84, or where the defeasance though in writing is not recorded, or to create a parol secret trust as against such deed, the evidence must be clear, precise and indubitable.

The fraud which will convert a purchaser at a sheriff's sale into a trustee *ex maleficio* for the debtor, must have been found at the time of the sale.

Where an attempt is made to set aside such deed on the ground of an alleged written agreement between the sheriff's vendee and the debtor which has been subsequently lost, the plaintiff can not simply give his opinion as to the legal effect of such agreement unless he can recollect all its contents and the exact terms upon which a reconveyance was to be made.

Plaintiff's testimony alone when contradicted by defendant's is not sufficient to prove the existence of such an agreement.

Where the plaintiff has allowed twelve years to pass before taking action and the evidence shows that the conditions upon which he alleges the property was to be reconveyed were fulfilled one year after the deed, and that the title has been in the hands of a third person for five years and the latter has expended money upon the same, the plaintiff is guilty of such gross laches as is fatal to his claim.

Appeal of C. A. Burr, committee of A. E. Burr, from the judgment of the Common Pleas of Lackawanna County, in an action of ejectment by him against John Kase and H. Stone.

Plaintiff claimed title to land in dispute by virtue of an alleged written agreement made between him and John Kase at the time of a sheriff's sale of his (plaintiff's) real estate in 1879, on a judgment held by Kase. Kase also held mortgages against the property for $3,500, and plaintiff alleged that by this agreement Kase was to purchase the property at sheriff's sale for the amount of his judgment and after he had paid himself all costs and indebtedness he was to reconvey to Burr.

Kase held the property for seven years and then conveyed to Stone. Other facts appear in the opinion of the Supreme Court, *infra*.

The plaintiff requested the Court to charge the jury, *inter alia*, as follows:—

Fifth. "That even if H. Stone did not have notice of the agreement between Dr. Burr and John Kase, which converted the sheriff's deed into a mortgage, if the jury find that such an agreement was made before he purchased of Kase, it appearing that only a portion of the purchase money was paid, he would be entitled to protection to the extent of the money he had actually invested in the property before notice of Dr. Burr's claim, either by way of purchase

Digitized by Google

money or improvements, with interest thereon, and it is for the jury to find this amount from all the evidence in the case." *Answer*. This point is refused. (Second assignment of error.)

Seventh. "A *bona fide* purchaser is entitled to protection only to the extent of the money paid before notice. Therefore H. Stone is entitled to protection in this case, even if the jury find he was an innocent purchaser for value provided they find for the plaintiff as to the trust arrangement, only to the extent of the money he expended prior to November 27, 1891, and this amount the jury is to fix upon all the evidence in the case." *Answer*. Refused. (Third assignment of error.)

The defendant requested the Court to charge the jury, *inter alia*, as follows:—

Third. "If the jury should find from all the evidence that there was a written agreement made prior to said sheriff's sale between John Kase and A. E. Burr, by which John Kase agreed upon certain conditions to reconvey said property to A. E. Burr, and that said conditions had been fulfilled at the time suit was brought, and should further find from all the evidence that the defendant, H. Stone, had no notice at the time prior to his purchase of the land in question of John Kase, there can be no verdict against the defendants." *Answer*. I affirm this point. (Fourth assignment of error.)

Fourth. "If the jury find from all the evidence in the cause that H. Stone was an innocent purchaser without notice of any equities in the plaintiff A. E. Burr, the plaintiff cannot recover, and the verdict must be for the defendants." *Answer*. If you find that H. Stone was an innocent purchaser for value and without notice, the verdict must be for the defendants. With this qualification I affirm this point. (Fifth assignment of error.)

The Court charged the jury as follows:—

"It is necessary for you to find before you can render a verdict for the plaintiff in this case, that H. Stone, the other defendant, had knowledge of this agreement between Dr. Burr and John Kase. If Stone was a *bona fide*, innocent purchaser for value of this property, without any notice, at or before the time of the purchase, of this secret arrangement between Dr. Burr and Mr. Kase, then he is not chargeable with that arrangement, and your verdict will have to be for the defendant." (First assignment of error.)

Verdict for defendants and judgment thereon.

Plaintiff appealed, assigning for error the answers to the points as above noted and the portion of the charge quoted.

A. A. Vosburg and *Everett Warren*, (*W. S. Hulslander* with them), for appellant.

W. W. Watson, (*W. S. Diehl* with him), for appellees.

May 13, 1895. GREEN, J. The counsel of the parties made an agreement which is printed in the appendix, [of paper book] to the effect that the appellant need not print any more of the testimony than such as related "to the transaction between John Kase and H. Stone together with the charge of the Court and so much of the record evidence and exhibits as the appellant may see proper to print in his paper book." It is stated in the agreement by way of recital that, "the only question raised by the assignments of error is to what extent H. Stone is entitled to protection as an innocent purchaser without notice of any equities in the plaintiff A. E. Burr, absolutely or only to the extent of the money actually paid before notice."

If the case depended only upon the solution of that question an agreement such as the foregoing might not be subject to objection. But in this case there is another question of far greater importance than this, the decision of which can not be determined or even promoted by the solution of this. If the plaintiff's claim of title was of such a character that it can not be sustained under all the evidence even against Kase, the sheriff's vendee of the title, it is only a waste of time to inquire to what extent an innocent purchaser from Kase can be protected against the plaintiff's claim. It is unfortunate that the testimony relating to the inception of Burr's claim of title was not printed in the paper books, as it has nearly doubled our labor to discover it in a most voluminous record of 332 pages of typewritten matter. After a wearisome expenditure of most precious time which we cannot afford to spare, we have reached the conclusion that the plaintiff's claim can not be sustained in any point of view. It is grossly lacking in every element which is essential to its existence, and we could not possibly give it sanction without disregarding, and practically overruling a long line of decisions, the wisdom and justness of which have been demonstrated by a constantly recurring experience of more than half a century.

In 1879 and prior thereto the plaintiff was the owner of the surface of a small tract of land containing about twenty-five acres near Carbondale, in Lackawanna County. It was encumbered with two mortgages amounting together to $3,500 and a judgment in favor of John Kase, one of the defendants. The plaintiff alleges that prior to the sheriff's sale of the property, which occurred in May, 1879, he made a written agreement with Kase whereby it was agreed that the property should be sold at sheriff's sale under Kase's judgment for $500, and that at the sale Kase should buy the property and thereafter hold it until he was repaid all his expenditure on account of the property, and when he was fully repaid he should reconvey the property to the

Digitized by Google

plaintiff. The plaintiff's abstract of title contains no reference to this agreement, but in an amendment to the abstract the agreement is alleged substantially as above stated, and at the end of the amendment the plaintiff's claim is stated as follows: "That the sheriff's deed and the written agreement between A. E. Burr and John Kase formed part and parcel of the same transaction, and as the agreement was not recorded, the whole constituted an unrecorded mortgage, and was security for the said debt of $3,500."

The claim of the plaintiff therefore, is, that Kase held the title as a mortgagee only. Very often in this class of cases the attempt is made to hold the sheriff's vendee liable as trustee upon a trust arising *ex maleficio*. But our decisions have been perfectly uniform since Kellum *v.* Smith, 33 Pa. 158, decided in 1859, and indeed long before that, that a resulting trust can not be created in that way, that "the fraud which will convert the purchaser at a sheriff's sale into a trustee *ex maleficio*, of the debtor, must have been fraud at the time of the sale. Subsequent covin will not answer, any more than subsequent payment of the purchase money will convert an absolute purchase into a naked trust. When the purchaser at a sheriff's sale promises to hold for the debtor, and afterwards refuses to comply with his engagement, the fraud, if any, is not at the sale, not in the promise, but in its subsequent breach. That is too late." From this decision we have never departed.

Looking now at the claim that Kase held title only as a mortgagee under an unrecorded defeasance, it will be at once perceived, that the first and indispensable requirement is that there was a written agreement duly made and executed by the parties containing the terms of the alleged contract upon which the property was sold. The sale by the sheriff was made on May 3, 1879, and on the 8th day of May following the sheriff's deed to Kase was acknowledged in open Court and entered in the prothonotary's office in sheriff's deed book. It is an undisputed fact that Kase went into possession of the premises immediately after the sale and continued therein until 1886, when he sold the property to Stone, for $2,250, and Stone took possession at once and has occupied the premises ever since. This action of ejectment was brought June 1, 1891, twelve years after the sheriff's sale to Kase. On the trial the learned Court below submitted to the jury two questions of fact, to wit, whether there ever was such an agreement between Burr and Kase as was claimed by Burr, and whether Stone was an innocent purchaser for value without notice. The jury found a verdict for the defendant, and presumably, they did not sustain the contention of the plaintiff upon either fact, but as it is possible they may have found for the defendant Stone because he was an innocent purchaser for value without notice, it cannot be positively assumed that they found that the agreement alleged to have been made between Burr and Kase was never made.

This makes it necessary for us to review the testimony in order to learn whether we, sitting as chancellors, could determine whether the whole evidence was sufficient to change the absolute deed from the sheriff into a mortgage. The plaintiff stakes his case upon the allegation that there was an agreement in writing which established the defeasance. On the trial he did not produce any writing but said he had lost it and could not find it after diligent search. He therefore undertook to prove its contents by parol. He produced no witnesses but himself to testify to the contents and this is his testimony on that subject: "Q. Now, Doctor, without trying to give us the exact language, I wish you would tell us the substance of this paper? A. It set forth the agreement entered into between myself and Mr. Kase in regard to this property, setting forth the facts. Q. What facts did it set forth? A. The fact that I owed him so much on this property and that all he wanted, all he ever claimed to want was simply his money out of it, and when that was paid that the property should be reconveyed to me. Q. What if anything was said in the paper about a sheriff's sale? A. It stated the property was to go to him for the present. I forget just how it was worded. Q. I mean the substance of it? A. I cannot repeat it *verbatim*. I can only repeat the substance of the paper, what it was got up for. Q. Just tell the substance of it again. A. That when he received his money that was due him that was all he wanted. Q. Did the paper state what was due him? A. I think it did or about the amount. Q. Do you know what amount was stated in the paper as being due him? A. I think it was the amount of the mortgage. Q. Which was how much? A. $3,500."

This was his testimony-in-chief. On cross-examination he was asked: "Q. Now will you again state as near as you can what that alleged paper contained? A. Well, as I stated before, it contained an agreement between myself and Mr. Kase in regard to this property, agreed to let him have it on this note which he had paid to save costs to myself; that I was going to have the benefit of it. Q. Was this all in the paper? A. I don't know as it was; that was our agreement. Q. I am asking you what was in that paper. A. It was an agreement to this effect: it was an agreement that Kase gave me to satisfy me, that he didn't want to take any advantage of me, that when he received what he had against that property, that it should be deeded

Digitized by Google

back to me. Q. Was that in the paper? A. Yes. Q. That was in the paper? A. That was in the paper; it may not have been just in these words, but in substance that is what it was drawn for; all that he wanted; he didn't want to take any advantage of me. Q. Was that in the paper, that he didn't want to take any advantage? A. I don't know as it was but when the paper was signed the paper was drawn up on that basis, so that I would have something to show. Q. Doctor, will you tell me what was in the paper? A. Well, I was telling. Q. I don't want you to tell outside of it. A. Well, I will tell you as near as I can, it was an agreement and Mr. Kase, I couldn't tell you *verbatim*; I can only tell you the purport of the paper; that whenever he got what was due him that I should have the property, that he would transfer the property back to me and that the reason why it was sold the way it was, was on that paper or I wouldn't have let it be sold. Q. I want to know what was in the paper. A. Well, I have told you. Q. What was there about anything else? A. Well, I don't know, it was the usual paper drawn up by Alderman Thompson I suppose in these cases as an agreement between me and Mr. Kase that I should have the property at any time he got his money out of it, or I paid him the money. Q. It didn't mention about anything else, any other fact? A. Well there may have been, I can't give you just the words of the paper. Q. Can you tell now, Doctor, any other fact that you say was in that paper? A. Well, it mentioned something about the amount. Q. Was he to have back his expense? A. There wasn't anything said about that: I don't think there was. Q. Anything said about taxes? A. I don't remember anything being said about taxes. Q. Anything about repairs? A. I don't remember anything about repairs."

The foregoing is practically the whole of the plaintiff's testimony as to the contents of the alleged agreement. When it is considered that the effort of the plaintiff is to take away the title to land held by virtue of a sheriff's deed conveying an absolute title, by means of a lost written instrument, the only proof of whose contents is the testimony above indicated, it will at once be seen how utterly deficient it is in all legal requirements as to that kind of testimony. A criticism that pertains to the whole of it, is, that it does not purport to be a statement of the actual contents of a written instrument at all. It does not designate a subject matter by any kind of description; it does not contain the slightest attempt to repeat any of the actual words of the instrument or even to give the meaning of words actually used; it states no terms of any kind; it contains no statement or even description of the amount of money which Kase was entitled to obtain before any obligation to reconvey arose, nor does it furnish any means of determining what that amount should be; it expressly ignores all knowledge as to whether certain important matters of expenditure were included, such as the expenses incurred by Kase, the taxes on the property, and repairs made. The whole of the testimony leaves the subject of Kase's right of recoupment in a state of hopeless uncertainty. The witness has but one idea as to the paper and that is, that in some way, or at some time, the property was to be conveyed back to him. In other words the plaintiff's testimony, instead of being a statement of the literal contents of the paper or its substance, is nothing but the declaration of his opinion as to its legal effect. He was to have back the property when Kase got what was due him. When, however, he was subsequently asked what indebtedness there was due from himself to Kase he was entirely unable to tell. He denied that he owed anything on the $500 judgment, he admitted that he owed sums which he could not state, and he made no attempt to define either the aggregate amount which he owed, or the sums or kinds of indebtedness which Kase was entitled to have reimbursed out of the land. It would not be possible for any chancellor to decree the specific performance of such an agreement or to frame a decree which would do justice between the parties. The evidence is entirely too meagre.

As an illustration of the strictness required in proving the contents of lost instruments the following cases are instructive.

In Dennis *v.* Barber, 6 S. & R. 420, an important letter was lost. A witness was offered who had made an extract or copy from it, but not of the whole, and he offered to testify that the copy or extract was all of the letter that related to the business in question, and that the remainder of it had no connection with that business. The offer was rejected, and this Court, GIBSON, J., said, sustaining the Court below, "Mr. Levy did not pretend that either the extract offered, or his own recollection embraced even the substance of *the whole* letter. But it is urged that his offer to prove that the rest of it related in no respect to any matter in the cause was equivalent to proof of the contents not comprised in the extract. A decisive answer is, that for all this, we have only the opinion of a witness who undertakes to say what the letter did not contain, without pretending to give an account of what it actually did contain; and although we would in the present case rely on Mr. Levy's judgment with implicit confidence, yet, as every rule of evidence must be general, we would if such evidence were competent, often be compelled to give credit to witnesses who could not claim anything like an equal degree of

Digitized by Google

respect. There can seldom be a sound construction of written evidence without adverting to all the parts and considering the operation of the whole; but the operation of the several parts on the exposition of the whole is seldom if ever perceptible to any but a professional eye; and the danger would therefore be that the Court, while they thought they were deciding on a view of the whole would be giving a garbled construction of but a part. . . . Every day's experience must bring home to the conviction of all men the insecurity of relying on men's recollection; and I care not therefore how strict the construction of written evidence may be protected from the insidious influence of parol proof. In this we have already relaxed too far." These words of wisdom are especially applicable to this case. The plaintiff claims that he is entitled to a reconveyance of land from the defendant which he says is worth from twelve to fifteen thousand dollars. The defendant has a sheriff's deed for an absolute fee simple title to the land. The action is not brought until after twelve years from the date of the deed, and during every moment of that time the vendee of the sheriff and his assignee have been in adverse possession of the land. The plaintiff says he has lost the paper under which he claims a reconveyance, and although he admits he made no search for it during three years before the case was tried he was allowed to give parol evidence of its contents. He does not pretend to recollect the contents of any portion thereof. He gives what is really nothing but his own opinion of the meaning of the writing. He does not for a moment state upon what terms and conditions, or at what time, or in what circumstances, he was entitled to have a reconveyance under the agreement, and he admits entire ignorance as to whether certain important items of disbursement which necessarily accompanied the holding of the land were to be repaid to the grantee before he could be required to transfer the title. He cannot state the amount of his indebtedness to the grantee, though he concedes that the whole of his indebtedness was to be first received by the grantee. He denies that he owed anything to the grantee on account of the judgment of $500 which the grantee held against him and he admits that he owed the grantee other sums of money the amounts of which he is unable to state. On what possible basis could a reconveyance be ordered by a Court without having, first, full knowledge of the precise terms of the agreement of defeasance, and, second, without knowing the exact amount of the indebtedness which the plaintiff owed to Kase for which the latter was entitled to be reimbursed. It is simply and utterly impossible to make any such decree in such a state of the proof.

In McCredy *v.* The Schuylkill Navigation Co., 3 Whart. 424, we held that evidence of the contents of an instrument alleged to have been lost can not be given without previous proof of its due execution, which includes proof of its delivery; and where a witness, called to prove the former existence of an instrument, testified that it had been put into the hands of A. as an escrow, and A., on his examination, testified that he could not recollect on what occasion, or with certainty, to whom it was given up, and that he should not have given it up without the consent of both parties, it was held, that evidence of the contents of the instrument was properly rejected.

In Kerns *v.* Swope, 2 Watts, 75, GIBSON, C. J., said, "The rule of law which requires the best evidence to be produced is nowhere more rigidly enforced than in proving the contents of a lost deed. There are but two ways of doing this in the circumstances of the present case. Before a copy can go to the jury it must be proved to be such by one who compared it with the original; and it is even then inadmissible if there be a counterpart."

In Coxe *v.* England, 65 Pa. 212, AGNEW, J., said, speaking of a witness who was offered to prove the contents of a lost letter, "She can not say that she remembered any sentences of the letter word for word as they were written or read aloud. Her account evidently shows a hasty glance at the letter, while the true source of her recollection was the utterance of her husband. . . . . In addition to this she does not profess to give the whole contents, and does not even state that this portion of the letter was all that related to the subject of the timber. On this point her testimony falls far short of the evidence of the contents offered in Dennis *v.* Barber, 6 S. & R. 420, a case which rules this in respect to the proof of contents."

We hold that the proof of contents in this case was altogether short of the requirements of the law, and that it can not be considered as sufficient to establish any right of recovery in the plaintiff as upon an agreement in writing. The plaintiff admitted on the trial that he had made no search for the paper within three years before the trial, and, in our opinion, the offered proof of contents should not have been received for that reason.

But there is a still more important objection to the validity of the claim, and that is the want of sufficient proof that there ever was such an agreement. The plaintiff testified that the agreement was written by an alderman named J. G. Thompson, living in Carbondale, and that he attested it as a witness, and took the acknowledgment of the parties to it. The alderman was called as a witness by the plaintiff, but he

Digitized by Google

entirely failed to establish either the preparation or the execution of such a paper. After stating that he knew both Dr. Burr and John Kase he was asked: "Q. Did you do any business for them about 1879? A. Yes. Q. Do you remember drawing any paper between them relating to the cottage property in 1879 in the spring? A. Well, I cannot recollect anything very particular about it. I have some recollection of drawing some paper, a faint recollection of drawing some paper for Mr. Kase and Mr. Burr. Q. Can you give us the contents of that paper at this time? A. I cannot." The remainder of his testimony was no improvement upon the foregoing. No other testimony was offered by the plaintiff as to the execution of any written agreement between Burr and Kase.

When Kase was called as a witness on his own behalf, he denied in the most positive and emphatic manner that he ever made any written agreement, or any other agreement, with Burr for the purchase of the property and the reconveyance of it, as alleged by Burr. After saying that Alderman Thompson never drew any paper between him and Burr relating to this property, he was asked: "Q. State whether or not you ever signed any paper? A. No, I never did. Q. Whether you ever signed any paper agreeing in any way to reconvey this property upon any conditions whatever to Dr. Burr? A. No, I never did. Q. State whether at any time before, at the time, or since the sheriff's sale you ever made any agreement in any way to reconvey this property to Dr. Burr upon any condition? A. Not any. Q. State whether Dr. Burr ever demanded of you to make any conveyance of this property to him? A. No, he never did."

His subsequent testimony made no change in the foregoing. So far then as the making of an agreement in writing is concerned the case stands upon the testimony of Burr on the one side and Kase on the other. There was some attempt made on the part of the plaintiff, as is usual in this class of litigations, to show admissions in conversations by Kase of having made some kind of agreement with Burr to reconvey. Mrs. Catharine Lee was one of these witnesses, and she said, "I heard Mr. Kase and my husband talking about the cottage property at that time. Mr. Kase, as I understood it, wanted to get his share out of the property. It is so long ago that I can hardly remember the conversation fully. That is all he wanted to get, his share out of it, or something like that." As this would be entirely consistent with the idea that Kase wanted to get his money back by a sale of the property as his own, and as nothing was said about any reconveyance of the property to Burr, the testimony was absolutely useless in support of the plaintiff's claim.

M. B. Simrell, a witness for the plaintiff, testified to a conversation with Kase which occurred in 1879, fifteen years before the time when he testified. After saying that he was at Kase's store and was talking with Kase about the property, he was asked, "Q. Tell us what the conversation was? A. I asked him if it was going to take all Mr. Burr had to satisfy this judgment, and he says, 'Oh, no, he will be left all right.' And I says, 'How is this?' 'Well,' he says, 'I have got some money involved there, and when I get my money out I am satisfied and shall return the property to him.' Q. What else? A. And I says, 'How is this, has he got any bonds for that,' and he says, 'He has got a paper to protect him.' Q. Is that all the conversation? A. I think that is the sum and substance of it that day." On cross-examination he gave this version of the same conversation: "Q. What was said next? A. I said, 'How is it you have got him advertised and you are going to sell him out by the sheriff?' and he said, 'That is all right.' I said, 'Ain't that going to ruin him, ain't that going to take all he has got?' He said, 'He has enough there to pay me, and after I get that that is all I want.' Q. Was there anything else said; do you remember any thing more that was said about this? A. Nothing particular."

The discrepancy between the testimony of this witness in chief and on cross-examination, is enough to condemn it for any purpose in a case of this kind, where the whole fate of the case depends upon clear, precise and indubitable testimony to the very matter in controversy, without considering its lack of detail as to most essential matters, or the fact that the defendant positively denied the whole conversation. On his examination-in-chief he simply said that Kase said "When I get my money out I am satisfied and shall return the property to him." This of course means no more than a simple declaration to a stranger of an intention that when he got his money out he should return the property to Burr. He does not say that he had made any contract to reconvey, but simply that he would reconvey. In other words he had the intention to reconvey, which of course he might change at any moment. Dr. Burr was not present and therefore it was not in any degree the expression of a contract to reconvey. Then the witness in reply to the next question, said, "He has got a paper to protect him." What kind of a paper? The witness does not say. Was it a bond of indemnity, or an agreement to hold the property in trust, and ultimately, if either Burr should pay the debt he owed Kase, or Kase should recoup himself out of the proceeds of the property, that would protect him? And what money was Kase to get out of the property? Was it all the

Digitized by Google

debts Burr owed him, or only the liens on the property, and was it to include expenditures for taxes, repairs, expenses and costs? The witness says nothing as to any of these particulars. But in his cross-examination the witness says nothing about any agreement to reconvey or any paper that would "protect him," and the question is which version is correct. It is a sufficient reply to the whole of this that it is too indefinite, too uncertain and too contradictory for any Court to rely upon as the basis of a decree.

The only other witness to conversations is Philo Lee, and this is his testimony: "I and Mr. Kase got talking, and I asked Mr. Kase how he and Mr. Burr was getting along; he said he thought they would get along all right, that all he wanted, he says, was to get what belonged to him, if he gets that he would be perfectly satisfied." There is nothing here of any agreement to reconvey or any intent to do so, and as to getting what belonged to him it is altogether consistent with getting his money by means of a sale on his own account. This is all the testimony in the case on the part of the plaintiff upon this subject, and it is so lamentably short of the kind of testimony required for such a case, that it will only be necessary to state the rule which has been established for quite half a century in this Commonwealth, to make out a right of recovery in this class of cases.

The cases in which it is held that in order to convert a deed absolute on its face into a mortgage, or to create a parol secret trust as against such a deed, the evidence must be clear, precise and indubitable, are so numerous, and the profession is so familiar with them, that only a brief reference to a few of them will be necessary.

In the case of Fisher *v.* Witham, 132 Pa. 488, we said, "While a deed absolute on its face, executed prior to the Act of 1881, may be converted into a mortgage by parol proof, it is well settled that the evidence must be clear, explicit and unequivocal. It must show an agreement in the nature of a defeasance, contemporaneous with the execution and delivery of the deed. Subsequent admissions alone are not sufficient. The evidence in this stale case falls far below the required standard, and we therefore think the Court below was clearly right in sustaining exceptions to the master's report and dismissing the bill."

In Rankin *v.* Simpson, 19 Pa. 471, Mr. Justice WOODWARD, commenting upon this class of cases said, "If a party call on Courts to execute parol contracts for land in spite of the statute of frauds and perjuries, let him prove a contract. Because he can find persons who remember the owner's loose or casual declarations indicative of a sale, shall he have a decree in disregard of the statute and in opposition to his own declared convictions? The chancellor has never lived who would tolerate such a demand. Patents and deeds and wills would be a solemn mockery if they might be trifled with and set aside in this manner."

In Nicolls *v.* McDonald, 101 Pa. 514, we said, "When a party sets up a title against a deed absolute in its terms and seeks to convert it into a mortgage the proof of the alleged agreement necessary to change its character must be clear, explicit, and unequivocal. It should not rest on the subsequent admissions and declarations of the alleged mortgagee only." . . . "When the attempt is made he claims as a mortgagor seeking to redeem. Although the action may be ejectment in form, yet in substance it is a bill in equity to compel a reconveyance of the land from the mortgagee in possession. . . . If the parol evidence be insufficient to move a chancellor to decree a reconveyance, it is insufficient to justify a recovery in ejectment. . . . If he be of opinion that the evidence does not make out a case which would induce a chancellor to decree a conveyance, it is his duty to give the jury binding instructions to that effect."

To show by parol that a deed absolute on its face is a mortgage, the proof must be clear, explicit and unequivocal: Plumer *v.* Guthrie, 76 Pa. 441.

To convert a deed absolute on its face into a mortgage by parol evidence it must be clear, precise and indubitable, sufficient to satisfy the mind of a chancellor, otherwise it is error to submit it to the jury: Pancake *v.* Cauffman, 114 Pa. 113; Rowand *v.* Finney, 96 Id. 192; Saunders *v.* Gould, 134 Id. 445.

It is unnecessary to multiply the citations. Applying the principle to the present case it is seen at once that the plaintiff's claim is destitute of merit. His oath is met by the contrary oath of the defendant Kase. If we look for corroborating circumstances they are absent, but they are present against his claim with great force. For instance, in the very next year after Kase received his sheriff's deed some of the buildings on the premises took fire and were burnt to the ground. Kase received almost $4,000 of insurance money, and according to plaintiff's theory Kase was thereby fully paid all the money that was due him. Yet the plaintiff took no steps to enforce his equity. If he held a written agreement such as he alleges, then was the time to present his demand, and if refused, to take immediate steps to enforce it. Then everything was fresh in the memory of parties and witnesses, the written agreement was in the plaintiff's possession according to his statement, and his remedy was simple and easy. It is absolutely inexplicable why he did not do this, and no explanation worth speaking of is attempted. He stood by and did

Digitized by Google

nothing. Finally Kase being in possession constantly for seven years, sold the property to Stone, who was undoubtedly an innocent purchaser for value without notice. Stone took possession at once and spent some $1,500 in improvements, according to the testimony. Meanwhile Burr gave him no notice of his claim of title but allowed the improvements to be made without any objection or demand, or offer of indemnity. It is simply impossible to reconcile such conduct with the integrity of the plaintiff's claim. At last after delaying all efforts to assert his title for twelve years he brings the present action without making any demand upon Stone, or giving any notice of his title, or making any offer to pay him the money he had expended. This is gross laches which is fatal to any claim in an equitable proceeding.

In our opinion no chancellor would decree a conveyance in such circumstances as these, and therefore we hold that Burr cannot recover either against Kase or Stone.

The assignments of error are all dismissed.

Judgment affirmed.

W. M. S., Jr.

May, '95, 8. April 29, 1895.

Commonwealth v. The Merchants and Manufacturers National Bank.

Constitutional law—Constitution of the U. S., Art. XIV. sec. 1. of the Amendments—Constitution of Pennsylvania, Art. IX. sec. 1—Taxation — Corporations — Act of June 8, 1891, secs. 6 and 7, P. L. 229—U. S. Rev. Sts. sec. 5219.

The division of corporations, by the Act of June 8, 1891, into classes, viz, those which elect to pay a tax of eight mills upon each dollar of the capital stock, and those which do not so elect, and the subjection of the stock of the said classes to different measures of taxation, do not constitute such inequality or lack of uniformity of taxation as renders the Act unconstitutional, as a violation of the Constitution of Pennsylvania, Art. IX., sec. 1.

The Act of 1891 is not in conflict with Amendment XIV., sec. 1, of the Federal Constitution, as a denial of equal protection of the laws to any person within its jurisdiction.

The Act of 1891 is not in conflict with the condition of U. S. R. S. sec. 5219, allowing a State to tax stock of national banks, *i. e.*, that the taxation thereof shall not be at a greater rate than that assessed upon other monied capital in the hands of individual citizens of such State.

The 6th and 7th sections of the Act of 1891 do not establish a system whereby the shareholder in a corporation is deprived of his property without due process of law, in violation of Art. XIV., sec. 1, of the Constitution of the United States.

Appeal of the Merchants & Manufacturers National Bank of Pittsburgh, from the judgment of the Common Pleas of Dauphin County, in proceedings upon appeal from the settlement of taxes due the Commonwealth for the year 1893, made by the auditor-general and State treasurer.

The facts of the case appear by the following opinion filed by SIMONTON, P. J., in the Court of Common Pleas:—

"This is an appeal by defendant from an account settled against it by the auditor-general and State treasurer, November 1, 1893, for tax on capital stock for the year 1893, amounting to $4,160; and it was by agreement of the parties tried by the Court without a jury, as provided by the Act of April 22, 1874.

FINDINGS OF FACT.

"1. Defendant is a national bank, organized under the Act of Congress of June 3, 1864, and doing business in the City of Pittsburgh, Pennsylvania. Its cashier reported, as required by section 7 of the Act of June 8, 1891 (P. L. 242), to the auditor-general that the whole number of shares of its capital stock issued was 16,000; the actual value of each share, $65; and the actual value of capital stock issued, $1,040,000.

"On this actual value of capital stock issued the auditor-general and State treasurer settled an account November 18, 1893, charging defendant with a tax of four mills on each dollar of said actual value, amounting to $4,160; and from said settlement this appeal was taken, December 28, 1893.

"2. There were in the city of Pittsburgh during the year 1893, twenty-seven national banks chartered under the same Act of Congress, and doing the ordinary and general business of a national bank, as was defendant, the aggregate par value of whose shares of capital stock was $11,200,000, its actual market value being largely in excess of the par value and estimated at $21,226,875.

"3. There were in the State of Pennsylvania during said year 1893, about 336 national banks doing the same kind of business as defendant, the aggregate par value of whose shares of capital stock was about $72,000,000, its market value being much greater, and estimated at about $128,000,000.

"4. Nine of the said twenty-seven national banks doing business in the city of Pittsburgh in 1893, having capital stock of the par value of $2,800,000, elected to collect from their shareholders for the year 1893 a tax of eight mills on the dollar upon the par value of their shares, as provided by section 6 of the Act of June 8, 1891. The actual value of all the shares of said banks was more than three times the par value, and the amount of tax paid by said banks was therefore much less than it would have been if

Digitized by Google

they had paid four mills on the actual value of all their shares.

"5. There were in Pennsylvania in 1893, as shown by the report of the superintendent of banking, a number of State banks whose entire capital stock at par amounted to $8,461,559; and as reported by them to the superintendent of banking, their total capital, surplus funds and undivided profits amounted to $14,321,350 and the market value of their shares to $16,000,000, and a number of these, whose aggregate capital amounted to not less than 12 per cent. of all the monied capital invested in shares of State banks in Pennsylvania, by electing to pay the eight mills under said section 6, paid a less amount of tax than they would have paid if they had been taxed at the rate of four mills upon the actual value of all their shares.

"These facts are found from affidavits presented on the trial and received with the consent of the Commonwealth as depositions.

"The learned counsel for defendant have stated in writing, the facts as they understand them to be shown by the evidence, and have requested us to adopt their findings as the facts of the case. Some parts of these findings are, however, conclusions of law, and these we do not adopt. But so far as these findings state matters of fact, and are not in conflict with the facts above found by us, we adopt them for the purposes of this case, to show the working of the taxing Act in question and the degree to which it produces a lack of uniformity of taxes. They will, therefore, be filed herewith.

"Section 6 of the Act of June 8, 1891, provides that any bank or savings institution incorporated by this State or the United States, may in lieu of all taxation except upon its real estate, collect from its shareholders, and pay into the State treasury a tax of eight mills on the dollar on the par value of all its shares that have been subscribed for or issued; and section 7 imposes upon every national bank located within this Commonwealth which fails to collect and pay said tax of eight mills a tax of four mills upon the actual value of all the shares of its capital stock.

"Defendant objects, by its first specification of appeal, that these sections of the Act are repugnant to Article IX., section 1, of the Constitution of Pennsylvania, which ordains that 'all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.'

"The contention is, that by the terms of these sections of the Act in question some national banks of the State are permitted to elect to pay a less rate of tax than four mills upon the dollar of the actual value of their capital stock, while others are required to pay tax at this rate. This result does actually follow the working of the Act, for the reason that the par value of the capital stock of some of these banks is so much less than the actual value that a tax upon the former at eight mills is less than a tax on the latter at four mills would be, and naturally these banks elect to pay the eight mills, while others, whose par value is more nearly equal to their actual value, for the same reason decline to pay the eight mills, and are taxed at the rate of four mills upon the actual value of their capital stock. Therefore, while the right of election is given to all, it is the interest of some to elect and of others not to elect, and thus actual and absolute uniformity of taxation is not attained, and is shown by the finding of facts.

"A discussion of the numerous cases cited by counsel for defendant, in which the Courts of other States have considered and passed upon the question of the constitutionality of taxing Acts, in view of the requirement in their Constitutions that taxation shall be uniform, would serve no useful purpose. Many of them were cited and discussed by counsel and by the Court in Com. *v.* Del. Div. Canal Co., 123 Pa. 594, where the defendant contended that section 4 of the Act of June 30, 1885, taxing corporation loans, was unconstitutional because the taxes imposed by it were not uniform.

"In that case the Court below found as a fact (p. 597) that 'the nominal or par value of bonds and mortgages issued by corporations is no certain measure of their actual value, which is often either above or below their par value, the actual value being dependent upon the value of the property mortgaged, the rate of interest, the date of maturity and other conditions, some bonds upon which interest is regularly paid selling as low as fifty cents on the dollar, and others as high as one hundred and fifty;' and in discussing the law, said: 'When, however, the law itself is so framed that it necessarily produces gross inequality of burden, no matter how perfectly it may be administered, it would seem impossible to avoid the conclusion that it violates the mandate of the Constitution. . . . But if in one case the value to which the rate is applied is the expression of the judgment of the proper official, and in another a mere arbitrary nominal value, it is in the very nature of the case that the resulting taxes cannot be uniform. There can be no definite proportion between the value of the property of the citizen and the amount of his taxes. And, as the findings of fact show, this would be the inevitable consequence of the enforcement of the law in this case, no matter how faultless its administration might be.' And the Court below, therefore, held the taxing section there in question unconstitutional. But on

Digitized by Google

appeal the Supreme Court, in an opinion by the late Mr. Justice CLARK, reversed this decision, and, notwithstanding the fact that some of the securities, taxed at their nominal or face value, sold in the market as low as fifty cents, and others as high as one hundred and fifty cents on the dollar, held that the taxing section was constitutional, and that the taxes were uniform in the sense of that instrument.

"There was certainly as great a want of actual uniformity in the taxes imposed by that Act as there is in those collected under the two sections of the Act of June 8, 1891, in question in this case, for, as was shown by the finding of fact quoted above, under it the same amount of tax might be imposed on a bond worth $500 as upon another worth $1,500.

"That case was followed by Com. *v.* Brush Elec. Light Co., 145 Pa. 147, where the findings of fact showed that under the normal working of section 4 of the Act of June 7, 1879 (P. L. 114), the tax imposed by it on corporations ranged in amount from less than two mills to over five mills on the actual value of their respective capital stocks, as will be seen by referring to finding of fact No. 5, on page 149, of 145 Pa., and to the table prepared from the evidence and made part of said finding, which is to be found in the report of the same case in 28 WEEKLY NOTES, 529.

"The Court below, however, held said section constitutional, on the authority of the Del. Div. Canal Co. case above cited, and this ruling was affirmed by the Supreme Court, Mr. Justice WILLIAMS in the opinion saying: 'This is justified by Com. *v.* Canal Co., 123 Pa. 594. . . . And the learned Judge was right in his conclusion that the provisions of the Act of 1879 relating to this subject are not objectionable on constitutional grounds.'

"We are unable to distinguish these cases from the one before us. The want of actual uniformity is, as the findings of fact above referred to show, not greater here than it was in those cases, and we therefore think that they preclude any further discussion of the question raised by defendant's first specification of appeal.

"Defendant has specified in its appeal the further objection that the settlement is invalid, because said sections of the Act of June 8, 1891, are in conflict with the condition upon which the several States are permitted to tax the shares of stock in national banks, namely, 'that the taxation shall not be at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such State."

"The learned counsel rest their attempt to sustain this objection upon the proposition, stated in their brief, 'that the words "other monied capital" in section 5,219 of the United States Revised Statutes means *particularly* other monied capital invested in the banking business, that is, the shares of stock in banks, national or State;' and this being so, that as the Act of 1891 allows some national banks to pay eight mills on the par value of their shares while others are taxed at the rate of four mills on the actual value of their shares, the requirement of the statute, that the shares of national banks shall not be taxed at a greater rate than other monied capital, is violated.

"But an examination of the cases decided by the United States Supreme Court which are cited by counsel shows that this is not the meaning of the words 'other monied capital.'

"Thus in Hepburn *v.* The School Directors, 23 Wall. 480, the argument on behalf of the plaintiff was that 'monied capital in the hands of individual citizens means private investments other than in stocks or securities.' But in answer to this the Chief Justice, delivering the opinion of the Court, said: 'It is contended that the term "monied capital," as here used, signifies money put out at interest, and that as such capital is not taxed upon more than its par or nominal value, the par of these shares is their maximum taxable value.'

" 'We cannot concede that money at interest is the only monied capital included in that term as here used by Congress. The words are "other monied capital." That certainly makes stock in these banks monied capital, and would seem to indicate that other investments in stocks and securities might be included in that descriptive term. But even if it were true that these shares can only be taxed as money at interest is, the result contended for would not necessarily follow.' That is to say, stock in national banks is 'monied capital,' and other investments in stock and securities are 'other monied capital.'

"So in Mercantile Bank *v.* New York, 121 U. S. 138, when the Court, speaking of the meaning of the words 'other monied capital' as used in the statute, say: 'Of course it includes shares in national banks; the use of the word "other" requires this. If bank shares were not monied capital, the use of the word "other" in this connection would be without significance;' the meaning is the same. The contrast is between national bank shares, which are monied capital, and shares of stock in other institutions and securities of other kinds, which are 'other monied capital;' and the true meaning of this section of the revised statute is as stated in Boyer *v.* Boyer, 113 U. S. 689, on page 702: 'Capital invested in national bank shares was intended to be placed upon the same footing of substantial equality in respect of taxation by State authority as the State establishes for other monied capital in the hands of individual citizens, however in-

Digitized by Google

vested, whether in State bank shares or otherwise.'

"The statute does not deal with the question of uniformity of taxation of the shares of different national banks as between themselves, but is simply intended to protect them from taxation at a higher rate than that imposed upon monied capital invested otherwise than in the shares of national banks.

"Defendant in its appeal specifies the further objection that the taxing Act upon which the settlement appealed from is based provides no means of notice to the shareholders of the stock upon which the tax is imposed.

"The argument is that the tax is in effect a tax upon the shareholders, and that it is imposed upon them without notice or any provision for notice to them.

"The principle upon which this tax is assessed with respect to notice is the same as that upon which the tax on the capital stock of other corporations is, and has been for half a century, assessed. The settlement is made against the corporation, which is considered for the purpose of taxation the representative of the shareholders. Furthermore, it has been decided in recent cases by the Supreme Court that the corporation and the shareholders, as well as the capital stock and the shares of stock, are practically the same: Com'th *v.* Fall Brook Coal Co., 156 Pa. 488; Com'th *v.* Lehigh Coal & Nav. Co., 162 Id. 603. This being so, notice to the corporation would seem to be, to all intents and purposes, notice to the shareholders. And it has frequently been held that the corporation is not entitled to notice before the settlement is made, but that the requirement of the Act of 1811, in relation to public accounts, that a copy of the account settled shall be mailed to the corporation, with the right of appeal from the settlement during sixty days thereafter, is a sufficient provision for notice; and that, where the copy of the settlement was not actually received, an action brought for the amount of the tax is sufficient notice. And the law evidently presumes that the officers of the bank will notify their stockholders, for, prescribing in section 7 the duties of the auditor-general in assessing this tax, it declares that 'it shall be his further duty to hear any stockholders who may desire to be heard on the question of the valuation of the shares as aforesaid.' For these reasons we think these objections cannot be sustained.

"Nor do we think this taxing Act is open to the final objection specified in the appeal, that it is in conflict with 'Amendment XIV of the Constitution of the United States, section 1, which, in part, is as follows: "Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."'

"The question intended to be raised by this specification was, we think, settled by the Supreme Court of the United States in Bell's Gap Railroad Co. *v.* Pennsylvania, 134 U. S. 232, followed by Jennings *v.* Coal Ridge Improvement & Coal Co., 147 U. S. 147, and it is therefore not now open for discussion.

"We therefore conclude:—

"1. That sections 6 and 7 of the Act of June 8, 1891, are not repugnant to Article IX., section 1, of the Constitution of the State of Pennsylvania, which ordains that 'all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.'

"2. That said sections of said Act are not in conflict with the condition upon which the several States are permitted to tax the shares of stock in national banks, namely: 'That the taxation shall not be at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such State.'

"3. That the taxing Act upon which the settlement appealed from is based does not fail to provide sufficient means of notice to the shareholders of the stock upon which the tax is imposed, and said settlement is not invalid for want of such notice.

"4. That said taxing Act is not in conflict with Amendment XIV. of the Constitution of the United States, section 1, which, *inter alia*, ordains as follows: 'Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.'

"The Commonwealth is therefore entitled to recover as follows:—

Amount of tax as per settlement	$4,160 00
Interest from Jan. 1 to Nov. 22, 1894 @ 12 per cent. per annum	401 46
Attorney-general's commission, 5 per cent.	208 00
Total,	$4,769 46

"For which amount judgment is directed to be entered in favor of the Commonwealth and against defendant if exceptions be not filed within the time limited by law."

Exceptions were filed which were dismissed by the Court and judgment was entered. The Bank took this appeal.

John Wilson, (with him *William Scott*, *Gordon* and *Wm. M. Hall, Jr.*), for appellant.

By section 6 of the Act of June, 1891, P. L. 242, a bank which elects to collect from its shareholders a tax of eight mills on the dollar of the par value of all shares subscribed for or issued, and pays the same over, obtains except as to its investments in real estate, exemption from local taxation; by section 7 of the same Act a

Digitized by Google

bank not so electing must pay four mills on the dollar of the actual value of the capital stock issued. This is unequal taxation. The system provided by the Act lacks uniformity in application to members of the same class, it is, therefore, unconstitutional as in violation of Art. IX., sec. 1, of the Constitution of Pennsylvania.

See—

School District *v.* Readington Twp., 36 N. J. L. 70.
State *v.* Runyon, 41 Id. 98.
State *v.* Indianapolis, 69 Ind. 378.
Exchange Bank of Columbus, *v.* Hines, 3 Oh. St. 15.
New Orleans *v.* Davidson, 30 La. Ann. 555.
Woodbridge *v.* Detroit, 8 Mich. 301.
Lexington *v.* McQuillan's Heirs, 9 Dana, 513.
Porter *v.* R. R. Co., 76 Ill., 561.
Knowlton *v.* Supervisors, 9 Wisc. 389.
Weeks *v.* Milwaukee, 10 Id. 186.
Marsh *v.* Supervisors, 42 Id. 502.
Philleo *v.* Hiles, Id. 527.
Com'th *v.* Five-Cents Savings Bank, 5 Allen, 436.
County of Santa Clara *v.* So. Pac. R. R. Co., 18 Fed. Rep. 385; 118 U. S. 394.
State Railroad Tax Cases, 92 U. S. 611.
Londonderry *v.* Berger, 2 Pear. 230.
Fox's Appeal, 112 Pa. 352.
Com'th *v.* Del. Div. Canal Co., 123 Id. 594.

The system violates the provision of the U. S. Rev. Sts. sec. 5219, that national bank stock shall not be taxed at a greater rate than is assessed upon other monied capital in the hands of individual citizens of such State.

See—

Boyer *v.* Boyer, 113 U. S. 691.
Mercantile Bank *v.* New York, 121 Id. 138.
People *v.* Weaver, 100 Id. 546.
Stanley *v.* Supervisors, 121 Id. 542.
Pelton *v.* National Bank, 101 Id. 146.
Lionberger *v.* Rouse, 9 Wall. 468.

The system adopted by the Commonwealth is one which deprives the stockholders of their property without due process of law and is, therefore, in violation of Art. XIV., sec. 1, of the Constitution of the United States. Procedure for the levy of taxes is "process of law."

Kelly *v.* Pittsburgh, 104 U. S. 78.

Due process of law implies—

1. The right to notice to appear and answer;
2. A remedy in Court.

Brown *v.* Hummel, 6 Pa. 86.
Craig *v.* Kline, 65 Id. 413.
Phila. *v.* Scott, 81 Id. 80.
Phila. *v.* Miller, 49 Id. 450.
Stuart *v.* Palmer, 74 N. Y. 188.
Albany City Nat. Bank *v.* Maher, 19 Blatch. 175.
People *v.* Pittsburgh R. R. Co., 67 Cal. 625.

The Act of 1891 gives no assurance of either of these rights to the stockholder.

In permitting taxes to be paid at different rates the Act denies "equal protection" within the meaning of Amendment XIV., sec. 1, of the Federal Constitution.

John P. Elkin, deputy attorney-general, and *Henry C. McCormick*, attorney-general, for the appellee, were not heard.

May 20, 1895. WILLIAMS, J. The complaint of the appellant is against the inequality of burden existing under the operation of the statute providing for the taxation of national banks. The argument is that inequality of burden establishes the unconstitutionatity of the law under which the tax is levied. If the validity of our tax laws depends upon their ability to stand successfully this test, there are none of them that can stand. Absolute equality of burden is theoretically possible, but it has not been attained in practice in this State.

It is a reasonable presumption that banks are honestly organized, and that each one enters upon its business career with an actual capital exactly equal to the face value of all its shares of stock. A tax levied at any given rate per cent. on the shares would operate for a few months to produce substantially uniform results. But once launched in business each bank is affected by many circumstances and influences that are peculiar to it. One bank may accumulate its earnings in a large surplus fund to be used in the business of the bank. Another may divide its earnings in dividends semi-annually among its stockholders. One bank may be managed with financial skill and economy. Another may be conducted in a careless and extravagant manner. One may be located at an active business centre and have a large line of deposits and accounts, another may be located at an unimportant point where money is scarce and loans few. These and many other circumstances result in decided success in some cases, in the swallowing up of earnings in expenses in others, and in a positive impairment of capital in some others. The law, that operated with practical uniformity of result at first, produces noticeable inequality as the results of differences in location and management begin to develop themselves, until results such as are brought to our attention in this case flow from the application of a uniform rate of taxation to the shares of stock at their par value.

The inequalities are due to causes which the Legislature could not be required to foresee or provide against, and for that reason they cannot be charged to the law. But the appellant complains that the law furnishes two modes and rates for taxing the stock of national banks, and denies that this can be constitutionally done. But the State finds it convenient and economical to tax its corporations and collect the taxes through its own proper machinery. To induce the banks to make their returns to the auditor-general and to pay their taxes into the State treasury, the State offers an inducement. It proposes to relieve

Digitized by Google

all the banks from local taxation that elect to pay a certain rate per cent. upon their shares of stock directly into the State treasury. All the banks may come into this class. All that do are assessed with a uniform rate per cent. which they pay at one time and one place.

Those that elect not to pay this rate are assessed at a lower and uniform rate upon the appraised value of their shares, and upon this valuation the local as well as the State taxes are assessed. We cannot say that this classification is unconstitutional, nor that the rate per cent. differs so widely as to invalidate the law. The rate is uniform for each class, and the aggregate of the taxes levied per share in both classes is as nearly the same as could well be estimated in advance of the action of the local authorities which it is impossible to forecast with accuracy. The banks are themselves responsible for the existence of the second class. They are all invited to deal directly with the State. If they do not it is fair to assume that their action is guided by what they believe to be their own pecuniary interest. Of a want of uniformity which is the result of their own deliberate action, they certainly ought not to complain.

Of a want of equality of burden that results from circumstances affecting particular banks, and is not produced by the application of the law, they cannot complain. We think the learned Judge decided this case correctly, and the judgment is now affirmed.

Judgment affirmed. H. B.

Orphans' Court.

January, 1895, 258.

Wheeler's Estate.

Decedents' estates—Liability of husband for funeral expenses of wife—Foreign executor—Jurisdiction of Orphans' Court.

The liability of a husband for the funeral expenses of his wife, and for medical services in her lifetime, is not discharged as against the creditor, by a provision in her will directing payment out of her estate; but such a provision gives him the right to call upon her executor for exoneration as between himself and mere legatees after all claims for which he is responsible have been fully satisfied.

The Orphans' Court is powerless to compel contribution by a legatee who has been overpaid, either under the decree of a foreign Court or voluntarily, by a foreign executor.

Exceptions to adjudication.

Testatrix devised and bequeathed her estate in equal shares to her husband and her daughter absolutely. Under an erroneous decree of a Virginia Court, both legatees received one-half of entire estate directly, instead of payment being made to accountant; which caused an overpayment. Dr. Fisher presented a claim for $175 against the estate; but only $32 remained after the auditing Judge, ASHMAN, had restated the account properly, which amount he awarded to the doctor.

James W. Laws, for exceptions.

John Weaver, contra.

April 27, 1895. PENROSE, J. The liability of a husband for the funeral expenses of his wife, and for medical services in her lifetime, is not discharged, as against the creditor, by a provision in her will directing payment out of her estate. Such a provision, it is true, gives him the right to call upon her executor for exoneration as between himself and mere legatees, but it can only be after all claims for which he is in any way responsible, whether primarily or as surety, have been fully satisfied. This is the necessary result of the familiar principle which forbids competition by a debtor with his creditor in the distribution of a fund subject to the claim of each of them, even though the obligation of the debtor be that of surety, merely, and his claim upon the fund, but for his relation to the creditor, would be entitled to priority: a principle of which there are many illustrations: Worrall's Appeal, 5 Wright, 524; Huston's Appeal, 19 Smith, 485; Bennett's Estate, 8 WEEKLY NOTES, 288; Lindley on Partnership, *1007–1008, etc., etc., etc.

It is clear, therefore, that the auditing Judge could do nothing else than award the entire balance shown by the adjudication in part payment of the debt due for medical attendance, to the exclusion of the husband; and this whether the debt to him arose from the payment of funeral expenses, which the will charged upon the estate, or from advances by him for expenses of administration.

As between himself and his co-distributee, the husband is, undoubtedly, entitled to repayment; but in the settlement of the account of the executor, though the Orphans' Court could adjust all equities if a sufficient balance had remained after payment of debts to third parties, it is powerless to compel contribution by a legatee who has received an amount in excess of what he was entitled to under the decree of a Court in another State or by the voluntary distribution of a foreign executor or administrator. The remedy must be sought for elsewhere.

There having been no such balance, the settlement of the account as between the legatees was not before the auditing Judge, and their rights are not affected by the adjudication.

The exceptions are dismissed, without prejudice. F. B. N.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, JUNE 7, 1895.* [No. 17.

Supreme Court.

May, '95, 16, 17, 18 and 19. April 29, 1895.

Commonwealth v. Wm. B. Mann.
Same v. William G. Shields.
Same v. James W. Latta.
Same v. Thomas Green.

Fees—County officers—Acts March 10, 1810, and March 31, 1876—Repeal by substitution—Act of March 31, 1876, construed—Interpretation by contemporaneous construction.

A statute, which embraces all the essential provisions of an antecedent one on the same subject and formulates a new system, will be construed to be a substitute for the old one, although there be no expressed intention to that effect.

Under the Act March 10, 1810, the State was entitled to one-half the aggregate fees of county officers, in excess of $1500, without any deduction for clerk-hire and expenses; this was amended by the Act of April 5, 1842, allowing such officers to deduct such expenses and providing that one-half the remainder should go to the State. These Acts were subsequently repealed except as to six certain counties, including Philadelphia county. The Act of March 31, 1876, was then passed "to carry into effect section 5 of Art. XIV. of the Constitution relative to the salaries of county officers and the payment of fees received by them into the State or county treasury in counties containing over 150,000 inhabitants." This Act provided salaries for such county officers, declared that all fees should belong to the county and made it the duty of such officers to collect all fees to and for the use of their respective counties, "except such taxes and fees as are levied for the State, which shall be paid to and for the use of the State:"

Held, (1). That the Act of March 31, 1876, was a substitute for the Act of March 10, 1810, and that *all* fees received by such officers are to be paid to the county.

2. That the words "except such taxes and fees as are levied for the State, which shall be paid to and for the use of the State" do not qualify the previous declaration that all fees received by the officer, *qua* county officer, should belong to the county.

When examined in connection with the whole scheme of the Act, these words are seen to refer to certain fees and taxes levied directly for the State, *e. g.*, collateral inheritance tax, State tax or writs, wills, commissions and license fees.

3. This Act is not invalid because of any alleged inequality in exempting the larger counties from paying a share of fees to the Commonwealth.

4. The construction put upon the Act of March 31, 1876, for a period of twenty years, both by county and State officers, will be presumed to be the true one.

Appeals of William G. Shields, register of wills, James W. Latta, clerk of Quarter Sessions, William B. Mann, prothonotary, and Thomas Green, recorder, all of Philadelphia county, from the judgment of the Common Pleas of Dauphin County.

Appeals were taken by the above-named officers, from tax settlements made by the auditor-general and State treasurer on September 24, 1894, charging them with 50 per cent. of the fees of their several offices in excess of their salaries and amounts paid for clerk-hire.

The cases were tried by agreement of parties by the Court without a jury, and the material facts as found by the Court are set out in the opinion of the Supreme Court, *infra*.

In each case the defendant offered to prove certain office expenses, including rents, stationery, etc., and the offers were overruled. Exceptions were taken by each defendant.

The Court found as a conclusion of law:—

"1. The Act of March 31, 1876, did not repeal the Act of March 10, 1810, so far as its effect is to impose a tax upon the excess of fees or to validate the claim of the Commonwealth to receive one-half the excess of office fees received by the defendant as prothonotary of the Court of Common Pleas of Philadelphia, after payment of his salary and clerk-hire, and the settlement appealed from is therefore valid."

A similar conclusion was reached in each appeal and judgment was directed to be entered in favor of the Commonwealth. These appeals were accordingly taken.

James W. Catharine and *James Alcorn*, assistant city solicitors, and *F. Carroll Brewster*, (*John L. Kinsey*, city solicitor, with them), for appellants.

The Act of March 10, 1810, requiring a proportion of the fees of county officers to be paid to the State was repealed by the Act of March 31, 1876.

The best exposition of a statute is that received from contemporary authority.

Endlich on Statutes, 357.
Potter's Dwarris on Statutes, 179.
Edwards *v.* Darby, 12 Wheat. 210.
U. S. *v.* Recorder, 1 Blatch. C. C. R. 218.

An examination of secs. 2, 5, 6, 9 and 15 shows a complete new system in regard to fees of county officers, which is inconsistent with the construction contended for by the State.

The 50 per cent. charged by the State was not a tax, but a charge against the officers.

Cohen *v.* Commonwealth, 6 Pa. 111.

None of the fees in question were levied for the State.

It is not contended by the appellants that the

Digitized by Google

taxes and fees levied for the State belong to the county or are even to be paid to the county. Of course, such taxes and fees are received by the officers, but they are paid directly to the State. All such taxes and fees have been paid to the State, unless the view of the Commonwealth be correct that the "taxes and fees levied for the State," include the fifty per cent. of fees of office after deducting $1,500, under the Act of 1810.

The office fees were not levied for the State prior to the Act of 1876, and could not have been intended to come under the exception in that Act.

It will be noticed that the first part of section 1 of the Act of 1876 states that "all fees limited and appointed by law to be received or which are legally authorized, required or entitled to be charged or received by county officers, shall belong to the county." Then follows the injunction, that it shall be the duty of each of said officers to exact, collect, and receive all such fees to and for the use of their respective counties, and excepting from its requirements "such taxes and fees as are levied for the State" which shall be to and for the use of the State. This clearly means that all fees, except taxes and fees levied for the State, shall belong to the county.

Benjamin M. Nead, (with him *John P. Elkin*, deputy attorney-general, and *Henry C. McCormick*, attorney-general), for the Commonwealth.

It is contended that the Act of 1876 repeals the Act of 1810, and creates a system independent of the earlier Act for the compensation of county officers and the disposition of their fees.

Let us examine the practical workings of the new system without regard to the Act of 1810.

The first section of the Act of 1876 provides:—

Section 1. . . . . "All fees limited and appointed by law to be received by each and every county officer therein elected by the qualified voters of their respective counties, or appointed according to law, or which they shall be legally authorized, required or entitled to charge or receive, shall belong to the county in and for which they are severally elected or appointed; and it shall be the duty of each of said officers to exact, collect and receive all such fees to and for the use of their respective counties, *except such taxes and fees as are levied for the State, which shall be to and for the use of the State;* and none of said officers shall receive for his own use, or for any use or purpose whatever, except for the use of the proper county, *or for the State*, as the case may be, any fees for any official service whatsoever."

Now, under existing laws, what taxes and fees are levied for the use of the State? The county officers enumerated in this Act, who collect taxes and fees for the State are the prothonotaries, clerks of the several Courts, the registers of wills, and the recorders of deeds. The taxes collected by these several officers under existing laws are, by prothonotaries and clerks, taxes on process, appeals and transcripts from justice of the peace dockets; by the registers, taxes on wills, letters testamentary, letters of administration and collateral inheritance taxes; by recorders, taxes on all instruments recorded, including a tax of $10 on each of the commissions of certain officers under the provisions of the Act of 1829–30, P. L. 272.

All of the taxes above enumerated have been accounted for or paid to the Commonwealth by the county officers affected by this controversy.

What then is meant by the "fees" belonging to the Commonwealth, which the Act of 1876 calls upon the county officers to account for; recognizing them and providing for their payment into the State treasury as follows:—

Act of 1876, section 9: "At the same time that monthly returns are made by section two of this Act *of the gross receipts* of fees and emoluments received by said officers, *to and for the use of their respective counties*, for the preceding month, each of said officers shall make a separate return to the State treasurer of all collateral inheritance taxes collected or earned for the State by him, if any have been so collected or earned, and of all taxes due the State on any writs or legal proceedings *or fees otherwise belonging to the State* collected or earned by him, and the amounts so returned by any of said officers as received by him for the State shall be separately paid into the State treasury by him, quarterly, on the first Mondays of April, July, October and January, for which he shall take duplicate receipts."

Section 15. "The salaries fixed and provided by the foregoing provisions, shall be in lieu of all or any moneys, fees, perquisites or mileage which are now or may hereafter be received by any officer named in this Act; and all said moneys, fees, mileage or perquisites, received by any of them as compensation, fees or perquisites, from any source whatever, shall in all cases belong to the county, and shall be paid into the treasury, (*except where required to be paid to the State*), as provided in this Act."

Here is a clear and unmistakable recognition of the State's right to have paid it its share of the "moneys, fees, mileage or perquisites, received by any of them, as compensation, fees or perquisites," (note the repetition of the words, "fees or perquisites.")

Without the Act of 1810 there is nothing to indicate what the Legislature meant:—

By the "fees levied for the State, which shall

Digitized by Google

be to and for the use of the State" in the first section.

By the "fees otherwise belonging to the State" in the ninth section.

By "the fees, mileage or perquisites," other than compensation of the officer, "required to be paid to the State" in the fifteenth section.

By the provision about the "net receipts" in the last clause of the sixteenth section.

Without the Act of 1810 all of these provisions must be read out of the Act of 1876, otherwise it would be inconsistent with its own terms.

It cannot be seriously contended that the fees meant by the Act of 1876 can have any reference whatever to the commission taxes enumerated in the Act of 1830, P. L. 272, or to mercantile and liquor license fees; the insignificance of these species of revenue would preclude any such an idea.

The Act of 1876 is therefore so far from repealing the Act of 1810 that it cannot stand consistent with its own terms, independent of the Act of 1810.

The Act of 1810, being necessary to the intelligent consistence of the Act of 1876, can in no wise be repealed by that Act, either directly by the meaningless repealing clause at the close, as has been contended, or impliedly, through repugnancy. The "two statutes can stand together," therefore, "the posterior does not abrogate the prior."

Erie *v.* Bootz, 72 Pa. 196.
Contested Election of Barber, 86 Id. 392.

A law exempting the county officers of Philadelphia county from the operation of the tax on fees is in violation of the Constitution requiring all taxes to be uniform.

COMMONWEALTH *v.* MANN.

May 20, 1895. DEAN, J. It is, perhaps, doubtful whether the party defendant in this case should not have been Philadelphia County; but as the county agreed with defendant to be answerable, in the event of an adverse judgment, he waived his right to object that a suit could not be maintained against him: therefore, we shall consider the case, as raising the question whether either is answerable.

Before the passage of the Act of March 10, 1810, the fees of this officer all belonged to him, and out of them he paid the expenses of his office. On that date, however, was passed an Act entitled "An Act taxing certain offices." The first section of the Act directs that with other county officers, the prothonotaries of the Courts of Common Pleas of the Commonwealth, "Shall, from and after the first day of October next, keep or cause to be kept a fair and accurate account of all the fees received for services performed by them or any person employed by them in their respective offices; and shall annually thereafter furnish a copy of such account upon oath or affirmation to the auditor-general; . . . and whenever the amount of any of the said accounts shall exceed the sum of fifteen hundred dollars, the auditor-general shall charge the said officers respectively fifty per cent. on the amount of such excess; which sum so charged shall be paid by them into the treasury for the use of the Commonwealth."

Under this Act, the State took one-half the aggregate fees, in excess of fifteen hundred dollars, without any deduction by the officer for clerk-hire, stationery, or other expenses incident to the performance of the duties of the office; but by the Act of 5th of April, 1842, the officer, in addition to the fifteen hundred dollars, was authorized to deduct these expenses, and the State took only one-half the remainder. It will be noticed, that the Acts of 1810 and 1842 were general Acts applicable to every county in the Commonwealth. But, by Act of April 2, 1868, they were repealed as to all counties except Allegheny, Lancaster, Montgomery, Philadelphia, Beaver, and Washington; so that, as to Philadelphia, the Act of 1810, as qualified by the Act of 1842, remained in force. The next general legislation on the subject, is the Act of 31st of March, 1876, passed, as declared in the title: "To carry into effect section five of Article fourteenth of the Constitution, relative to the salaries of county officers, and the payment of fees received by them into the State or county treasury in counties containing over one hundred and fifty thousand inhabitants."

The first section enacts:—"That in all counties in this Commonwealth containing over one hundred and fifty thousand inhabitants, all fees limited and appointed by law to be received by each and every county officer therein elected by the qualified votes of their respective counties, or appointed according to law, or which they shall legally be authorized, required or entitled to charge or receive, shall belong to the county in and for which they are severally elected or appointed." This is the first thought or intent of the Act; all fees which the officer shall be authorized, required or entitled to charge or receive, shall belong to the county; not one-half the fees, over fifteen hundred dollars and expense, but all the fees. There can be no question as to the meaning; they were such fees as had been received by him before the Act of 1810, all of which he kept as his own; those received afterwards, fifteen hundred dollars of which, and half over that amount, he kept as his own; those received after 1842, when in addition he kept as his own an amount equal to his office expenses; all he was "entitled to charge or receive" now

Digitized by Google

belong to and must be paid to the county. Is this manifest purpose qualified by the language which follows in the same section? "And it shall be the duty of each of said officers to exact, collect, and receive all such fees to and for the use of their respective counties, except such taxes and fees as are levied for the State, which shall be paid to and for the use of the State." When it is remembered, that the Act put all county officers in counties of over one hundred and fifty thousand inhabitants in the salaried list, the purpose of the introduction of the words "except such taxes and fees as are levied for the State," is obvious. Taxes levied for the State on personal property and other objects of taxation, are paid to the county treasurer; liquor license fees are also paid to him; the tax on probate of wills, recording of commissions, and the collateral inheritance tax, levied for the State, are paid to the register of wills and the recorder; the tax levied by the Act of 1830, on writs, for the State, is received and paid over by the prothonotary; and the State might, for economy and convenience, direct that other taxes levied for its use, should be paid to these or other county officers, for transmission to the State treasury; hence, the necessity for this exception; but to our mind, it neither qualifies, nor was it intended to qualify, the previous declaration, that all fees the officer was entitled to charge or receive, as a county officer, should belong to the county,

The second section of the Act, then prescribes how the account of fees shall be kept, and directs, that on the first Monday of each month, the officer shall pay to the county treasurer "all fees so received during the preceding month," and "he shall make oath . . . that the said transcript contains a true and correct list of all the fees received, earned or chargeable upon the county for services rendered in his office, either by himself, deputies or clerks during the preceding month." Thus, the Act still assumes, in accord with the first section, that all the fees pertaining to the office belong to the county, and must be paid by him to the county.

The third and fourth sections declare it a misdemeanor in the officer to neglect to keep accounts, to make returns, or pay over the money; to swear falsely; to neglect to charge fees according to law.

The fifth section enacts, that the officers, their deputies and clerks shall be paid specific salaries, and these shall be paid monthly from the county treasury.

The sixth section provides, that the salary of the officer shall only be paid out of the aggregate of the fees paid into the treasury by him the preceding month, after deducting the amount due deputies and clerks, and if there be not enough left to pay him, then he shall get only the aggregate of net fees received during the month; but also providing, if there be any excess in subsequent months, the deficit shall be made up from the excess.

The seventh and eighth sections relate to the determination of the number of deputies and clerks, and the fixing of their salaries.

The ninth section provides, that "each of said officers shall make a separate return to the State treasurer, of all collateral inheritance taxes collected or earned for the State by him, if any have been so collected or earned, and of all taxes due the State on any writs or legal proceedings or fees otherwise belonging to the State collected or earned by him, and the amount so returned by any of said officers as received by him for the State, shall be separately paid into the State treasury quarterly."

The tenth section provides for access to the books and accounts by the proper officers.

The eleventh directs, that the county, at its own cost, shall provide office furniture, books and stationery.

The twelfth, thirteenth and fourteenth specifically fix the salaries of the officers.

The fifteenth is a repetition of the first, somewhat elaborated.

The sixteenth and seventeenth sections, declare certain offices county offices, and provide for the quarterly payment of the officers.

The eighteenth and last section, having in mind the fact, that existing laws provide for entirely different means of compensation of county officers, as well as wholly different methods of accounting, directs that:—"All county officers affected by it, shall settle their accounts under existing laws," up to the expiration of the term of the then incumbents.

We have noticed these different sections of the statute, because they show another scheme, covering all possible phases of the subject embraced by the Act of 1810. The Act of 1876, takes up the same subject, and by more, as well as more elaborate provisions, undertakes to specifically designate the ownership of the fees, the duty of the officer and the limitation on his salary.

The case turns on the question, whether the Acts of 1810 and of 1876 can stand together; they are both legislation on the same subject; both affirmative statutes. This is not exactly the case of a new statute repealing an old one in whole or in part, because of repugnancy; it is a new statute on the same subject, embracing provisions similar to those of the old, for its enforcement; elaborating them, and introducing a more complete system with a wholly different purpose. Theretofore, the Commonwealth had title and right to half the money beyond certain deductions; the officer had title to the other half; he collected and accounted to the Com-

Digitized by Google

monwealth for her share; she now relinquishes her title to any part, and by unmistakable language, deprives the officer of all title; vests the whole in the county; constitutes the officer the mere channel through which it reaches the declared owner, the county. We are far from intending to infringe on the well-settled rule that a later statute on the same subject will not repeal an older one by implication, unless they be plainly repugnant. But if a statute embrace the essential provisions of an antecedent one on the same subject and formulate a new system, the intention that the new shall be a substitute for the old is manifest, although there be no expressed intention to that effect. It is so held in Commonwealth *v.* Cromley, 1 Ash. 179; Goodenow *v.* Buttrick, 7 Mass. 140; Commonwealth *v.* Cooley, 10 Pick. 39; Johnston's Estate, 33 Pa. 511, and many other cases.

The constitutional and legislative intention to introduce an entirely new system, as to fees collected by county officers in the large counties, is just as manifest as it was to introduce in Philadelphia a new system as to aldermanic or magistrate's fees. Section 12 of Article V. says: "In Philadelphia . . . . they (magistrates) shall be compensated only by salaries to be paid by said county. . . . . All fees, fines and penalties in said Courts, shall be paid into the county treasury." As to county officers the same thought is expressed: "All county officers shall be paid by salary," and they "shall pay all fees which they may be authorized to receive into the treasury of the county or State, as may be directed by law." Then as to the latter, came the directions of the law: "All fees limited and appointed by law to be received by each and every county officer . . . . shall belong to the county," with no re-transfer of the right to any portion to the Commonwealth.

In answering this question, it is proper to have in mind the circumstances which moved the Legislature in 1876 to pass any law on that subject.

The section of the Constitution referred to in the title, peremptorily directed that: "In counties containing over one hundred and fifty thousand inhabitants, all county officers shall be paid by salary; and the salary of any such officer and his clerks heretofore paid by fees shall not exceed the aggregate amount of fees earned during his term, and collected by and for him." The same section directed that: "All county officers who are or may be salaried, shall pay all fees which they may be authorized to receive, into the treasury of the county or State, as may be directed by law." Then, immediately following in section six of the same article is this injunction: "The General Assembly shall provide by law for the strict accountability of all county, township and borough officers, as well for the fees which may be collected by them, as for all public or municipal moneys which may be paid to them." The subject of section six, being so palpably the same as that of section five, it is scarcely separable in thought, and may fairly be treated as part of it.

The purpose of the Act of 1876, as disclosed in its title, was to obey the mandate of the Constitution. 1. All county officers in counties containing over one hundred and fifty thousand inhabitants must be paid by salary; no longer by fees. 2. The salary was limited; it must not exceed the aggregate amount of fees earned during the term, and collected by or for them. 3. They must not keep any part of such fees and credit them on salary, but must pay over all of them into the treasury of the county or State, as may be directed by law. 4. The Legislature was to provide by law for a strict accounting by them, not only for all fees collected by them, but for all other public money paid to them.

The Act of 1876, following so soon the Constitution of 1874, it may be presumed, the Legislature knew the old law, the mischief or abuses under it, as well as did the members who framed the Constitution and the people who adopted it. The large compensation of officers paid by fees in large counties for years before was felt to be a wrong on the public; though the grievance was not so sore as farming out the taxes in France before the French Revolution, it was getting to be of the same character; the compensation of the officer and revenues of the State were only limited by the amount of fees the officer could wring from unfortunate litigants. He had every temptation to pile up fees and then extort them; as the Commonwealth halved the money with him, it made no rigid inquiry as to how he got it; individuals were practically defenceless, for lawyers were averse to incurring the displeasure of the officer by resisting illegal exactions from their clients. It is difficult for those who have come to the bar since to realize the abuses of the fee system in large counties before that time. But the convention of 1875 understood the matter, and so did the Legislature of 1876. The latter, aware of the mischief, was in full sympathy with the convention in legislating the remedy; and in that spirit was framed the Act of 1876.

The legislative intention was to sweep away, as directed by the Constitution, a pernicious system, by removing, as far as possible, all motive for illegal exactions. It in no way affects the force of the mandate that it embraces only counties containing over one hundred and fifty thousand inhabitants; the evil, at the adoption of the Constitution, was only serious (or thought to be so) in counties of large population. When, as

Digitized by Google

to such counties, the Legislature, as part of a new system, declared "all fees" which the county officers were "entitled to charge or receive, shall belong to the county in and for which they were severally elected or appointed," it meant, and could only mean, all the fees pertaining to the county office, and which, from the character of the office, the incumbent earned and received. It did not mean one-half the fees over and above a certain amount, or the Act would have said so. It did, by exception, save fees and taxes specially levied for the State, but the language of the exception seems to carefully guard against affecting the scope of the words first used: "And it shall be the duty of each of said officers to exact, collect and receive all such fees to and for the use of their respective counties, except such taxes and fees as are levied for the State." This would have been but little more significant if it had said "except collateral inheritance taxes, State tax on writs, wills, commissions and license fees." And that this is the meaning is obvious from the provision in section nine; section two had required the officer to keep a special account of all the money received for fees, and pay all the money so received monthly into the county treasury, but outside of these fees payable to the county monthly were other moneys not belonging to the county; so this section directs the officer "shall make a separate return to the State treasurer of all collateral inheritance taxes, ... all taxes due the State on any writs or legal proceedings, or fees otherwise belonging to the State," and these shall be paid by him into the State treasury quarterly. He was to account to the county and pay over monthly, to the Commonwealth quarterly.

Then comes the last section, which assumes the Act is a substitute for prior legislation, by directing that it shall take effect only on the expiration of the terms of those then in office, and they shall settle their accounts under the old system up to that date.

We are of opinion that the Act of 1876, as to Philadelphia county, that county having over one hundred and fifty thousand inhabitants, was intended as a substitute, in its application to county officers, for the Act of 1810, and that the latter, of necessity, was repealed by it; that by the Act of 1876 all the fees which the defendant, as prothonotary, was entitled to charge or receive, belonged to the county.

It is argued by the learned attorney-general, with some force, that this construction of the Act of 1876 tends to inequality, because large counties will have the whole excess revenue derived from fees, while the officers in the smaller counties will continue to contribute a share to the Commonwealth's treasury. But this inequality is more apparent than real. The larger county becomes answerable, under the Act, for all the expenses of the office and all salaries; the nearness of the county to the officer; it having a voice in determining, not only the number of deputies and clerks, but their salaries; and having, to a large extent, control of the expenses, there is established a motive to watchful, economical supervision. Besides, the fact is well known that litigation tends towards the larger counties. Our Courts are Courts of the Commonwealth; corporations and large business concerns have offices in the large counties, and can there be easily served with process; there, in personal actions, where the cause has arisen in other counties, suits are often brought and determined. Consequently, the expense of maintaining Courts, outside of that which is reimbursed by fees, is heavier in such counties, and the Legislature may have thought it but right to relinquish the Commonwealth's claim on a share of the fees. But whatever may have been the motive, the Legislature, in so doing, had the power to, and, by no uncertain words, did give up to the county, what before the Act of 1876 the Commonwealth had claimed.

While we do not think this interpretation of the Act of 1876 at all doubtful, so as to require the aid of contemporaneous construction, the fact that the same construction has been given it, from the time it became a law, for nearly twenty years, by all whose duty it was to construe it, or who were affected by it, is worthy of notice. In speaking of contemporaneous exposition of a statute, Judge ENDLICH, in his valuable work on Statutes, section 357, says: "But, further, the meaning given by contemporary or long professional usage (to a statute) is presumed to be the true one, even when the language has etymologically or popularly a different meaning. Those who lived at or near the time when it was passed may reasonably be supposed to be better acquainted than their descendants, with the circumstances to which it had relation, as well as with the sense then attached to legislative expression." And further on in the same section, he says, "It often becomes, therefore, material, to inquire what has been done under an Act, this being of more or less cogency, according to circumstances, for determining the meaning given by contemporaneous exposition." And for the text he cites many authorities both in this country and England. And, further, in note to same section, "In construing statutes applicable to public corporations, Courts will attach no slight weight to the uniform practice under them, if this practice has continued for a considerable period of time." In the case before us, as is intimated by the learned Judge of the Court below, the construction given to the Act by the officers or county to be charged, in their

Digitized by Google

own interest, is not entitled to much weight; but, when that construction has been acquiesced in by the Commonwealth, from the date of the Act until the institution of this suit, if the construction were doubtful this would have much weight. The many auditor-generals, attorney-generals and State treasurers, whose sworn duty it was through all these years to see that the revenues of the State were accounted for and paid over, were grossly neglectful in not exacting payment if the Act of 1810 were still in force. It would be highly unjust to impute to them such neglect; evidently they considered, and rightly so, the Act of 1810 repealed by the Act of 1876, on the expiration of the term of those then in office; the contemporaneous exposition of the Act, and the long uniform practice under it, show that, in their opinion, it took the place of the old Act, and that neither the county officer nor the county was longer answerable for one-half the excess of office fees, for all were declared to belong to the county.

The appeal is sustained and the judgment is reversed.

COMMONWEALTH OF PENNSYLVANIA *v.* WILLIAM B. MANN.

May 20, 1895. DEAN, J. (On page 300, "*The sixth section*" is to read as follows):—

The sixth section provides, that the salary of the officer shall only be paid out of the aggregate of the fees paid into the treasury by him the preceding months, after deducting the amount due deputies and clerks, and if there be not enough left to pay him, then, he shall get only the aggregate of net fees received; but also providing, if there be any excess in subsequent months, the deficit shall be made up from the excess during his term. His compensation cannot be greater than the aggregate of net fees during the term.

Judgment of reversal was also entered in Commonwealth *v.* Shields, Commonwealth *v.* Latta, and Commonwealth *v.* Green.

W. M. S., JR.

May, '95. April 29, 1895.

Commonwealth v. County of Allegheny.

Fees of county officers of Allegheny County—Act of March 10, 1810, repealed by Act of April 6, 1871, and its supplement March 6, 1872.

An earlier statute is repealed by a later one which acts as a substitute and which, if enforced according to its terms, leaves nothing for the old Act to operate upon.

The Act of March 10, 1810, was repealed by the special Act of April 6, 1871, and its supplement of March 6, 1872, so far as relates to the right of the Commonwealth to one-half of the office fees of officers of Allegheny County.

Appeal of the County of Allegheny, from the judgment of the Common Pleas of Dauphin County, upon an appeal from a settlement of account, by the auditor-general against the prothonotary, register, recorder and clerk of Quarter Sessions of said county.

The case was tried before SIMONTON, P. J., without a jury, and the facts as found by him are fully set out in the opinion of the Supreme Court, *infra*.

His conclusions of law were as follows:—

"1. The Act of March 10, 1810, was not repealed by the Act of April 6, 1871, nor the Act of May 6, 1862, or either of them, so far as relates to the claim of the Commonwealth to one-half the excess of office fees charged against defendant in the settlement appealed from in this case.

"2. The Act of March 10, 1810, was not repealed by the Act of March 31, 1876, so far as relates to the claim of the Commonwealth to one-half the excess of office fees charged against defendant in the settlement appealed from.

"3. The several Acts above cited are *in pari materia* and must be construed together, and their effect is to entitle the Commonwealth to one-half the excess of office fees collected and paid by the several officers named in the settlement appealed from to the County of Allegheny, after deducting their clerk-hire and the salaries of the respective officers.

"4. The Commonwealth is entitled to recover in this case as follows:—

Prothonotary's fees for 1893, half excess, .	$ 8,046 84
Register's fees for 1893, half excess, . .	2,101 40
Recorder's fees for 1893, half excess. . .	1,460 54
Clerk of Quarter Sessions' fees, half excess,	1,589 37
Total, ...	$13,198 15

"For which amount judgment is directed to be entered in favor of the Commonwealth and against the defendant, if exceptions be not filed within the time limited by law."

The exceptions filed by the County of Alle-

Digitized by Google

gheny were dismissed and judgment was entered in accordance with the above opinion, whereupon this appeal was taken, assigning for error, the conclusions of law as above and the entry of judgment.

D. T. Watson, (with him *Walter Lyon*, *W. J. Brennan* and *N. S. Williams*), for appellant.

A contemporaneous construction of a statute long acquiesced in is practically conclusive.

Graham's Appeal, 1 Dallas, 136.
Edwards *v.* Darby, 12 Wheat. 210.
U. S. *v.* Recorder, 1 Blatch. C. C. R. 218.

Where the words of a statute are plain there is no need of rules of construction.

Potter's Dwarris on Statutes, 182.

The Act of 1871 supplied and repealed the Act of 1810. (*a*) Took from the officer all right to any fees and gave them to the county. Thus making it impossible for the officer to do what the Act of 1810 commanded, *i. e.*, to pay into the State treasury the one-half of the excess fees over $1,500.

(*b*) Made an entirely new arrangement for the State by which the county paid to the State the one-half of the fees which theretofore, under the Act of 1810, the county officer had paid.

(*c*) Expressly provided that the State's share of the fees should have precedence to all salaries.

After the Act of 1871 was passed the State could thereafter only claim under it, and only by reason of its provisions. The only debtor the State had was the county, and this relation the Act of 1871 created.

The rule of construction is well settled that even a subsequent affirmative statute which supplies, repeals the prior statute thus supplied. When it contains really negative provisions the intent to repeal is more clearly shown; and when it is a particular statute for one county only the intent more particularly appears.

Bank *v* Com'th, 10 Pa. 447.
Norris *v*, Crocker, 13 How. 429.
Johnston's Est., 33 Pa. 511.
In re Bounty Accts. 70 Id. 96.
Com'th *v.* Grier, 152 Id. 180.
McCleary *v.* County of Allegheny, 35 WEEKLY NOTES, 193.

Since the Act of March 6, 1872, the situation in Allegheny County seems plainly to have been and to be as follows:—

(*a*) That the General Assembly, as to Allegheny County, in 1871 and 1872, instituted a system totally at variance with that under which the Act of 1810 was passed.

At that time (1810) all the fees received by county officers belonged to them, and they paid their own rent, janitors, stationery and incidental expenses, and, in addition, paid one-half over $1,500 to the State.

The Act of 1871 and 1872 introduced an entirely new system; gave all the fees to the county and took them all away from the officers, and paid the officers a fixed salary and expenses, and this salary, by the terms of the Act, the General Assembly charged upon and made payable out of the county treasury.

If it had not been for so charging upon the county treasury not a single officer could have received from that treasury one cent. They so received solely and only by reason of the words of the Act of 1871 and 1872.

(*b*) In the Act 1871 the General Assembly, by section 4, gave to the State its share of the fees given under the Act of 1810 by expressly providing that out of the county treasury, by a warrant drawn on the treasury, the county should pay to the State the State's share of the fees, and by providing in section 7 for its payment prior to the salaries of the officers.

But this was totally inconsistent with the Act of 1810, for it made the county debtor to the State, and provided for the payment from the county treasury out of its property, whereas, under the Act of 1810, the officer was the debtor to the State, and out of his property he paid to the State a share of the fees.

The Act of 1871 supplied, and, therefore, repealed that provision of the Act of 1810 which required the officer to pay to the State the one-half of the fees over $1,500.

Thereafter it was the county, out of the county treasury, who paid the State its share.

(*c*) The Act of 1872 wholly repealed these provisions of the Act of 1871 which made the county debtor to the State, and provided for the payment by the treasurer out of the county treasury of the State's share of the fees.

This left the State without a debtor, and took away from the State any share of the fees.

It had no claim under the Act of 1810 upon the officers, for this was supplied and repealed by the Act of 1871.

It had no claim under the Act of 1871, for this was repealed by the Act of 1872.

(*d*) Viewed in another light the same result is reached. Under the legislation of 1871 the means of payment to the county officers of their salaries, *i. e.*, the fees they received, were given by the General Assembly to the county treasury.

In the same Act the General Assembly charged these fees, (1), with the salaries of the officers; and (2), with the State's share of the fees, *i. e.*, 50 per cent. of over $1,500.

The Act of 1872 took away the second charge and left the fees subject only to the first charge, *i. e.*, the salaries of the officers; and the Acts of 1871 and 1872, construed together, show the fees in the county treasury charged *only* with the salaries of the officers. *Expressio unius est exclusio alterius.*

Digitized by Google

The argument here is much stronger than in the ordinary case.

To make the fees in the treasury of the county subject to the charge of the State's share the General Assembly thought it was necessary to insert an express provision in the Act of 1871, which it did. After a year's experience the General Assembly expressly repealed those provisions of the Act of 1871 which made the State's share a charge on the treasury.

(*e*) The change in the system in force under the Act of 1810 to the system under the Acts of 1871 and 1872 was not only that out of the fees of the different officers their salaries should be paid, but the State charged upon Allegheny County in addition to those salaries other encumbrances, among which was the payment to the Judges of the Courts of Common Pleas of $1,000 per year of each of their salaries. As this was done under the Act of 1872, which was the same Act which took away from the State any share of the fees, does it not strengthen the argument that legislative intent was clear to make a complete change in the system, to give to the county all the fees, and to have those fees subject to no charge whatever except the charges put upon them in the Acts of 1871 and 1872.

(*f*) If the Act of 1810 is still in force the State is entitled to the one-half of the fees over and above $1,500 per year. There is nothing in the legislation to show that this limit of $1,500 under the Act of 1810 was raised by the Acts of 1871 and 1872 and 1876. If it is true that this half still belongs to the State the whole system under the Acts of 1871 and 1872 would be overturned, because there would not be sufficient left in the county treasury out of which to pay the salaries provided by the Acts of 1871 and 1872, and especially as those salaries are increased by the Act of 1876.

Henry C. McCormick, attorney-general, (with him *Benjamin M. Nead* and *John P. Elkin*, deputy attorney-general), for the Commonwealth.

Implied repeals are not favored.

Erie *v.* Bootz, 72 Pa. 199.
Contested Election of Barber, 86 Id. 392.

Under the Act of 1871, "the State's proportion of the fees received" is still to be paid to the State, but the county is the paymaster instead of the officer.

If by any reasonable construction both Acts can be upheld the later one will not repeal the earlier.

Plum *v.* Lugar, 49 N. J. 557.
McNeely *v.* Woodruff, 1 Green, 352.
23 Am. & Eng. Ency. 491.
Chicago, etc., R. R. *v.* U. S. 127 U. S. 406.
Homer *v.* Com'th, 106 Pa. 221.

The failure of the auditor-general to collect the share of fees due the Commonwealth is not a contemporaneous construction, but a case of neglect of duty.

Commonwealth *v.* Philadelphia, 157 Pa. 558.
Commonwealth *v.* Lehigh C. & N. Co., 162 Id. 603.
Sutherland on Statutory Construction, sec. 307.

The Act of 1872 is within the constitutional prohibition because it does not clearly state its purpose in the title.

May 20, 1895. DEAN, J. In 1894, the auditor-general and State treasurer settled accounts against the prothonotary, register, recorder and clerk of Quarter Sessions of Allegheny County, in which they charged these officers with one-half the fees received by them in excess of their salaries and clerk-hire, for the year 1893. As they had paid all the fees pertaining to their office which had been received by them for this year, to the county, by agreement, the county assumed the responsibility, and was made party defendant in the suit. The case was tried before the Common Pleas of Dauphin County, under Act of 22d of April, 1874, without a jury. Judgment having been given for the Commonwealth, in sum of $13,198.15, the amount claimed, the county presses this appeal.

Before the Act of March 10, 1810, all the office fees of a county officer belonged to him exclusively. But that Act, which is entitled, "An Act taxing certain offices," required him to pay over to the State fifty per cent. of all fees in excess of fifteen hundred dollars. Then, by the Act of April 5, 1842, in addition to the fifteen hundred dollars, he was allowed to deduct his expenses for clerk-hire and stationery.

When passed, the Act of 1810 was a general Act, applicable to all the counties of the State, and so continued to be until the passage of the Act of April 2, 1868. It was then repealed, as to all counties, except Allegheny, Lancaster, Montgomery, Philadelphia, Beaver, and Washington. Then, the Act of April 6, 1871, a local or special law for Allegheny County, was passed, which directed that all fees limited and appointed by law to be received by the county officers against whom this account was settled, as well as others designated in the Act, should belong to the County of Allegheny, and that said officers should not "receive for their own use, or for any use or purpose whatever, except for the use of the County of Allegheny, any fees for any official services whatever." This was, in substance, the provision of the first section of the Act; the officer no longer had title to a single dollar chargeable to litigants under the fee bill, except, by a proviso to the third section, the sheriff and coroner were allowed fees for mileage. By section four, it was expressly provided, that the

Digitized by Google

Commonwealth's taxes on writs, and its proportion of the fees received, should be paid by warrant on the county treasurer. Section seven of the Act, directed that the officer, and all his deputies and clerks, should be paid fixed and specific salaries, which were either determined by the Act itself, as in case of the principal officers, or as in case of deputies and clerks, by a board designated to perform that duty. The same section directed that the Commonwealth's share of the fees should be deducted from the aggregate sum received, before the salary of the principal officer was paid, and if not enough remained to cover the salary, then he should receive only such proportion as equalled the aggregate of fees earned during his term, after paying the deputies and clerks in full and the Commonwealth.

It will be noticed, what a radical change was made in the relations between the Commonwealth and the officer, as they had existed under the Act of 1810. Before the Act of 1871 the officer accounted to the Commonwealth for, and paid to her, fifty per cent. of the fees in excess of fifteen hundred dollars; he was her debtor, and she looked to him alone for her money; under the last named Act, she peremptorily ordered him to pay all fees into the county treasury, and at the same time announced she would look to the county for payment; in effect, the officer was no longer answerable to her, and the county was.

This Act was followed by a supplement to it of March 6, 1872, which expressly repealed the fourth section of the Act of 1871. The repealed section, as already noticed, directed that the State's share of the fees, instead of being paid as under the Act of 1810 by the officer, should be paid by the county by warrant drawn on the county treasurer. The first section of the Act of 1871 had declared all the fees should belong to the county, and be paid into the county treasury; the fourth qualified it by declaring that the Commonwealth's proportion should be drawn out by warrant; this repeal left unqualified the positive declaration, that all the fees belonged to the county; they were in the county treasury, and by the explicit declaration of the law, in the first section, belonged to the county; then this sweeping disclaimer of right to any part, was restricted by the claim in the fourth section, to a proportion of these fees, to be paid by warrant on the county treasury; but now, by the repeal, this claim to a proportion is absolutely abandoned, leaving the unqualified renunciation of any claim to any proportion of such fees, as announced in the first section, standing in full force.

But the Act of 1872, as a repealing Act, went further; the second proviso to the seventh section of the Act of 1871, directed, "That after ascertaining the amount due the deputies and clerks in each office, and the State's share of the fees, if there has not been a sum sufficient from fees received and paid in, or earned and due by the county for services rendered, to pay the full amount of the salary of the officer holding said office, he shall only receive such proportion of his salary, as shall be equal to the aggregate of the fees received and earned during his term of office, after paying the deputies and clerks in full, and after also paying the share of the fees due the Commonwealth; and all the moneys accruing from fees above the said salaries and the share of the State, shall accrue to the benefit of the county," excepting, however, officers then in office elected before the year 1870, who should, for the unexpired term of their office, be paid all fees earned after paying the salaries of clerks and deputies, and the Commonwealth's share of fees, as provided by Act of 1871.

This second proviso, the Act of 1872 also expressly repealed, and in lieu thereof, it was directed that all salaries, except those of county commissioners, officers elected in 1870, and a part of the salaries of Judges of Courts, should be paid from the county treasury, out of the fees paid into the treasury, after ascertaining and deducting the amounts due deputies and clerks; and if there were not enough left to pay the salary of the officer, he should only receive such proportion of his salary, as equalled the aggregate of the net fees. The proviso directed, the officer should receive his salary, after deducting the salaries of deputies and clerks, and the Commonwealth's proportion of the fees; it is repealed; he is now to receive his salary, after deducting those of his deputies and clerks only; there is no longer anything to be taken off for the Commonwealth.

The Court below determined that the Act of 1810 was not repealed by the Acts of 1871 and 1872, so far as relates to the right of the Commonwealth to one-half the office fees. We are of a different opinion.

The Act of 1871 was, manifestly, a substitute for the Act of 1810, so far as related to Allegheny County. Could they stand together, or could any material part of the Act of 1810 stand, if the Act of 1871 were enforced according to its plainly expressed terms?

The Act of 1810 made the officer accountable to and debtor of the State; that of 1871 discharges him and accepts the county as debtor; the first, made an allowance to the officer of fifteen hundred dollars, and demanded one-half the excess; the second, makes no allowance to the officer. The Act of 1810 simply provided that the officer should account for and pay to the Commonwealth one-half of all fees for ser-

Digitized by Google

vices performed by him in excess of fifteen hundred dollars. When the Act of 1871 declared that he should pay all fees into the county treasury, and the county should thereafter pay one-half to the Commonwealth, without any deduction of a minimum salary for the officer, what was left of the Act of 1810 to enforce? If the Commonwealth demands from the officer an annual account, as provided in the old Act, he replies, I have as you directed by the second section of the new Act, accounted monthly to the county; if she demands payment of any proportion of the fees received, he replies, I have none of them, having paid all as you directed by the second section of the same Act, to the county monthly.

If the mandates of the new statute be obeyed, there is nothing for those of the old to operate on. Nor, is there ambiguity or doubt as to the import of the commands of the new statute; we do not need to wrestle over doubtful construction of dubious words and phrases; they admit of but one construction; are almost as peremptory and plain as the command of the centurion, and were obeyed as implicitly: "I say . . . to my servant, do this, and he doeth it."

If then, the Act of 1871 was plainly a substitute for the Act of 1810, the Act of 1872, by its repeal of the fourth section and second proviso to the seventh section, just as plainly relinquished all claim of the Commonwealth to any part of the officer's fees. Without this fourth section, and this proviso, under the Act of 1871, the Commonwealth would have been entitled to nothing; by their express repeal, that Act is without them and stands a palpable renunciation of any claim under the Act of 1810, to half the fees. Where the words of a statute are not doubtful, there is no need for construction; it is the duty of Courts to follow explicit enactments of the Legislature, the taxing power; if it has clearly not taxed, we cannot by a strained construction, tax.

From 1872 down to 1894, both the county and Commonwealth officers assumed the Act of 1810 was repealed by that of 1871, and that, by the Act of 1872, the Commonwealth relinquished claim to any part of the office fees, which theretofore it had demanded. In so doing, they did not adopt one of two doubtful constructions of the law; they only followed its manifest directions. It needs no aid now, from contemporaneous construction; standing on its unambiguous words, it could have received no other construction. The learned Judge of the Court below admits that he arrives at his conclusion in favor of the Commonwealth with a great deal of hesitation, we arrive at ours with none.

The appeal is sustained, and the judgment is reversed. W. M. S., Jr.

July, '94, 1. February 4, 1895.

Ogontz Land and Improvement Co. v. Johnson.

Building restriction — Porches — What are "buildings" covered by restriction.

The restriction in a deed that "all buildings upon the said lot shall be erected not less than fifteen feet back from the fence line" means all substantial parts of all buildings. Merely incidental encroachments on this space, by steps, or eaves, or ornamental projections may not amount to violations of the agreement, but a porch extending the whole width of the house as a substantial and integral part, is clearly a violation.

Appeal of the Ogontz Land and Improvement Company, plaintiff, from the decree of the Common Pleas of Montgomery County, refusing a perpetual injunction against Amos Johnson.

The facts of the case appear in the following opinion filed by WEAND, J., upon the application for an injunction; and in the opinion of the Supreme Court, *infra*: —

"The complainants sold to the respondent a lot of ground in Abington Township subject to the restriction 'that all buildings upon the said lot shall be erected not less than fifteen feet back from the fence line.' In erecting his dwelling house the respondent has complied with this condition but he now proposes to build a porch in front of the dwelling within seven feet of the fence line. Plaintiff asks for an injunction to restrain the building of the porch and alleges that it is a 'building' within the meaning of the terms of the deed.

"Whether a porch or piazza attached to a dwelling house is a building or a constituent part of the dwelling in our opinion depends upon the manner of its construction and the uses to which it is to be applied. If open and used only for comfort and convenience instead of a place to live in, it may be merely a covered entrance or ornamental approach. If enclosed it may become as much a part of the main building as a kitchen or parlor. The evident intent of the grantor was to prevent the front yards of this and adjoining lots from being shut up by buildings using the term in its ordinary sense as meaning 'a house,' but we do not think it was intended to deprive the grantee from adding an open structure intended only for comfort or ornament as porches are usually used. The evidence shows that the porch is to be open and of the ordinary kind. For the same reason it might be urged that the steps could not be covered or the eaves extended beyond the limit of 15 feet. In Tench *v.* Rothermel, 4 Kulp, 110, it was said, 'In whatever sense the term piazza is used it does not convey the meaning of a building.' When the language making an exception or re-

Digitized by Google

servation in a deed is doubtful it should be construed more favorably to the grantee: Richardson v. Clements, 89 Pa. 503.

"We think that the question as to whether a porch can be considered a violation of this particular reservation must depend upon the particular facts of the case and that the respondent so far as the affidavits show, has not violated the spirit of the terms of the deed, or, at least, that the complainants have not shown such a clear right to the relief prayed for as to warrant an injunction at this stage of the case. And now, Dec. 4, 1893, the motion for an injunction is overruled."

The case was subsequently heard on bill and answer, and after hearing the bill was dismissed, the Court referring to the foregoing opinion as containing the reasons for the dismissal.

The plaintiff took this appeal and filed assignments, *inter alia*, that the Court erred in holding that the porch erected by the defendant was not a building and within the meaning of the restriction in his deed; in holding that the porch erected by defendant, the same having been erected with and attached to the house with the front line thereof seven feet from the fence line, was not a violation of the restriction in defendant's deed; the refusal of the injunction as prayed for, and the dismissal of the bill.

Edward F. Kane, for appellant.

The single question involved in this case is, whether a porch built with and attached to a house, one story in height, covered by a roof and laid with a floor, extending along the entire front of the house, twenty feet in length, eight feet in depth and eight feet six inches in height, resting upon brick foundation piers that have been planted in the ground, constitutes a building within the meaning of a restrictive clause in a deed which stipulates "that all buildings upon the said lots shall be erected not less than fifteen feet back from the fence line." A covered porch, like the one in question, having no connection with any other building, would be an ordinary shed and therefore a building. The legislative understanding of building, inferred from the manner of its use and the wide latitude given to it, is certainly not inconsistent with the contention of the plaintiff that a porch is a building. Nor have the Courts of our own and sister States restricted this general idea of the kind of structure that constitutes a building. "Taken in its broadest sense a building can only mean an erection intended for use and occupation as a habitation or for some purpose of trade, manufacture, ornament or use, constituting fabric or edifice, such as a house, a store, a church, a shed."

Truesdell *v.* Gay, 13 Gray (Mass.) 312.
Short *v.* Miller, 120 Pa. 476.
Lightfoot *v.* Krug *et al.*, 35 Id. 348.
Short *v.* Ames, 121 Id. 530.

The porch in question having been built with and attached to the house proper, is part of the house and together they form a single structure or building. The intention of the grantor, as expressed in the deed, was to prohibit the erection of buildings or any part thereof, within the prescribed limits, and any permanent structure, built within these limits, that will obstruct the view of adjoining owners, violates the conditions of the deed.

Means *v.* Presbyterian Church, 3 W. & S. 312.
Wright *v.* Evans, 2 Abb. Pr. N. S. 308.

William F. Solly, for appellee.

The appellant contends first that this frame attachment, this porch, is a shed; and therefore a building; and second, because it is attached to the house, the two together form a building. He gives a definition of the word building. That of itself shows that an unenclosed porch is not a building. In whatever sense the term piazza is used it does not convey the meaning of a building.

Tench *v.* Rothermel, 4 Kulp, 110.

It may be said that in whatever sense the term porch is used it does not convey the meaning of a building; and that in whatever sense the term building is used it does not convey the meaning of an ordinary open porch to be used only for comfort and convenience.

The language of the reservation is doubtful. "All buildings upon the said lots shall be erected not less than fifteen feet back from the fence line." What did the appellant mean in the use of the term buildings? Not open porches or it would have been easy to say so. The deed does not stipulate that no part of a building shall be erected, which the appellant contends should be read into the reservation.

When the language making an exception or reservation in a deed is doubtful it should be construed more favorably to the grantee.

Whitaker *v.* Brown, 46 Pa. 197.
Richardson *v.* Clements, 89 Id. 503.

It is the fundamental rule in the interpretation of a deed or lease that it is to be taken most strongly against the vendor or lessor.

Trout *v.* McDonald, 83 Pa. 144.

May 20, 1895. MITCHELL, J. Both the bill and the answer are in very brief and general terms, and the facts in regard to the porch in controversy do not therefore appear with precision as to details. The answer, however, admits that the porch is to be a permanent part of the house, built upon brick foundations, and projecting to within seven feet of the fence line.

Digitized by Google

Prima facie this is in violation of the building restriction. The terms of this are not in dispute. They are that "all buildings upon the said lots shall be erected not less than fifteen feet back from the fence line." The intention of this clause is plain. It is to widen the entire space between the house lines and secure the light, air, and open view incident to a wide street. The language is "all buildings," and that means all substantial parts of all buildings. While merely incidental encroachments on this space by steps, or eaves, or ornamental projections might not amount to violations of the agreement (See City of Phila. *v.* Presbyterian Board of Pub., 9 Phila., 499), yet a porch extending the whole width of the house as a substantial and integral part of it, is clearly so. If it can occupy eight feet of the reserved space, it could as well occupy the whole fifteen feet to the fence line, and thereby destroy the open uniform general effect meant to be secured.

We agree with the learned Judge below that "whether a porch or piazza attached to a dwelling house is a building or a constituent part of the dwelling depends on the manner of its construction, and the uses to which it is to be applied," but we do not think the fact of its being open or enclosed is the ruling factor. It is one item of evidence only, and each case must depend on its own circumstances as shown by the whole evidence. As already said the details as to this porch do not precisely appear, but it is to be gathered from the answer and the arguments of both parties that it is an integral part of the house, built with it, on brick foundations, roofed, and permanently attached to the whole width of the front. The fact that it is open at the sides and in front will not save it from being an obstruction to light, air and uniformity of effect, and as such contrary to the restriction.

Decree reversed, bill reinstated, and injunction directed to be awarded, with costs.

W. C. S.

July, '94, 137. January 31, 1895.

Wertheimer v. Thomas.

Contract of sale—Notice to purchaser—Subject to terms of lease—Necessity of reasonable diligence on part of purchaser—Option of purchase in lease.

The general rule is that notice of a lease will affect the purchaser of real estate with notice of the covenants contained in it. An agreement, however, giving the tenant an option to purchase, although incorporated in a lease, is not a part of it, but is a distinct agreement having no necessary connection with the lease, is unusual, and not to be expected.

Appeal of S. Wertheimer, plaintiff, from the judgment of Common Pleas No. 4, of Philadelphia County, in an action of assumpsit against William H. Thomas and Celestine D. Thomas.

This was an action brought upon a written agreement whereby the defendants undertook to sell to the plaintiff certain premises, cleared of all encumbrance except a certain mortgage and a lease to one Price not exceeding five years.

On the trial before THAYER, P. J., the facts appeared as follows:—

On March 4, 1892, the plaintiff's agent, Israel Hecht, called upon the defendants with the view of purchasing for his principal the property No. 33 North Eleventh street owned by them. In the course of the conversation the defendant stated that there was a mortgage upon the property of $3000, and that it was also leased to a tenant named Price for a term which had about five years to run. The plaintiff's agent, on behalf of his principal, agreed with the defendants to purchase the property for $9000, subject to the mortgage and the unexpired term of Price, and an agreement in writing under seal was thereupon executed whereby the defendants agreed to sell the property to the plaintiff for $9000, of which it was stipulated $100 should be paid at the time, and the balance on the delivery of a deed to the plaintiff for the premises "clear of all encumbrances, except a mortgage of $3000, now due, and a lease to Mr. Price not exceeding five years," and the plaintiff's agent paid the $100 to the defendants on the signing of the agreement.

Upon examining the lease it was discovered that, while it was a lease from the defendant, William H. Thomas to Charles S. Price of the premises for a term of seven years, of which about five were then unexpired, it also contained an agreement on the part of the lessor granting unto the lessee "the option or privilege to purchase the demised property at any time during the term for the price of $12,000, clear of all encumbrances." The existence of this option on the part of Price was unknown to the plaintiff or his agent until the production of the lease, and it had apparently been forgotten by the defendants, for when his attention was called to it W. H. Thomas expressed great surprise and stated that he did not know that it was there, and that he would try to get it arranged in some way. Subsequently he offered to return the plaintiff the $100 paid on account and cancel the contract, which Mr. Hecht declined; but told him that he did not think Price intended to exercise the option, and that the plaintiff would take the property subject to the lease, and give him (Thomas) a bond of indemnity against any loss which he might sustain by reason of Price bringing suit against him. This Thomas declined. Whereupon the plaintiff tendered the de-

Digitized by Google

fendants the balance of the purchase money together with a deed for the premises and requested them to make the conveyance to him. Defendants refused to accept the purchase money or to execute the deed, and on June 18, 1892, sold the property to Price for $12,000. Price on the same day sold the property to a man named Veit for $14,500, from whom the plaintiff subsequently purchased it for $16,500, being thus forced to pay for it $4500 more than he had originally contracted to pay.

The Court below gave the jury a binding instruction to find for the defendants.

The plaintiff took this appeal, and assigned as error, the instruction of the Court that the agreement of sale being made subject to the lease to Price it meant subject to every covenant contained in the lease to Price, including the covenant that Price should have the property if he chose to buy it during the tenancy for $12,000; and the binding instruction to the jury to find a verdict for the defendants.

George P. Rich, for appellant.

Under the ruling of the Court below the plaintiff not only loses the property and the very considerable profit there was in his bargain, but actually forfeits to the defendants the $100 which he paid them on account. It is submitted that in any event the plaintiff was entitled to recover back from the defendants the purchase money he had thus paid them, and that the judgment must be reversed upon this account if no other. He was entitled to recover more than this, and the question of his right to substantial damages for the loss of his bargain should have been left to the jury. In Pennsylvania the rule is well established that if the vendor has sold in good faith, and is unable to make title by reason of some defect unknown to him at the time the agreement was executed, and is willing, however, to make such title as he can, the vendee is not permitted to recover for the loss of a good bargain, but is confined to his actual loss in money, labor, or service performed on the faith of the contract. On the other hand, when the vendor has not acted in good faith, but has been guilty of deception, or fraud in the original contract, or of collusion, tort, artifice, and fraud, to escape from the effects of a bad bargain, the vendee is entitled not only to compensatory damages, but to damages arising from the loss of the bargain or the money he might have derived from the completion of the contract.

Bitner *v.* Brough, 11 Pa. 127.
Meason *v.* Kaine, 67 Id. 132.
Burk's Appeal, 75 Id. 141.
Burk *v.* Serrill, 80 Id. 413.

The vendor must, however, under all circumstances, make such title as he can if the vendee is willing to accept it.

Burk's Appeal, *supra*.
Burk *v.* Serrill, *supra*.
Riesz's Appeal, 73 Pa. 485.

Where it appears that there was an encumbrance upon the land, or some defect or deficiency in the title, quantity, quality, description or other matters touching the estate, unknown to the purchaser at the time the agreement of sale was executed, the purchaser is entitled, if he chooses, to have the contract specifically performed, so far as the vendor can perform it, and to have an abatement out of the purchase money or compensation for the defect or deficiency.

Burk's Appeal, 75 Pa. 141.

Even in the case of a parol contract for the sale of lands, where there has been fraud, or deceit on the part of the vendor in the inception of the contract, as where he has fraudulently induced the vendee to agree to purchase by false representations as to his title, etc., where, in other words, there has been fraud on the part of the vendor in making the sale, there the vendee may recover compensation for the loss or value of his bargain.

Rineer *v.* Collins, 156 Pa. 342.

The defendants refused to convey to the plaintiff not because of any defect in their title, but because they were unwilling to pay damages to Price. But the fact that the defendants, by carrying out their agreement with the plaintiff, subjected themselves to an action by Price was no concern of the plaintiff, and has no bearing in this discussion. The testimony of the plaintiff and his witnesses was that the plaintiff, when he agreed to purchase the property, knew nothing about the lease to Price other than as communicated to him by the defendants, viz., that it was a lease which had about five years to run. There was evidence then from which the jury could have found that the defendants were able to make a good title to the plaintiff, but deliberately refused to do so, and put it out of their power to convey to him by conveying to Price. The jury under the evidence in this case might very well have found that the defendants did know of Price's option when they executed the agreement to sell to the plaintiff, and concealed their knowledge from him, believing that they would be able to get Price to withdraw. This would bring the case within the ruling in Pumpelly *v.* Phelps, 40 N. Y. 59, where it was held that when a party contracts to sell lands which he knows at the time he has not the power to sell and convey, and if he violates his contract in the latter case he shall be held to make good to his vendee the loss of his bargain, and it does

Digitized by Google

not excuse the vendor that he may have acted in good faith, and believed when he entered into the contract that he should be able to procure a good title for his purchaser.

We concede that the plaintiff in taking the property subject to a lease took it subject to all the usual covenants and conditions customary in leases, relating to the tenure of landlord and tenant, and for the protection and enforcement of their reciprocal rights, duties, and obligations. The plaintiff is therefore bound to know the class of covenants usually inserted in lease and to anticipate that this lease would have those covenants; but is he bound to know that the lease contained some other covenant or agreement, having no relation to the tenure of landlord and tenant or the physical condition of the property, and not a covenant usual to be inserted in lease, but an extraordinary one, which no person would expect to find in a lease? In determining this question, we are afforded some light by the class of cases which hold that a purchaser to whom the vendor has agreed to make a deed of conveyance is bound to take notice of the kind of covenants usual and customary to be inserted in deeds of conveyance, to wit, a covenant of special warranty, and cannot insist on a covenant of general warranty or any other extraordinary and unusual covenant.

Espy *v.* Anderson, 14 Pa. 308.
Lloyd *v.* Farrell, 48 Id. 73.

The jury might, perhaps, have thought from the testimony that the defendants were not acting with the absolute good faith towards the plaintiff; that the fact that the property was worth very much more than the price for which they had agreed to sell to him, had something to do with their extreme anxiety to carry out their contract with Price; and they might also have thought it very significant that Price, on the very day he received the property from the defendants, should immediately sell it for $14,500; and they might even have come to the conclusion that this profit of $2,500 thus coming to Price, had a controlling influence upon the minds of the defendants, and that the defendants themselves shared in this profit.

Wendell P. Bowman, for appellees.

According to the express terms of the written contract, the agreement to sell was subject to the lease to the tenant, and consequently subject to all the terms and agreements in the lease. One of the terms of the lease was that the tenant had the option to purchase. The effect was just the same as if the lease, with all its terms, had been incorporated in the agreement of sale, with the right to purchase. There was no confidential relation between the parties. They were dealing as vendor and purchaser. It is not claimed that there was any deceit or fraud in the making of the agreement. The agreement in effect was this: That Thomas agreed to sell to Wertheimer, provided that Price declined to buy the property under his agreement of purchase.

That the learned Judge below was right as to his ruling that the second purchase was bound by all the terms of the lease, the following authorities will show:—

1 Sugden on Vendors, 8 Am. Ed., page 10.
2 Sugden on Vendors, Am. Ed., page 561.

A notice of a deed is notice of all its contents.

Boggs *v.* Varner, 6 W. & S. 469.

The appellant, according to the testimony, appears to have known all about the lease before the making of his agreement, but even if the contract had not expressly been made subject to the lease, he had notice of that fact by the tenant being in possession, and from the testimony it is to be presumed that he saw the tenant and was notified by him of his right to purchase.

Kerr *v.* Day, 14 Pa. 112.
Corson *v.* Mulvany, 49 Id. 88.
Peoples Street Railway Co. *v.* Spencer, 156 Id. 85.

These authorities show that the tenant in the present case had an equitable estate in the demised premises, and not a mere personal contract; and that a subsequent purchaser would be bound to inquire of the tenant as to any such estate.

May 20, 1895. FELL, J. The general rule is that notice of a lease will affect the purchaser of real estate with notice of the covenants contained in it. If with knowledge of a lease he buys without examining it he cannot afterwards object that he had no notice of a particular covenant. The equity of a tenant in possession may extend still further, and notice of unusual covenants and even of a collateral agreement to purchase may be imputed to the vendee. This equity, however, rests upon the fact of possession, which is notice to the purchaser of the occupant's title and of the fact that the property is affected, and imposes upon him the duty of inquiry. The purchaser is therefore chargeable with notice not only when the evidence raises a presumption that he knew, but also when there is just ground for inferring that reasonable diligence would have led him to discover the truth. But this rule of constructive notice by tenancy does not apply to controversies between the vendor and the vendee. Facts which in a controversy with a third party whose rights have been prejudiced by the sale would affect the vendee with constructive notice will not charge him with defects in the vendor's title: Leading

Digitized by Google

Cases in Equity, Vol. 2, part 1, p. 145. While the vendee is put to inquiry as to the tenant's title, the duty of inquiry arises because of the possession. In protection of innocent parties the doctrine of implied notice has been carried to its fullest extent. As between the vendor and the vendee, the latter is held to have had notice of the covenants of a lease of which he knew but had not examined, and as to the contents of which he has not been misled, but he is not charged with notice of a distinct collateral agreement.

When the agreement in this case was made the plaintiff's agent knew that the property purchased was in the possession of a tenant under a lease from the defendant. The agreement was made expressly subject to this lease. Actual notice of the lease carried with it constructive notice of all its covenants and conditions relating to the tenure or intended to secure or enforce the rights and duties of the parties to it as landlord and tenant; but there does not seem to be ground as between the parties for carrying the implication of notice further. The agreement giving the tenant an option to purchase, although incorporated in the lease, was not a part of it. It was a distinct agreement having no necessary connection with the lease. It was unusual and not to be expected. Had this agreement been separate and distinct from the lease in form as it was in substance, it clearly would not have been as between the parties to this action notice of the tenant's equity.

We are of opinion that the case should not have been withdrawn from the jury on the ground that the plaintiff was charged with notice of the agreement to sell. That his agent had actual notice, or purposely avoided it, and in fact secured by the agreement only the right to take title to the property in the event of the failure of the tenant to do so, the jury might well have found from the testimony.

The judgment is reversed and a venire de novo awarded.

W. C. S.

Jan. '95, 108. March 6, 1895.

Crouse v. Binkley.

Ejectment—Conditional verdict — Mortgage—Deed.

In an ejectment by a mortgagor out of possession against a mortgagee in possession, if it be shown that the debt has been fully satisfied before suit brought, the plaintiff will be entitled to an unconditional verdict; and if it be not so shown he may obtain a verdict conditioned on the payment of the balance.

A deed conveying a title in fee simple may be shown to have been only in fact a mortgage, a method of securing a debt.

Appeal of Levi Binkley, defendant, from the judgment of the Common Pleas of Berks County, in discharging a rule for judgment *non obstante veredicto*, and discharging a rule for a new trial, conditioned upon plaintiff paying the balance of an indebtedness owed by his grantors to defendant's grantors, in an action of ejectment, wherein George W. Crouse was plaintiff.

This was an action of ejectment brought by George W. Crouse against Levi K. Binkley to recover a tract of land containing four acres, situate in Lower Heidelberg township, Berks County.

On the trial, before ENDLICH, J., the facts appeared as follows:—

In 1879 William M. Crouse, the father of the plaintiff, was the owner of two tracts of land, one containing twelve acres, on which he lived, situate in Lancaster county, the other a four-acre tract of improved land, without buildings, in Berks county. On July 18, 1879, Crouse and wife made an assignment for the benefit of creditors to one Ream. Under a writ of execution against Crouse the twelve-acre tract was in the fall of 1879 sold by the sheriff and bought by Levi W. Mentzer, for $1,545, Mr. Mentzer paying ten per cent. in cash on the day of sale and the balance within sixty days when he received his deed for the premises.

Mentzer purchased the farm at the sheriff's sale at the request of Crouse, who promised to pay him fifty dollars for his trouble and to refund all expenses he might be put to in buying. These Mentzer stated amounted to about one hundred and fifty-eight dollars. Unable to pay this Crouse and wife conveyed on April 17, 1880, to Mentzer the four-acre farm, the subject of this action.

Crouse subsequently rented the premises at an annual rental from Mentzer.

To secure the debt to Mentzer, being what he paid at the sheriff's sale, Crouse executed a mortgage for $1555 upon the premises in Berks county.

On May 22, 1890, the deed of April 17, 1880, not having been recorded, Crouse and wife conveyed the tract to their son, the plaintiff, and on April 1, 1891, Mentzer conveyed it to defendant.

The Court charged the jury, *inter alia*, as follows:—

"Now, gentlemen, the plaintiffs in this case have undertaken to prove to you that this deed was accompanied with an understanding at the time between the parties that it should not operate as an absolute transfer of the title of Crouse to Mentzer in this four-acre tract of land in Berks county, but that Mentzer should hold that

Digitized by Google

tract as additional security for some money which the Crouses at the time owed him, Mentzer, by reason of some former transaction between them. The question in this case is, is that or is it not true? and that is the question which you will have to decide under the rule I have given you. You must remember that the written instrument shows Mentzer to be the absolute owner, that in order to make him out anything else than the absolute owner, in order to establish the proposition which the plaintiffs contend for, you must be satisfied that they made it out beyond a reasonable doubt by the testimony produced here before you, remembering, also, the contradiction which Mentzer and his witnesses have placed in the way. You will, of course, consider with all the testimony of the plaintiff and his witnesses the written instruments that have been shown here before you, this letter that Mentzer wrote to 'Squire Ream, the accounts, his own explanations and denials, and whatever else has been shown in evidence, and from all this you will determine, gentlemen, whether you are satisfied that the story which the plaintiff told you is true, is made out clearly, fully and satisfactorily, beyond a reasonable doubt. If so, then you will return a verdict for the plaintiff; if not, you will find for the defendant."

Defendant asked the Court to charge:—

1. There is not sufficient evidence to show that the deed from Crouse and wife to Mentzer is other than an absolute deed—no contemporaneous defeasance—and defendant cannot recover.

2. Even if the deed to Mentzer is collateral for the payment of the money Mentzer had advanced, there can be no recovery in this case, as the money is still unpaid.

The Court reserved both points.

Verdict for plaintiff.

The defendant took a rule for judgment *non obstante veredicto* and for a new trial. After argument the Court entered the following judgment:—

"And now, to wit, January 8, 1894, the rule for judgment *non obstante veredicto* is discharged, and the rule for a new trial is discharged, on condition that the plaintiff, within thirty days from this date, pay into the Court so much of the sum of $1,555 owing by Nancy Crouse to Levi Mentzer, with interest thereon, as shall still be due, or produce to the Court satisfactory evidence of the payment, discharge or settlement of said debt; otherwise said rule to become absolute."

The defendant took this appeal, and assigned as error the refusal to affirm the above quoted points, the portion of the charge above set out and the entry of judgment, *ut supra*.

Herbert R. Green (*A. G. Green* with him), for appellant.

Prior to the Act of June 8, 1881, it was competent to show by parol testimony that a deed absolute on its face, was in reality a mortgage and intended as security for a debt. But such evidence must be clear, precise, indubitable, and sufficient to satisfy the mind of a chancellor, otherwise it is error to submit it to the jury.

Pancake *v.* Caufman, 114 Pa. 113.
Burger *v.* Dankel, 100 Id. 113.
Ferguson *v.* Rafferty, 128 Id. 356.
Thomas *v.* Loose, 114 Id. 35.

Again it must be shown that the parol defeasance was contemporaneous with the deed.

Nicolls *v.* McDonald, 101 Pa. 514.

As a prerequisite to a decree in equity for a re-conveyance, as well as to recover in ejectment, in a suit brought on an equitable title, it is necessary for the plaintiff to prove that the debt has in some way been paid, or that a tender of the sum due has been made before suit.

Gore *v.* Kinney, 10 Watts, 139.

In the case of an action of ejectment, founded on an equitable title, the plaintiff must not only tender the money before suit brought, but he must have it in Court ready to be paid to the defendant, in case of a verdict for the plaintiff.

Levick *v.* Bensing, 1 Mona. 592.
Munger *v.* Casey, 1 Id. 692.

A. K. Stauffer, (*S. M. Meredith* with him), for appellee.

April 1, 1895. WILLIAMS, J. This is an equitable ejectment brought by a mortgagor out of possession against a mortgagee who is in under his mortgage. Ordinarily in such cases a tender of the amount due on the mortgage, made before suit brought, is a condition precedent to a recovery. But when it is alleged that the mortgagee has been paid out of the rents and profits received by him, or in any other manner, so that the land is no longer in pledge, an account may be taken at the trial to determine the truth of the plaintiff's claim. If the account so taken shows the payment of the debt in full the plaintiff may recover an unconditional verdict. If the account results in showing a balance still unpaid this may be secured by a conditional verdict which ascertains the amount due and enables the plaintiff to recover subject to its payment.

In this case the defendant was found to be a mortgagee in possession. It was made to appear beyond all doubt that his debt was fully paid. On such a state of facts the plaintiff was entitled to an unconditional verdict in his favor.

The judgment is affirmed. W. D. N.

Digitized by Google

Jan. '95, 21. April 17, 1895.

In re Opening of Pringle Street.

Opening of streets—Mandamus execution—Judgment—Certiorari—Orders "nunc pro tunc"—Viewers' report.

An execution cannot issue upon a report of viewers appointed under a petition under the Act of April 22, 1856, to ascertain and assess benefits and damages arising from the opening of a street, unless specific amounts are assessed against or in behalf of certain persons, as there is no judgment on which to base execution.

A report of viewers that does not so precisely ascertain whether or not there be damages and benefits and the amount of the same and the names of the property owners so damaged or benefited, is an imperfect performance of the office of viewer.

Appeal of the Borough of Kingston, from the decree of the Quarter Sessions of Luzerne County, entered in making absolute a rule to show cause why a mandamus execution should not issue on the report of viewers filed November 25, 1872, and discharging a rule entered to show cause why the report of viewers should not be stricken off and execution stayed.

The record of the case disclosed that on September 23, 1872, the borough petitioned for the opening of Pringle street from Main street to Toby's creek. The viewers having been duly appointed, on November 25, 1872, filed their report in which they found as follows: "In opening said Pringle street, beginning at Main street, running up to the Pringle House, we find that no person would sustain damages exceeding the advantages, the said street being opened nearly all the way between these two points; and in our opinion the damages would be seven hundred and fifty dollars by opening the street from the southeasterly side of said Pringle House to the creek, and in our opinion the individuals owning lots and land along the line of said street would not be benefited by the opening or extending of the said street from the southeasterly side of said Pringle House to the creek, and it is also our opinion that the borough would not be benefited by opening the said street between the last two points named; therefore, we hereby report that it would be burdensome, wrong and unjust to assess the lot owners or the borough with advantages sufficient to pay the damages that would be caused by opening said street from the southeasterly side of said Pringle House to the creek."

A draft of Pringle street was attached to the report.

This report was confirmed January 25, 1873. A rule to set aside the report was taken March 13, 1895, but by direction of the Court entered as of June 26, 1894, *nunc pro tunc*. March 5, 1894, N. G. Pringle and Samuel Pringle obtained a rule to show cause why a mandamus execution should not issue, which rule was on June 25, 1894, made absolute. The borough took this appeal and assigned as error the action of the Court in making absolute the rule for an execution and the allowance of interest on the award.

On January 17, 1893, the ordinance on which these proceedings were based was repealed.

Thomas H. Atherton, for appellant.

The status of the petitioners is not clearly shown; the petition alleges them to be descendants of Samuel Pringle; and the draft which was appended to the viewers' report shows "*the heirs* of Samuel Pringle" to have been owners of the land at the time the report was filed.

The report of the viewers is fatally defective for—

(1) It fails to assess and allow damages to any persons by name.

(2) It fails to designate or describe any lands in favor of which damages are assessed.

(3) It fails to indicate what lands ought to be assessed with advantages, or who ought to pay the damages ascertained.

Myers *v.* South Bethlehem, 149 Pa. 85.

The draft attached to the report could not cure these defects.

Schuylkill Falls' Road, 2 Binn. 250.
Penna. Canal Co. *v.* Dunkel, 101 Pa. 109.

The well settled rule of law that a judgment is presumed to be paid after twenty years, as announced in the decisions of this Court, applies to this case.

Hayes's Appeal, 113 Pa. 380.
Murphy *v.* Trust Co., 103 Id. 380.
Van Loon *v.* Smith, 103 Id. 238.

F. W. Wheaton, (with him *Darling* and *Woodward*), for appellees.

(1) Did the report of viewers, as confirmed absolutely on the 25th of January, 1873, constitute a judgment in favor of the owner of the land occupied by the street between the southeasterly side of the Pringle House and Toby's creek, and against the Borough of Kingston?

(2) Did the lapse of time prevent the exit of the execution?

(3) Did the repeal of the ordinance, under which the view was had, years after the confirmation of the viewers' report, prevent the issuing of the execution?

These questions are to be answered from the record, and nothing else.

Esling's Appeal, 89 Pa. 205.
Road in McCandless Township, 110 Id. 605.

By "the record" is not meant the depositions, nor the opinion of the Court, nor *nunc pro tunc*

Digitized by Google

orders made in the Court below more than six months after the case had been removed to this Court by certiorari.

Such an order as the one of March 13, 1895, carefully concealed in appellant's "Abstract List of Proceedings," page 2, under date of June 26, 1894, is beyond the jurisdiction of the Court below, after certiorari from this Court has been filed, and while the case is here pending.

Cox's Adm'r *v.* Henry, 36 Pa. 445.
Martzinger *v.* Smith, 9 WEEKLY NOTES, 274.

It is only within the jurisdiction of the Court below, pending an appeal, to make such orders in the cause, according to the recognized rules of practice, as will preserve the status of the respective parties.

New Brighton R. R. Co. *v.* Pittsburgh R. R. Co. 105 Pa. 24.

The *nunc pro tunc* order of March 13, 1895, did not tend to preserve the status of the parties, but just the opposite.

Interest is payable from the date of the confirmation of the report.

Weiss *v.* South Bethlehem, 136 Pa. 295.

April 29, 1895. STERRETT, C. J. The vice of this decree, awarding a mandamus against the borough appellant, is that there was no judgment, or decree in the nature of a judgment, or any definitely ascertained indebtedness of the borough to the appellees or either of them on which any execution process could by any possibility issue. It was a mistake to assume that the confirmation of the report of the viewers in January, 1873, was in effect a decree for the payment of money by the borough to the appellees or to any other person, because the viewers neither assessed, nor intended to assess, any sum or sums of money, as damages, against the borough in favor of anybody. That clearly and conclusively appears by their report. After setting forth therein that, "In opening said Pringle street, beginning at Main street and running up to the Pringle House, we find that no person would sustain damages exceeding the advantages, the said street being opened nearly all the way between these two points," the viewers proceed to say: "In our opinion the damages would be $750 by the opening of the street from the southeasterly side of said Pringle House to the creek, and in our opinion the individuals owning lots and land along the line of said street would not be benefited by the opening or extending of the said street, from the southeasterly side of said Pringle House to the creek, and it is also our opinion that the borough would not be benefited by the opening of said street between the last two points named; therefore we hereby report that it would be burdensome, wrong and unjust to assess the lot owners or the borough with advantages sufficient to pay the damages that would be caused by the opening of said street from the southeasterly side of the Pringle House to the creek." In other words, while they express their opinion that the damages caused by the opening of the northwesterly portion of the street would be $750, they not only omit to specify how much thereof should be paid to the respective owners of property abutting thereon, but they decline to assess the same against the borough, or against other property owners in the form of special benefits, and distinctly give their reasons therefor.

While the report is clearly not a proper execution of the order issued to the viewers, and perhaps ought to have been set aside or recommitted to them, the Court and all parties concerned appear to have acquiesced in the action and suggestions of the viewers, and thenceforth, for over twenty years, treated the proceeding as an opening and settlement of damages merely of the southeasterly portion of the street, from Main street to the Pringle House, and a temporary abandonment of proceedings as to the northwesterly portion of the street. But, however that may be, it is very clear that there is nothing in the report of the viewers or in the confirmation thereof by the Court to sustain the mandamus.

It follows from what has been said that the learned Court erred in awarding the mandamus; and all the assignments of error, except the first, should be sustained.

Decree reversed and petition dismissed with costs to be paid by the appellees.

W. D. N.

Orphans' Court.

January, 1894, 4.

McCarthy's Estate.

Examiner—Fees—Practice, O. C.—Rule V., Sec. 10.

Examiners are mere agents to take depositions for the parties; they have no right to withhold the report for the purpose of compelling the payment of their fee

Rule V., sec. 10, only applies where his duties have not been completed; he can not require security for costs after the completion of his duties.

Rule for security for examiner's fee.

In December, 1893, Georgeanna McCarthy, the decedent, died.

Digitized by Google

In January of 1894, upon petition being presented to this Court by one Dorsey, (for whom the administrator, J. J. Crout, was substituted), alleging that Patrick McCarthy was in possession of certain moneys belonging to above named decedent, the Court issued an order in the nature of an injunction restraining respondent from withdrawing the sum of twenty-five hundred dollars that he had deposited in the Southwark National Bank in his own name.

Respondent Patrick McCarthy denied that the money deposited in the bank was the property of the decedent and claims that it was his own.

The matter was referred to an examiner for the purpose of taking testimony. Both sides have closed and the report is ready for filing, but not being paid his fee the present rule is taken.

The respondent Patrick McCarthy is the husband of the decedent.

The rule is upon both the administrator and McCarthy to show cause why an order should not be made requiring both parties to enter security for the examiner's fee.

Henry Budd, for the rule.

Charles K. Westbrook, and *Alfred C. Ferris*, for the respondent.

It is too late for the respondent in the original suit to ask for new security; he has waived such right by laches and acquiescence for more than a year; and having taken testimony, and cross-examined all the witnesses he must now submit to a decision on the merits of the case.

Weidner *v.* Fletcher, 1 Jones, 336.
Canal Co. *v.* Loftus, 21 Smith, 418.
Wilson *v.* Kelly, 81 Pa. 413.
Kerr on Injunction, page 635.

The fund within the grasp of the Court is liable for the examiner's fees. In the Orphans' Court the fees of an examiner are payable out of the fund.

Dyre's Estate, 5 WEEKLY NOTES, 455.

J. W. Logue and *J. A. Scanlan*, for petitioner.

March 30, 1895. PENROSE, J. We do not share in the apprehensions of the learned examiner as to the effect of the amendment of the proceedings, by the introduction of the administrator c. t. a. as a party, upon the liability of the surety upon the injunction bond; but as the question is irrelevant to the present application and the surety is not before us it is not necessary now to discuss it.

It is to be regretted that the report of the examiner was not filed when the testimony was completed so that the case could have been disposed of on final hearing upon the present argument list, for until then we can, of course, make no order as to the party by whom the costs, including the examiner's fees, shall be paid, and in the meantime our interlocutory powers are only such as the rules of Court provide for. Examiners are mere agents to take depositions for the parties. Each party is, in the first instance, liable for the expense of the testimony taken for him (Daniell's Chanc. Pr. *900; Nichols *v.* English, 3 Brewst. 260), and there is no right to withhold the report for the purpose of compelling payment. The rule of Court provides that, "Auditors, examiners' or masters shall not retain their reports as security for their compensation, but when the compensation is allowed by the Court they shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof he does not pay within the time prescribed by the Court:" the provision as to enforcing payment by attachment being, of course, subject to the operation of the Act of 1842 abolishing imprisonment for debt (Pierce's Appeal, 7 Outerb. 27; Church's Appeal, Id. 263; Wilson *v.* Wilson, 27 Crumr. 247). So far as appears, there has been no submission of the question of compensation to counsel in accordance with the requirement of the rule (V. section 7), nor has there been any apportionment of the amount between the parties, nor any demand upon them for their respective shares.

The rule (V., sec. 10) which provides for security at the instance of the examiner only applies where his duties have not been completed. It affords protection by permitting him to decline to proceed so long as the security is not entered; but it gives no right to compel the entry of security by peremptory order, enforceable by process.

So far as concerns the respondent's share of the fee, its ultimate payment is assured by the existence of the fund, within the control of the Court, which his counsel have agreed shall be responsible therefor if the question of ownership shall be decided in his favor; while, on the other hand, if the decision shall be in favor of his wife's estate, he will still be entitled to a distributive share more than sufficient to cover all costs that have arisen or can arise in the course of the proceeding.

We think the report should be filed at once. The examiner, if unwilling to await the determination of the controversy, can then proceed to compel payment by the petitioner of his share of the fee in accordance with the practice prescribed by the rules of Court. We cannot make the order now asked for.

Order for security refused, without prejudice.

F. B. N.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, JUNE 14, 1895.* [No. 18.

Supreme Court.

Jan. '95. February 7, 1895.

Township of Plymouth v. The Chestnut Hill and Norristown Railway Co.

Street passenger railway companies—Use of roads by—Consent thereto by local authorities—Consent coupled with conditions—Validity of—Revocation of consent—Effect of—Constitution of Pennsylvania, Article XVII., sec. 9—Act of Assembly May 14, 1889, sec. 15.

Under the provisions of Article XVII., sec. 9, of the Constitution, the consent of the local authorities is a prerequisite to the construction of a passenger railway, and if such consent is given upon conditions, the railway company must take it subject thereto or not at all.

City of Allegheny *v.* Millvale etc. Ry. Co., 33 WEEKLY NOTES, 397, followed.

The right of the local authorities, to consent or refuse, is directly given them by the Constitution, and it neither needs help from nor can it be interfered with by the Legislature.

The requirement of the 16th section of the Act of May 14, 1889, that the company shall construct its street railway, and complete it within two years is not a privilege, but a limitation on the privileges or franchise otherwise granted.

The conditions of consent of the local authorities are a further limitation, and if there is any conflict between such conditions and the statute, the latter, not the former, will have to give way.

A consent revoked in accordance with the terms on which it was originally granted is the same as none at all; and the revocation is no more a forfeiture of the charter or franchises of the company, than a refusal of consent in the first instance would have been.

In either case the company is building without authority, and there being no adequate measure of damages at law, equity will intervene.

The Township of P. gave its consent to the building of a passenger railway upon its roads on condition that, "the said company shall build its said railway over the roads herein described within fourteen months after the date hereof." Subsequently the township notified the railway company that this consent was revoked because it had not complied with this condition. The company continued to build its road, and the township applied for an injunction:

Held, that the township acted within its constitutional authority, in imposing this condition, and that the injunction should be granted.

Appeal of the Township of Plymouth, plaintiff, from the decree of the Common Pleas of Montgomery County, dismissing a bill in equity filed by the Township of Plymouth against the Chestnut Hill and Norristown Railway Company, praying for an injunction to restrain the said railway company from building its railway upon any of the public roads of Plymouth Township, and from in any way obstructing any of said public roads.

The facts of this case, as found, appear in the opinion filed by SWARTZ, P. J., as follows:—

FINDINGS OF FACT.

"1. The defendant company was chartered to build a street railway from Barren Hill to Chestnut Hill and from Barren Hill to Norristown, under the Act of May 14, 1889, P. L. 211. The proposed road passes through Whitemarsh Township, Plymouth Township, Springfield Township, the Borough of Norristown, and enters the City and County of Philadelphia.

"2. Consent by all these municipalities was given to the defendant company to build the proposed railway. The supervisors of Plymouth Township gave their consent the 20th of May, 1893. The written agreement giving such consent contained the following provision: 'And it is further stipulated and agreed that the said company shall build its said railway over the roads herein described within fourteen months after the date hereof.'

"3. On the 25th of July, 1894, the supervisors of the said Township of Plymouth notified the defendant company that the time for building the railway terminated on July 20, 1894, and that the consent of said township to build said railway was revoked.

"4. On July 3, 1894, the defendant company placed some ties on the Germantown and Perkiomen turnpike road in Plymouth Township. This turnpike road was abandoned some years ago and has been under the care of the supervisors of the respective townships through which it passes. The ten or more ties were laid, spaced almost two and one-half feet apart, and trenches were dug to receive them, the length of the ties. The ties were covered up and suitably laid with a view to be straightened up when further construction came along. At this time and prior thereto work was being done at the other end of the proposed railway. The survey of the whole road was completed on July 19, 1894, at least to the line dividing Plymouth Township from the Borough of Norristown. The construction in Whitemarsh began June 30, 1894. The proper mode of construction was at the beginning of the proposed line, that is between Chestnut Hill and Barren Hill.

"5. At the time this bill was filed, the defend-

Digitized by Google

ant was at work with a large force of men in Plymouth Township.

"6. On July 21, 1894, the supervisors of Plymouth Township gave their consent to the Conshohocken company to build a passenger railway on the road in question—that is the German-town and Perkiomen turnpike. This agreement gave said company two years in which to build said railway, and the exclusive right in said township, at least this is the apparent intent of said agreement.

CONCLUSIONS OF LAW.

"1. [The agreement between the plaintiff and the defendant did not work a lawful change as to the time given by the Act of May 14, 1889, in which the railway must be constructed. The defendant had two years in which to complete the construction notwithstanding said agreement.]

"2. [If the defendant failed to comply with the time limit fixed by the statute, the Commonwealth alone can move for a forfeiture for such laches.]

"3. [The violation of the limit of fourteen months, even if such limit is binding on the defendant company, is not *ipso facto* a forfeiture] by the agreement. A breach as to this provision is not made a cause of forfeiture by the agreement.

"In support of these conclusions we offer our opinion filed refusing the preliminary injunction and add the following:—

"We again examined carefully the case of Allegheny *v.* Millvale Railway Co., 159 Pa. 411. It is true the language of the Court is broad enough to sustain the right of the turnpike to impose the condition as to the fourteen months, but we must apply the opinion to the case then decided and the facts do not raise the issue now before us. [We admit that the consent may be coupled with conditions that are binding upon the railway company, but can the township make conditions that conflict with the terms upon which the charter was granted? The Legislature says, you shall have two years to build. The township says, no, you can have but fourteen months. If the township may overrule the Legislature in this particular, it may do the same as to any other provision in the Act. The township is not hurt; if it does not approve of the Act, it may withhold its consent from the chartered company.]

"If a township may ignore any of the provisions found in the Act of 1889, its sections, numbering twenty, may as well be stricken down and in their place we should have but a single section, declaring that street railways may be constructed.

"West Side Street Railway Co. *v.* Barnard, 110 N. Y. 548, does not overrule King's County Elevated Railroad, 105 N. Y. 114. In the former case the question of power in a municipality to impose conditions repugnant to the legislative grant was not considered.

"[Even if the township impose the condition that the railway be built in fourteen months, it has not in the case before us stipulated that failure to so build shall terminate all rights under the agreement.] Forfeitures are not favorites with the law, and if the township intended a breach of the agreement to have that effect, it would have been an easy matter to say so in the contract: Reck *v.* Hatboro Mutual Insurance Co., 163 Pa. 443. Here there was an attempt to forfeit the right of the defendant company without any notice to it. The purpose is manifest. A rival corporation obtains the consent to use the public roads in question. The supervisors grant to it the right to build within *two years*. It is very evident the township did not consider the fourteen months' limit of any consequence. Why stop the active work of one corporation and give the grant to another? If the necessities for a street railway are so great, the action of the supervisors is calculated to bring about still more delay.

"The township has ample protection under the Act of 1889. If the road is not built in two years, the Commonwealth will, no doubt, afford relief.

"And now, November 5, 1894, the prothonotary will notify the parties or their counsel of the filing of this report and opinion, and if no exceptions are filed thereto within thirty days from the time of the service of such notice, the prothonotary will enter a decree dismissing the bill at the cost of the plaintiff."

Whereupon the plaintiff took this appeal, assigning for error, *inter alia*, the portions of the opinion of the Court given above in brackets, and the action of the Court dismissing the bill.

N. H. Larzelere and *John G. Johnson*, for appellant.

The condition imposed upon the railway company by the Township of Plymouth to complete its road within fourteen months, was valid.

Allegheny City *v.* The Millvale etc. Ry. Co., 33 WEEKLY NOTES, 397.

Nor was it in violation of any privileges granted by the Act of 14th May, 1889, in regard to street railway companies. The provisions of that Act as to the time in which the railway must be completed, are intended to impose a restriction, not to grant a privilege.

In granting its consent the township exercised its constitutional right, and it was not within the power of the Legislature to compel the local authorities to consent to a construction, without

Digitized by Google

imposition of conditions by them, as to time of completion.

The grantors of the license to lay the tracks were the supervisors of the township. Having power to grant on condition, they had necessarily power to enforce such condition.

People *v.* Mutual Gas Light Co. of Detroit, 38 Mich. 154.
Archbald Borough *v.* Carbondale Trac. Co., 3 Dist. Rep. 751.
Elliott on Roads and Streets, 584 and note.

Francis Rawle, and *Henry C. Boyer*, (*Henry M. Tracy* with them), for appellee.

The township is not entitled to the relief prayed for, even if it could plead the time fixed by the Legislature.

Lejee *v.* Continental Pass. Ry. Co., 10 Phila. 362.
Com'th *v.* Allegheny Bridge Co., 20 Pa. 185.
Western Penna. R. R. Co.'s Appeal, 104 Id. 399.

The defendant's delay has worked the plaintiff no harm, and the effort here now is to defeat a legislative grant on a plea which can avail no one but the Commonwealth.

Hinchman *v.* P. & W. C. Turnpike Road, 34 WEEKLY NOTES, 129
Larimer Railway Co. *v.* Railway Co., 27 WEEKLY NOTES, 113.

Even where a charter provides a time limit of construction it has always been held that such a provision is not self-executory, and that on non-compliance with the limit of time, forfeiture must be judicially ascertained and declared, unless the instrument expressly provides for a forfeiture.

Brooklyn El. R. R. Co., 125 N. Y. 434.
Pacific R. R. Co. *v.* Leavenworth City, 1 Dill. C. C. R. 393.
Atchison St. Ry. Co. *v.* Nave, 38 Kan. 744.
Chicago *v.* C. & W. I. R. R. Co., 105 Ill. 73.
Oakland Railroad Co. *v.* R. R. Co., 45 Cal. 365.

In the grant of a charter the Legislature may impose conditions which will be imperative and binding on the township and in derogation of which the township could not act. No part of the local consent, therefore, will be valid which runs counter to the lawful powers and franchises vested in the railway company under its charter and contained in the Act of 1889.

May 20, 1895. MITCHELL, J. This case is so clearly within the principle of Allegheny *v.* Millvale, etc., R. W. Co., 159 Pa. 411, that it would be sufficient to reverse it with a reference to that decision, in which it was held that the consent of the local authorities is a prerequisite to the construction of a passenger railway, and that if such consent is given upon conditions, the railway company must take it subject thereto or not at all.

As said in that case, the right to consent or refuse is "a gift directly from the Constitution to the local bodies, and needs no help, nor permits any interference from the Legislature." The learned Court below overlooked this constitutional character of the local authority, when it held that a condition to the consent, that the railway should be constructed within less time than that allowed by the statute, would be void. If there were the conflict between the conditions of the consent and the statute that the learned Judge supposed, the statute, not the consent, would have to give way. How far the Legislature may regulate the time or mode of indicating consent or refusal we need not consider, for the Legislature has not undertaken to do so. The Act of May 14, 1889, sec. 16, P. L. 217, provides that any company proposing to construct a street railway under the privileges of this Act, shall in good faith commence within one year after the consent of the proper local authorities, and shall complete it within two years, unless the time shall be extended by the authorities aforesaid. This is not a privilege, but a limitation on the privileges or franchise otherwise granted. It is a legislative declaration, as a condition of the grant, that the franchise shall be put in operation within the prescribed time, and not held dormant to stand in the way of the actual attainment by the public, of the benefits to them which are the consideration for the public grant. This limitation being in the fundamental law of the corporation, would of itself make the charter liable to forfeiture on failure to comply, and the Legislature, recognizing that the general rule might be too short for special cases, expressly authorized the local authorities to extend the time. The opposite contingency, that the general rule might be too long for the circumstances or public convenience in other cases, did not need to be provided for, because there was no danger in that direction from the fundamental law of the corporation, and the whole subject could safely be left to the control of the local authorities. There is nothing in the statute to indicate that the limitation in the present case to fourteen months was contrary to legislative intent. The statute does not say, "We give you two years whether the local authorities think that too much or not," but, "We will not give you more than two years unless the local authorities extend the time." For the latter to curtail the time is not only within their privilege in consenting, but is in the same line of general policy indicated by the statute itself, that the franchise when granted shall be put into prompt operation.

It is strenuously argued that even if the limitation of fourteen months was valid as part of the consent, it was at most a condition subsequent, and there was no express stipulation for a forfeiture. But the question here is not of forfeiture, but of consent, and a consent revoked in accordance with the terms on which it was originally

Digitized by Google

granted, is the same as none at all. The time limit was an express stipulation of the contract, and one of the conditions on which the consent was given. Time was plainly meant to be of the essence of the contract, to protect the public in their right to the prompt enjoyment of the benefits accruing to them from the franchise. There was no measure of damages for delay, and the only way that the public rights could be adequately enforced was by making the time essential. It is said that the township had ample protection in the provisions of the Act of 1889, and if the road was not built in two years, the Commonwealth would no doubt afford relief. But the township was not bound to wait two years, as already shown, nor was it bound to depend for enforcement of its rights on the favor of the Commonwealth. It had the matter in its own hands, by the requirement of its consent, and it protected its rights by giving its consent on condition. When a breach of the condition occurred, the consent became revocable, and was revoked. Thereafter it was as if it had never been given.

We find no difficulty about the jurisdiction in equity, nor about the necessary parties. There is no question here of forfeiture of the charter or the franchises of the company. If the revocation of the township's consent does as a practical result prevent the exercise of the franchise and render the charter ineffective, that is nevertheless in law only a collateral incident, and is no more than a refusal of consent would have done in the first place. If the appellee had undertaken to build without any consent at all, it would have been an act without authority, and for which there was no adequate measure of damages at law. Such acts equity always enjoins: Groff's Appeal, 128 Pa. 621. Here the question is legally the same, is the appellee now undertaking to build without consent, because the consent given was conditional and has been revoked for breach of the condition. The facts found by the learned Court below leave no doubt that the answer to this question must be in the affirmative.

Much of the appellee's argument was devoted to the question of good faith on its part, and the hardship of a revocation of consent under the circumstances causing the delay. Those matters are for the township authorities, not for us.

Decree reversed, bill reinstated, and injunction directed to be awarded as prayed, and made perpetual. Costs to be paid by appellee.

S. H. T.

Jan. '95, 293. February 21, 1895.

Yingst v. The Lebanon and Annville Street Railway Company.

Street railway company—Electric motor cars—Speed of—Respective rights of street railway cars and other conveyances—Negligence—Evidence.

The right of an electric railway company to run its cars upon its tracks is equal to the right of the public to ride in a wagon on the street, and the mere fact that a horse took fright at the sight of the car confers no right of action whatever for injuries sustained by a person riding in a wagon to which the horse was attached.

In such a case the burden of proof is upon the plaintiff to establish the negligence of the railway company, and this must be done by affirmative testimony, failing in which, he fails in his suit.

Electric cars may lawfully be run upon the streets, and may maintain a fair rate of speed. It is not possible to establish an allegation of negligence in respect of speed without testimony showing a standard, and further testimony showing a breach of the standard, and no jury can have liberty to deal with such a question unless there is practical evidence in the case upon these subjects.

In an action for injuries caused by a horse having been frightened by an electric railway car, it appeared, that as the car approached, the horse became frightened and turned round and the wagon was upset. The only direct evidence on the part of the plaintiff as to the speed of the car, which the plaintiff alleged was the cause of the accident, was her own testimony, which was to the effect that the car was going fast, but she could not say how fast. On the other hand two of her witnesses gave testimony which showed that the car was not going faster than a man could walk, and that the horse did not become frightened until the car was within thirty feet of it. The witnesses for the defendant testified that the car was only going at the rate of five miles an hour. The defendant asked the Court to charge that there was no proof that the car was run at an excessive speed, and that the jury be instructed under all the evidence to find for the defendant. This the Court refused to do:

Held, to be error.

Appeal of the Lebanon and Annville Street Railway Company, defendant, from the judgment of the Common Pleas of Lebanon County, in an action of trespass brought by Mary Yingst against the said company, to recover damages for injuries to the said plaintiff through the negligence of the said defendant.

Upon the trial, before MEILY, P. J., the following facts appeared: The Lebanon and Annville Street Railway runs a line of electric cars from a point near Avon, east of the City of Lebanon, through the said city, on the road bed of the Berks and Dauphin turnpike road, known in the City of Lebanon as Cumberland street, to the village of Annville, about five miles west of said city. On the 29th day of July, 1892, Mary Yingst was being driven in a one-horse grocery wagon, eastward towards the City of Lebanon.

Digitized by Google

At the same time a car on the electric railway was running westward. The wagon in which Mary Yingst was riding and the car approached each other in that part of Cumberland street between the Cornwall & Lebanon railroad, which crosses Cumberland street east of Twelfth street, and the Cornwall railroad crossing Cumberland street about a square and a half westward from Twelfth street. There were no buildings on either side of the turnpike between the two railroads above mentioned, and on the north side of the turnpike, at the place where the accident occurred, there was no fence, but an open common. The turnpike road was level and in good order, with plenty of room to pass along the side of the railway track. The electric car stopped at the Cornwall and Lebanon crossing and then proceeded. As it approached the wagon, which it met somewhere in the square and a half between the two railroad crossings, the horse attached to the grocery wagon became frightened, turned round, upset the wagon, and Mary Yingst was thrown out and injured. The only evidence that the electric car was going at a rapid rate, was that of the plaintiff, who testified that it was going "fast," but said that she did not know how fast it was going. On the other hand one of the witnesses for the plaintiff testified that the car was just behind him as he reached the Cornwall and Lebanon crossing, and that the car did not pass him, although he was on foot, between that point and the place of the accident, less than a square and a half. The witnesses of the plaintiff also testified that the horse did not begin to shy until the car was within twenty or thirty feet of it. The motorman further testified that the car was moving at the rate of five miles an hour.

The defendant submitted, *inter alia*, the following points:—

2. The negligence charged in this case, by the plaintiff, being the excessive and improper rate of speed at which the car was run, and there being no proof that the car was so run, it is error to submit the question to the jury, and the jury should be instructed to find for the defendant. *Answer*. This point is reserved. (First assignment of error.)

4. Street car companies, having as much right to run their cars on the streets of the city as other citizens to drive through them with their horses and carriages, are not responsible for horses taking fright at the movement of their cars. *Answer*. Affirmed, provided the defendant's cars are run in the proper and usual manner. (Second assignment of error.)

5. Under all the evidence in this case the verdict of the jury must be for the defendant. *Answer*. Refused. (Third assignment of error.)

Verdict for the plaintiff, upon which the Court entered judgment on the reserved point, filing the following opinion:—

"In our opinion there was evidence of negligence on the part of the defendant and judgment must be entered on the reserved point in favor of the plaintiff. The prothonotary is therefore directed to enter judgment on the verdict on payment of jury fee."

Thereupon the defendant took this appeal, assigning for error the answers to their points given above, and the action of the Court in not entering judgment in favor of the defendant, *non obstante veredicto*.

Grant Weidman, for appellant.

A railroad company is not liable in damages for an accident resulting from the ordinary legitimate and lawful use of its road; and there was no evidence in this case, that the car was being run at an unlawful speed.

Booth on Street Railways, sec. 298.
Drayton *v.* R. R. Co., 10 WEEKLY NOTES, 55.
Peoples Pass. Ry. Co. *v.* Hazel, 25 WEEKLY NOTES, 345.
Piollet *v.* Simmers, 106 Pa. 95.
Pittsburgh Southern Ry. Co. *v.* Taylor, 104 Id. 306.
Steiner *v.* Traction Co., 134 Id. 199.
Ehrisman *v.* Pass. Ry. Co., 30 WEEKLY NOTES, 373.
Chapman *v.* Zanesville St. Ry. Co., 27 Ohio L. J. 70.

There was no evidence to justify an inference of negligence, and the case should have been taken from the jury and a verdict directed for the defendant, as was requested.

Phila. & Reading R. R. Co. *v.* Yerger, 73 Pa. 121.
Goshorn *v.* Smith, 92 Id. 435.
Jennings *v.* Railroad Co., 93 Id. 340.
Fouhy *v.* Penna. R. R. Co., 17 WEEKLY NOTES, 177.
Traction Co. *v.* Bernheimer, 23 WEEKLY NOTES, 568.
Burrell *v.* Gowen, 134 Pa. 527.

The evidence of the plaintiff as to the speed at which the car was going was not of a character to be submitted to the jury.

Fischer *v.* The Ferry Co., 23 WEEKLY NOTES, 224.
Citizens Pass. Ry. Co. *v.* Thomas, 25 WEEKLY NOTES, 399.

Thomas H. Capp, (with him *J. M. Funck* and *George B. Schock*), for appellee, cited—

Schnur *v.* Citizens' Traction Co. 153 Pa. 29.
Dunseath *v.* Traction Co., 34 WEEKLY NOTES, 381.

April 15, 1895. GREEN, J. The plaintiff's injury resulted from the upsetting of a wagon in which she was riding, occasioned exclusively by the fright of the horse drawing the wagon. The horse took fright upon seeing an approaching street car on the defendant's track, and, turning suddenly away from the road, the wheel of the wagon struck a stone or other obstacle, and this

Digitized by Google

caused the overthrow of the vehicle. There was no collision of any kind, the wagon was not on the track but was being drawn upon the highway on which the defendant's track was laid.

The only ground upon which the claim of the plaintiff for damages was asserted in the statement of cause of action, and alleged on the trial, was negligence in running the car at too great speed and in not regarding signals given by the driver of the wagon. As the right of the defendant company to run its cars on their tracks is fully equal to the right of the plaintiff to ride in a wagon on the street, the mere fact that the horse took fright at the sight of the car confers no right of action whatever against the defendant: Hazel *v.* Passenger Railway Co., 132 Pa. 96; Piollet *v.* Simmers, 106 Id. 95; Pittsburgh Southern Ry Co. *v.* Taylor, 104 Id. 306. It is only for an abuse of the right to the injury of another that the company is responsible. In this case it is alleged that the car was running at an excessive rate of speed, and that this was such an abuse of the right of passage as to amount to culpable negligence which caused the fright of the horse and thereby occasioned the injury to the plaintiff. The case therefore centres upon this proposition of fact. Does the evidence sustain this charge? To make out such an allegation it is necessary to know what is the standard of legitimate speed for an electric car on such a street, and, next, was that standard exceeded in this case. The plaintiff, not being a passenger, is subject to the burden of proof, and must establish the truth of her allegations by affirmative testimony, failing in which, she fails in her suit.

Upon this subject, having read every particle of the testimony with patient attention, we are bound to say that the plaintiff has furnished no proof whatever, either as to what is the lawful rate of speed at which an electric car may run over such a street or any street, or as to whether the rate at which this car ran at the time of the accident, was in excess of lawful speed. Her whole testimony as to the fact of the accident consisted of the evidence given by herself and two other witnesses, Witters and Doody. Not one of them was even asked the question whether the speed of the car was greater than was allowable for an electric car to run, or whether they had any knowledge upon that subject. No experts in such matters were called to testify as to what would be a reasonably prudent rate of speed for such a car over such a street, and in short no evidence whatever was given upon that subject. Nor was any evidence given for the plaintiff as to the actual rate of speed at which this car was run, and therefore the plaintiff did not furnish any proof which could guide the jury in considering whether the defendant was guilty of any negligence in this regard.

As electric cars may lawfully be run upon the streets, and may certainly maintain a fair rate of speed, it is not possible to establish an allegation of negligence in respect of speed without testimony showing a standard, and further testimony showing a breach of the standard, and no jury can have liberty to deal with such a question unless there is practical evidence in the case upon these subjects. In this case there was none.

All that the plaintiff said in her testimony in this connection was as follows: "Then the car came at full headway, then when the horse saw that he could not get backward, then he made a sudden turn and threw us out." On cross-examination she was asked: "Q. Did the horse do anything then? A. He looked around but the car was too quick in passing and he hadn't time to do anything; they were running fast. They went pretty fast past us."

Again she said: "Then as we came to the railroad, or crossed the railroad, they came swiftly past us, and then the boy put up his hands that they should stop, and said they should stop."

This was all of her testimony on the subject of speed, and the vice of it is, its utter inadequacy. Electric cars have a lawful right to go "fast," to go with "speed." The fact that they can do so is one of the great reasons of their being. When a witness says, therefore, in a given case that the car ran swiftly or with speed, he says nothing to the purpose when the inquiry is as to the negligence in the rate of travel. Such testimony is altogether too uncertain for judicial action, and most especially so when there was no collision but only the fright of a passing horse. In this case it is at best only the thought of the witness, and that witness the plaintiff, as to what is speed and what is swiftness. In her own case she might well think that any rate of movement would be speed or swiftness in order that she might recover, whereas other witnesses might well think that the same rate of movement was neither speed nor swiftness. The difficulty is that no means of contrast is afforded by such testimony, by which to distinguish between the rate of speed which is usual, or customary, or reasonably prudent, and that which is not so. Now as to this witness, she was examined on this very subject. On cross-examination she was asked: "Q. What is the regular speed of a street car. Do you know how fast they run?" and she answered, "A. I cannot tell you that; that is something I can not tell you. Q. You know nothing about that street, do you? A. I don't know how far they run. Q. Nor how fast they run, do you? A. I know nothing about them except that I seen them go." She added she often saw them run.

And now it is necessary to say that there is

Digitized by Google

absolutely no other testimony in the case than the foregoing on behalf of the plaintiff, on the subject of the speed of the car.

Two other witnesses were called and testified for the plaintiff as to the facts of the accident. Neither of them said one word in regard to the speed of the car. They were not asked a single question upon that subject, and of course they gave no testimony in relation to it. On the question of the speed of the car, therefore, the case hangs alone upon the above two or three fugitive expressions of the plaintiff, and those admittedly not founded upon any knowledge as to what was the regular rate of speed of a street car.

But although the two witnesses called by her said nothing as to the rate of speed of the car, they did testify to some other facts which completely destroy the theory of the plaintiff on this subject, and also as to any negligence of the defendant being the cause of the fright of the horse.

The plaintiff's witness, Witters, who said he stood about thirty feet away from the place of the accident at the time it occurred, and saw it all, testified that he approached the place on foot, walking in the same direction in which the car was moving, but in front of the car. The wagon was coming towards him and he saw it as it crossed the Cornwall road, after he had crossed the Cornwall and Lebanon road. The two roads were not far apart, about a square and a half, and the witness was walking from the Cornwall and Lebanon crossing toward the Cornwall crossing. He was asked: "Q. Had you crossed the Cornwall and Lebanon road already? A. Yes. Q. Where was the car? A. The car was coming along behind me. They stopped there to let somebody on or off at the gas house somewhere. Q. Behind you? A. Yes, behind me. Q. At that time you saw these people crossing the Cornwall road; was the wagon crossing the Cornwall railroad? A. Yes. Q. Then you walked on; did the car go ahead of you then? A. No, he could not because he had stopped there. I don't know who got on or off; I didn't pay no attention to that. Q. Did the car pass you? A. No, not till I got up to that accident; after the accident happened." After saying that his best judgment was that the distance between the two railroads was about a square and a half, he was asked: "Q. You walked there about that distance and the car hadn't caught up with you yet? A. No, not until I got there—we pretty near both came there together where I stood."

Thus it appears that the speed of the car was scarcely more than that of the witness while walking along the road, and in the face of this testimony given by the plaintiff's witness, it is quite preposterous to contend that the car was running at improper speed.

In addition, however, to this fact, both of the plaintiff's witnesses testified to another fact which is in entire hostility with any theory of negligence on the part of the motorman, either for disregarding signals, or for running at too great speed. The witness, Witters, testified that the horse did not commence shying until he was close to the car, only twenty or thirty feet away. He was asked: "Q. Where did the horse first shy that you saw? A. When he got maybe twenty or thirty feet away from the car. Q. Then he didn't shy all the way coming down the hill? A. No, not till the car got close to him." The other witness, Doody, was asked: "Q. Now tell us as near as you can about how far the car and the team were apart when you saw the horse rear? A. It was right close to the team when the horse began to rear up." He further said that twenty or thirty feet was what he called close. As a matter of course if the horse began to shy at no greater distance than twenty or thirty feet from the car there was no opportunity to stop the car before reaching the horse. The momentum of the car would carry it at least that distance before it could be stopped, in point of fact the car did stop at about that distance. To say judicially that a failure to cause an instantaneous stoppage of the car in such circumstances, is negligence, would be a mere travesty of justice. No matter how many signals or calls to stop were made by the driver of the wagon in such a state of the testimony, they would utterly fail to establish the charge of negligence. The motorman was not responsible for the fright of the horse at sight of the car. He was not bound in advance to take precautions against a fright of which he had no knowledge, at least until he saw some evidence of the fright. As the plaintiff's own witnesses concur in saying that when the horse first shied he was only twenty or thirty feet from the car there was no opportunity to stop the car sooner than he did, and he was guilty of no negligence for not doing so.

The foregoing is the case of the plaintiff on the testimony adduced by herself, and it failed utterly to establish any negligence on the part of the defendant. It was the plain duty of the learned Court below to grant the compulsory non-suit which was asked for by the defendant's counsel at the close of the plaintiff's testimony.

This was not done and the trial of the case was proceeded with. It is only necessary to take a brief view of the testimony adduced by the defendant. The motorman testified that the horse made no attempt at shying until he was by the side of the car, that he did not see the boy in the wagon wave his hand, and that he did not yell at all, also that he stopped the car as soon as he saw the horse shying. H. S. Berry, the

Digitized by Google

conductor, said he saw the accident, that "Shiffler's team came along going east as we were going west, and when we were pretty near—when we were past why the horse ran around and upset." He also said he saw no signs of the horse becoming unruly until after the car passed and that he heard nobody call out "stop."

J. I. Greeley, a disinterested witness, riding in the car said, "I was sitting on the side when the team came along, and the horse and wagon as they came towards the car, the horse was prancing a little and the car was slacked down, and after the horse was past he ran around across the sidewalk over in the meadow—and the wagon struck a stone or whatever was lying there and that upset the wagon." He was asked: "Q. Did you see the horse? A. Yes. Q. When did you first see him? A. When he came up over the railroad. When he came down approaching the car. Q. When did he commence to jump? A. He didn't prance much; you can't say that he jumped much when he passed the car. Q. When did he turn around? A. After he passed the car. Q. Did you hear any hollering of anybody to stop? A. I did not." After saying that he was watching the team coming and sat facing them, and that the horse shied only a little, until he passed the car, he was asked: "Q. You saw they were going slow? A. Yes, not full speed, nothing like it, because the car was slackened down considerably. Q. Was there any evidence of the horse being unmanageable that you noticed? A. No, sir, not when he passed the car. Q. Was there before he came to the car? A. No, sir, he acted just like a great many other horses." On cross-examination he said: "I was sitting that way (indicating), and I couldn't help but see just exactly what was going on, but there was not sufficient about the prancing to pay particular attention to it." He repeated that he was looking directly at the horse and could not help seeing him, and that the horse was not excited to any extent. Jacob Schmidt, another disinterested witness, riding on the car, said he noticed the horse and wagon approaching the car and added, "I observed the horse—he was within my vision for a period of ten seconds, possibly, until the team got directly opposite the car." "Q. How did the horse behave until he got opposite the car? A. I saw nothing unusual. I saw the horse prick up his ears, and saw him drive along at a moderate rate of speed, the way most horses would as they pass a car, until as nearly as I can tell, he got directly opposite the car. Q. Did you notice anything peculiar about the horse up to that time? A. Well, nothing that I could say was peculiar, no, sir. Q. Well, what occurred then? A. Well, without any previous warning, I saw the horse wheel around shortly, a very short turn, and as I found afterwards, one of the front wheels had caught on a stone, of considerable size, and the wagon just turned right over on its side. Q. Was the car moving fast or slowly? A. I should judge at a moderate rate of speed. . . . . Q. Was there anything unusual in the behavior of the horse? A. I saw nothing unusual in the behavior of the horse. . . . . Q. Up to that time what was the rate of speed? A. A moderate rate of speed, I could not tell the rate."

This review of the testimony has been rendered necessary because the Court was asked to direct a verdict for the defendant, under all the evidence, and also to charge the jury, in answer to the defendant's second point, that there was no proof that the car was run at an excessive and improper rate of speed and therefore the jury should find for the defendant. We are clearly of opinion that the second point should have been affirmed without qualification, and also the fifth point asking for a general instruction under all the evidence, to find for the defendant.

The question of excessive speed was the one upon which the plaintiff's case depended entirely. Yet not a single witness, not even the plaintiff herself, gave any evidence that the speed was excessive. She merely said the car was moving fast—pretty fast—at full headway, and once she said swiftly. But that is not enough. In order to create liability on this ground, the evidence should show, and it should show clearly, either that the car was moving at an unusual rate of speed, or at a rate which was not reasonably prudent, or at a definite rate in miles per hour which would of itself show it was excessive, or at a rate greater than was allowed by the municipal ordinances, if there were any. But not a word of testimony of this kind is in the case anywhere. The plaintiff is the only witness on her side who says a word as to the speed of the car. Her two witnesses say nothing about it, and the case stands upon the entirely inadequate and interested testimony of the plaintiff on the one side, and the disinterested testimony of four witnesses upon the other side, all of whom say that the car was going at a moderate rate of speed, one of them, the motorman, fixing it at five miles an hour. As to the action of the horse, the great weight of the testimony is that nothing occurred until the horse and the car were very near together, and when according to the testimony of the plaintiff's witnesses, so near that the car could not have been stopped sooner than it was. It is to be regretted that cases so entirely destitute of real merit as this one is, should be permitted to go to the jury at all. We think the cause of justice would be much better subserved if the Judges of the Common Pleas

Digitized by Google

would in all proper cases where the testimony is manifestly insufficient, adjudge it themselves instead of submitting it to the jury. The assignments of error are all sustained.

Judgment reversed.

S. H. T.

Jan., '95, 188. April 10, 1895.

Kerr v. Pennsylvania Railroad Company.

Right of wife abandoned by her husband to sue for damages arising from death of minor child —Acts of April 15, 1851, P. L. 674; April 26, 1855, P. L. 309; May 4, 1855, P. L. 430; Feb. 22, 1718, 1 Sm. L. 99.

Where a husband has deserted his wife and family and has ceased to contribute to their support, the wife may maintain an action under the Act of April 15, 1851, P. L. 674, to recover damages for the death of a minor child of said husband and herself, without joining the husband as a party to the action.

Appeal of Margaret Kerr, plaintiff, from the judgment of the Common Pleas No. 2, of Philadelphia County, in an action of trespass brought by her against the Pennsylvania Railroad.

The plaintiff filed the following statement:

"On the tenth day of January, 1891, the defendant, a corporation, was operating a railroad in that part of the city of Philadelphia known as Tacony, and the plaintiff's minor son, Henry Kerr, was crossing over the said railroad of the defendant in the said Tacony at Longshore street, when, by reason of the negligence of the said defendant and its employés, the plaintiff's said minor son, Henry Kerr, was then and there struck by a train of the said defendant and killed, for which the plaintiff claims damages in the sum of $10,000.

"The plaintiff is the only person entitled to recover for the death of her said son. John Kerr, the plaintiff's husband and the father of the said son of the plaintiff, deserted the said plaintiff and her said son more than eight years anterior to the commencement of this action, and through drunkenness and profligacy failed and refused, from the time of his said desertion (which has been persisted in continuously to the present time) to provide in any way for his said child or for his wife, the plaintiff in this suit."

The defendant demurred on the ground that it appeared from the statement that Henry Kerr left surviving him a father who was not joined in the action.

The Court, after argument, sustained the demurrer with leave to add proper parties. The plaintiff took this appeal.

P. F. Rothermel, Jr., for appellant.

The Act of April 26, 1855, if the Court below was right, enables a father who has deserted his wife and child to deprive her of all right of action vested in her by the statute, by simply declining to join in the action. This would conflict with the Act of May 4, 1855, which vests a deserted wife with the right of a *feme sole* trader, one of which is to sue by herself: Act Feb. 22, 1718. It is not necessary for the exercise of such right that she be *declared* a *feme sole* trader.

Black *v.* Tricker, 59 Pa. 13.

The father had no right of action, because the family relation had ceased to exist between him and his son.

Iron Co. *v.* Rupp, 100 Pa. 95.

It is true the right to sue is vested by the Act of April 25, 1855, in the parents. But it vests it equally in her as in him. It does not prevent the mother from suing when the father is dead; then why should she lose her right of action because by the father's misconduct he has forfeited his?

Edwin Jaquette Sellers, (*David W. Sellers* with him), for appellee.

The statute on which this suit is brought is entitled "An Act relating to damages for injuries producing death," approved April 26, 1855 (P. Laws, 309), and is in these words:—

. . . "That the persons entitled to recover damages for any injury causing death shall be—The husband, widow, children, or *parents of the deceased*, and no other relative; and the sum recovered shall go to them in the proportion they would take his other personal estate in case of intestacy, and that without liability to creditors."

Railroad *v.* Decker, 84 Pa. 425.

The Act of May 4, 1855 (P. L. 431), makes no change as to this. This Act applies to the control and earnings of the child *during its life*.

No statute has ever modified the Act of April 26, 1855. It can hardly be supposed that an Act passed at the same session was meant to modify a statute to which it was not a supplement, nor to which it does not refer.

If the law is to be that in case of death *one* parent can sue under some circumstances, the general assembly must enact it. Damages for death are wholly founded on statute, and no other guide exists for the Courts.

Steamer "Harrisburg," 119 U. S. 199, (1886).

June 3, 1895. FELL, J. The question raised by the demurrer is whether a married woman, who has been deserted by her husband, can maintain an action in her own name to recover dam-

Digitized by Google

ages for the death of their minor child. It is alleged in the statement filed that the death of the plaintiff's minor son was caused by the negligence of the defendant, that she is the only person entitled to recover for his death, as her husband, the father of the boy, had deserted her and their son more than eight years before the commencement of the suit, and through drunkenness and profligacy had failed and refused to provide in any way for either of them.

The right to recover damages for negligence causing death does not exist at common law. It was first conferred in this State by the Act of April 15, 1851, P. L. 674. The Act of April 26, 1855, P. L. 309, specifies the persons entitled to recover. The fourth section of the Act provides: "The persons entitled to recover for any injury causing death shall be the husband, widow, children or parents of the deceased, and no other relatives." The second section of the Act of May 4, 1855, P. L. 430, provides that "Whenever any husband from drunkenness, profligacy or other cause shall neglect or refuse to provide for his wife, or shall desert her, she shall have all the rights and privileges secured to a *feme sole* trader under the Act of February 22, 1718," etc. The third section provides that "Whenever any husband or father from drunkenness, profligacy or other cause shall neglect or refuse to provide for his child or children, the mother of such children shall have all the rights, and be entitled to claim, and be subject to all the duties reciprocally due between a father and his children, and she may place them at employment and receive their earnings, or bind them to apprenticeship, without the interference of such husband, the same as the father can now do by law." The Act of 1718, 1 Sm. L. 99, above referred to, confers upon *feme sole* traders the right to sue "during their husbands' natural lives without naming their husbands in such suits."

There can be no doubt of the power of the plaintiff to sue without joining her husband to recover any claim due her in her own right. The Act of May 4, 1855, conferred upon her the common law rights and duties of her husband in relation to their child. She could have placed him at work and have received his wages, and was bound to the reciprocal duties of maintenance and education. Her legal relation to her son was the same as if her husband had been dead. It is out of this relation that the right to recover in an action for the death of a child grows. The measure of damages is the pecuniary loss sustained, and the loss arises because of the right of the parent to the child's earnings, until he is of age, or of the expectation of pecuniary advantage after the minority of the child, because of the continued existence of the family relation.

The father here had forfeited all right to his son's earnings; the mother alone was entitled to them. She alone could sue for and recover them. The pecuniary loss resulting from the child's death was wholly hers. If the father had not been living at the time of the son's death, the wife's right to maintain this action could not be questioned; if she had not been living at that time it is doubtful whether he could have recovered, because the family relation between him and his son had ceased to exist and he had forfeited all right to the son's earnings.

The force of the objection that the action cannot be maintained by one of the parents is in the fact that the right is purely statutory and is given to both. It is generally true that where the right is joint the action must be joint, and the non-joinder of one who ought to be a co-plaintiff is fatal. This is the case in actions *ex contractu* and where the form of the action is in tort but the liability springs from a joint contract or interest. The reason of the rule is that the plaintiff suing is not entitled to the whole recovery and knows who is joined in interest with him. The rule does not apply to actions purely *ex delicto*. In them any one of several having a right to sue may do so separately. We have in this case a right of action given to two and the right of recovery limited by the facts to one. Must the right in the party entitled be defeated because the other will not join, or in his absence cannot be made a party? The loss for which a recovery is provided by the Act of 1851 is that resulting from the severance of the family relation, and the recovery is not in all cases for the benefit of the party suing only. The Act of 1855, while specifying the persons entitled to sue, provides that the declaration shall state who are the persons entitled to recover, and that "the sum recovered shall go to them in the proportions they would take his or her estate in cases of intestacy." In Huntingdon and Broad Top R. R. Co. *v.* Decker, 84 Pa. 425, the present Chief Justice said: "If the deceased leaves a husband, he alone is clothed with the right of action; if the wife is the survivor, she is entitled to bring suit; if there be neither surviving husband nor widow, the right of action is given to the children, and if there be neither husband nor widow nor children surviving, it is given to the parents of the deceased. But while the right of action is given, according to the circumstances of each case, to one of the four designated parties, it is clear from the wording of the Act that the entire sum recovered is not always to be retained by the plaintiff in his or her own right. It is to be distributed among the relatives named in the proportion they would be entitled to take the personal property of the deceased in case of intestacy; and to the end that

Digitized by Google

it may appear who are entitled to participate in the damages recovered it is required that the declaration shall state who they are. In the present case the widow had the right of action, not exclusively for her own use, but for the joint use and benefit of herself and children."

In this case the wife alone has a claim upon which a recovery in damages can be sustained. Her right should not be defeated by the misconduct of her husband. Upon the trial she will have to establish her right to maintain the action in her own name, or fail. In the absence of the husband, or of notice to him, his right to participate in the distribution of the fund recovered cannot be finally determined against him. Whatever right he has may be preserved by the Court controlling the distribution until he shall have had a hearing.

I desire to add that I sat at the argument of this case in the Common Pleas, and fully assented to the judgment which was afterward entered by my colleagues. Upon further reflection I am satisfied that the demurrer should have been overruled, and that the error to which I contributed my full share should now be corrected by reversing the judgment.

The judgment is reversed with a procedendo.

H. B.

Jan. '95, 268. March 14, 1895.

Dickerman v. Eddinger.
Rockell's Appeal.

Will—Charge of annuity on realty.

The question whether an annuity is a charge upon real estate is one of intention. If the actual intention appears no form of words is necessary.

A charge cannot be created by the mere gift of an annuity, but it may be created without express words and by implication from the whole will that such was the intention.

While the mere fact that the testator had no personal estate from which an annuity can be paid is not conclusive of an intention to charge it upon the realty, yet it is to be taken in connection with other facts in arriving at a conclusion, and is of more weight when from the age of the testator and his circumstances in life it is improbable that he contemplated any change in the character or amount of his estate.

In this case the will held to have created a charge upon the testator's realty in favor of the annuitant.

Appeal of Margaret Rockell, from the decree of the Common Pleas of Northampton County, making distribution of a fund arising from a sheriff's sale of certain realty of John Eddinger, defendant, upon execution under a judgment obtained against him by Payson K. Dickerman.

Dickerman having obtained judgment against John Eddinger issued execution and had sold a certain tract of land; the amount produced by the sale was $2,245. Margaret Rockell obtained a rule on the sheriff to pay the money into Court, which was made absolute as to an amount sufficient to cover her claim, and H. J. Steele, Esq., was appointed commissioner to make distribution of the fund.

Before the commissioner Mrs. Rockell made a claim of $125 based on the following facts which appeared in evidence.

The property sold by the sheriff had belonged to Samuel Eddinger, who died seized thereof, leaving the following will:—

"In the Name of god I Samuel Eddinger
of Moore Township County of Northamton
State of Penn Do make this my Last will
and testament as follows
that is to Say my Disire
my son John he Shall have one
thousand Dollars in Advance before
any of the heirs Shall have any money
from my Estate personal property
first my Son John Shall Setle up all
my Depts funeral Expence &c.
till all is paid
my son John he shall setle
my personal property as soon
it is Posibile
he shall pay the of the money from
my personal goods the half of
the money to my Daughter Magret and
what is Left from the Balance of
the Thousand Dollars he tookt of for him-
self my Son John Shall pay to my
for Dowery { Daughter Magret an Anually one a
Hundred and twenty five Dollars for her
Natural Life Λ time or as Long she
will Liv in this World
and my son John he shall have
all my real Estate for his own
property as Soon my Daughter is Deased
my Son John Shall not pay any Longer
Dowery interest not to her heirs and to nobody
it be Stopt"

The decedent left surviving him two children John Eddinger the defendant in the execution and Margaret Rockell, the claimant, who had been married to David Rockell on Nov. 7, 1850. At the time of the death of Samuel Eddinger, his real estate was worth about $4,000. From the account filed by his executor it appeared that after paying debts and expenses, there was left of the personal estate for distribution $400.-84. At the time of said sale upon the Dickerman judgment public notice was given, that there was due Margaret Rockell one installment of $125 under said annuity which was payable on April 1, 1893.

Upon these facts the commissioner awarded the sum of $125 to Margaret Rockell. Executions were filed which the Court, regarding the case as ruled by the interpretation of the will by the Supreme Court in Rockell *v.* Eddinger, 81*

Digitized by Google

Pa. 523, sustained, and awarded the sum in Court to the plaintiff. Margaret Rockell took this appeal.

O. H. Meyers, (*A. S. Knecht* with him), for appellant.

R. I. Jones, (*R. E. James* with him), for appellee.

May 20, 1895. FELL, J. The will of Samuel Eddinger was before this Court in 1875 on an appeal in an action of ejectment. The contention then was that the will was void for the reason that it was contradictory and unintelligible, or that if susceptible of interpretation the testator's daughter took a life estate in the realty with remainder to his son. It was then held that the intention of the testator could be ascertained: that the real estate was devised to the son, and was not subject to a life estate in the daughter. See Rockell *v.* Eddinger, 81* Pa. 525. The question now raised, whether the annuity to the daughter was a charge upon the real estate, was not then before the Court; and we think that the learned Judge of the Common Pleas was in error in concluding that a construction which denied a life estate to the daughter gave the real estate to the son freed of the charge of the annuity. In the opinion in Rockell *v.* Eddinger, *supra*, it is said that the words following the devise to the son did not create a life estate in the daughter, but had reference to her annuity, as there was no devise over and no other intention disclosed. To give them this effect it is not essential that they should form a separate sentence. If a plan of punctuation is adopted by which they do not, there is an express charge upon the land. If they are separated by a period, the reference to an annuity is unchanged, and the connection in which they appear gives strength to the implication of a charge.

The question whether an annuity is a charge upon real estate is one of intention. If the actual intention appears, no form of words is necessary. Unless technical words by which rules of property are fixed have been used the intention is to be gathered from the whole will. A charge cannot be created by the mere gift of an annuity, but it may be created without express words and by implication from the whole will that such was the intention. As to this rule all our cases agree, and any apparent departure from it in the decisions will be found to have resulted from the difficulty of applying the general rule to the facts of a particular case. In Ripple *v.* Ripple, 1 Rawle, 386, Chief Justice GIBSON said: "A legacy may be charged on land by implication. No form of words is necessary to produce the effect, and when the intent is manifest Courts are bound to carry it into execution." In support of this he cites Nichols *v.* Postlethwaite, 2 Dallas, 131; Hassanclever *v.* Tucker, 2 Binn. 526; Witman *v.* Norton, 6 Binn. 395, and Dobbins *v.* Stevens, 17 S. & R. 13. This has since been followed in numerous cases, among them Gilbert's Appeal, 85 Pa. 347, in which it was said by WOODWARD, J., "While in order to make legacies a charge upon land it must be found that such was the testator's intention, still it is not necessary that its ascertainment should rest upon direct expression."

In this case the intention of the testator appears to have been, first, to give his son one thousand dollars and then to divide the balance of his personal estate equally between his son and daughter; secondly, to give his daughter an annuity of one hundred and twenty-five dollars for life; third, to devise the whole of his real estate to his son. He was a man of advanced age, and died within two months of the execution of the will. His personal estate, after the payment of debts and expenses of administration, amounted to only four hundred dollars, and his real estate was worth about four thousand. The will provided for an immediate distribution of the personalty, and there was nothing left but the realty from which the annuity could be paid. It is true that the mere fact that the testator had no personal estate from which the annuity could be paid is not in itself conclusive of an intention to charge it upon the realty, or alone a sufficient ground for such an inference. But it is a fact to be taken in connection with other facts in arriving at a conclusion, and is of more weight when from the age of the testator and his circumstances in life it is improbable that he contemplated any change in the character or amount of his estate. The words written on the margin of the will are not without significance in its construction. They were written by the scrivener before signing. The words "for dowery" are more than a mere marginal note. They are connected by a bracket with three lines of the will relating to the annuity, and in the second of these lines is a caret indicating that their omission from the text was accidental. This makes them a part of the will, and not merely a memorandum of its contents, and they are an aid in ascertaining the meaning of a clause not clear or free from doubt. They were evidently used in reference to a charge on land of the nature of a dower interest, and indicate an intention that the annuity should be a charge of that nature.

The intention to give the daughter an annuity for life is clear beyond doubt. The circumstances of the testator and the nature of his property, the direction for the immediate distribution of the personalty and its insufficiency to sustain a charge, the use of words showing that the testator had in mind a payment secured on

Digitized by Google

land and the connection in the will of the words making provision for the daughter with those creating a devise to the son, and the direction that the payment should be made by the executor, who was also the devisee of the land, each indicate an intention to make the annuity a charge on the real estate, and taken together give rise to an implication which we think is sufficiently manifest to sustain the charge.

The order of the Court of Common Pleas of November 12, 1894, is reversed and set aside at the cost of the appellee, Dickerman, and the record is remitted with directions that distribution be made in accordance with the report of the commissioner.

H. B.

Jan. '95, 5. January 29, 1895.

Hickok v. Still.

Equity—Trustee—Power of sale—Construction of—Specific performance.

A trustee cannot be permitted to deprive himself of a power conferred for the benefit of the trust, or so to fetter its exercise by himself or his successor as to defeat the purpose of the trust.

A power to sell during the life of the husband of testatrix, and a peremptory direction to sell immediately after his death, does not empower the executor to enter into an agreement giving a third person the privilege of buying at any time within three years and a half, and a Court of equity will not decree specific performance of such agreement.

An agreement of this kind is not a use of the power, but a surrender of it for a fixed time.

Appeal by Albanus C. Still, trustee, from the decree of Common Pleas No. 2, of Philadelphia County, for defendant, upon a case stated in the nature of a bill in equity to enforce specific performance of a contract by an executor to convey real estate.

Sarah K. Still, by her will, gave her executor a power of sale, as follows:—

"I authorize and empower my executor at any time during the lifetime of my husband with his assent, and I direct him immediately upon the decease of my said husband or so soon thereafter as may be, to sell the whole, or any part of my real estate for cash, upon credit or ground rent, and to convey the same to such purchaser or purchasers in fee simple, free, clear and discharged of all trusts hereby or otherwise created without any liability on the part of said purchaser or purchasers to see to the application of the said purchase money. The proceeds of the sale are to stand in lieu of the realty sold, and to be held upon like trusts. Until such sale or sales are made my executor is to have full power to make proper leases, to collect the rent and to distribute the net issues as above directed with reference to the proceeds of sale of my real estate."

On the 20th October, 1890, in consideration of fifty dollars, Charles Still, Sr., executor, the agreed:—

"That if Geraldine H. Hickok desire to become a purchaser of that piece of ground or land, with house and appurtenances thereon, one hundred and twenty feet front by two hundred feet deep, situate on Highland Avenue, Chestnut Hill, City of Philadelphia, of which she is now lessee and occupier, at any time during her leasing of the property she may do so for the sum of nine (9) thousand dollars, to be paid as follows: Five hundred (500) dollars at any time during her leasing of the property, when she shall be given a good and legal deed of the property and five hundred (500) dollars on each succeeding June and December, the balance of that amount of nine thousand remaining unpaid to be secured by a mortgage on the property bearing three and one-half per cent. interest; but if Geraldine H. Hickok become a purchaser, then all the monthly payments which she may have made as rentals after November, 1891, shall, upon her becoming a purchaser of the property, be considered payments which she has made on the purchase of the property, for which she shall be duly credited."

On January 5, 1891, Charles Still, as executor, executed a renewal of the lease upon the same terms for a further period of thirty months.

During the continuance of the lease and the renewal thereof payments on account of the purchase money were made by the appellant amounting to $250, receipts therefor were given duly signed by Charles Still, executor, and reciting that they were taken on account of the purchase money of the property occupied by the appellant, and two of the said receipts also contained the statement that the money was to be returned if the purchase was not made. Charles Still having died on February 13, 1892, Albanus C. Still, the appellee, and the defendant in the Court below, was appointed administrator d. b. n. c. t. a., and upon his refusal to comply with the contract of sale this action was brought against him both in his capacity as administrator d. b. n. c. t. a. and also as trustee under the will of Sarah K. Still, being the heir at law of Charles Still, the original trustee, there being, in the opinion of counsel, some doubt as to whether as administrator d. b. n. c. t. a. he had the power to carry the agreement into effect.

The question therefore for the decision of the Court was as to whether or not the contract of sale entered into by Charles Still as executor could be enforced as against the estate. The Court below dismissed the appellant's bill without filing an opinion, and this appeal was taken.

George Stuart Patterson, for appellant.

This contract of sale was a valid exercise of the power given in the will. It carries out the intention of the testatrix; there was a clear intention on the part of the donee to exercise the power, and the agreement was within the scope of the power.

A power to sell includes the power to mortgage (Lancaster *v.* Dolan, 1 Rawle, 231); to

Digitized by Google

make partition (King *v.* Merritt, 67 Mich., 194); to enter into executory agreements providing for payment in future, the vendee immediately to enter into posession (Demarest *v.* Ray, 29 Barb. 563; KENNEDY, J., in *Ex parte* Huff, 2 Pa. 227-228; Shippen's Heirs *v.* Clapp, 29 Id. 265.)

There are no American authorities, so far as the counsel for the appellant knows, which impeach the validity of such a contract. There are two English cases, however, which may be urged on behalf of the position of the appellee:—

Clay *v.* Rufford, 5 De G. & Sm. 768; and
Oceanic Steam Navigation Co. *v.* Sutherberry, L.R., 16 Ch. Div., 236.

These cases are distinguishable from the cases at bar. In the case of Clay *v.* Rufford, the power was vested in directors of a joint stock company, who had no power to bind their successors.

In Oceanic Steam Navigation Co. *v.* Luthberry, an administrator granted a lease of a leasehold estate of his intestate, with the option of purchase to the under lessee within seven years at a fixed price. The Court held the option *ultra vires*, as it was the duty of the administrator to sell the intestate's estate for the payment of his debts, and though in some cases it might be necessary to underlet a leasehold, yet the option was an unwarranted exercise of his power. There it was the duty of the administrator to realize at once upon all the assets; in the case at bar the time for the exercise of the power was left to the discretion of the executor.

That equity will decree the specific performance of an option cannot be questioned.

Corson *v.* Mulvany, 49 Pa. 88.
Smith and Fleek's Appeal, 69 Id. 474.
Childs *v.* Gillespie, 147 Id. 173-176.
Green *v.* Low, 22 Beavan, 625.
Weeding *v.* Weeding, 1 J. & H., 424.
Moss *v.* Barton, L. R., 1 Eq. Cases, 474.
Mills *v.* Haywood, 6 Ch. Div., 196.
Nicholson *v.* Smith, 22 Ch. Div., 640.

When a person enters into a contract for the execution of a power for a valuable consideration, but does not carry it into effect and exercise the power, the Court will supply the defect.

Farwell on Powers, 335, 1893.

See also—

In re Dykes' Estate, L. R., 7 Eq., 337.
King *v.* Roney, 5 Ir. Ch. Rep., 64.
Dowell *v.* Dew, 1 Y. & C., 345.

John G. Johnson, for appellee.

The cases of Clay *v.* Rufford, 5 De G. & Sm. 768, and Oceanic Steam Nav. Co. *v.* Sutherberry, L. R., 16 Ch. Div. 236, rule this case.

A decree to enforce specific performance of the agreement would not be in accordance with equity.

Fry on Specific Performance, §389.
2 Perry on Trust, §787.

May 20, 1895. FELL, J. The case stated is intended to take the place of a bill in equity to enforce the specific performance by the defendant of a contract for the sale of real estate made by his predecessor in the trust. The primary question is whether the agreement entered into by Charles Still, as executor, was a valid exercise of the power of sale conferred upon him by the will of Sarah K. Still. The power given is in these words: "I authorize and empower my executor at any time during the lifetime of my husband with his assent, and I direct him immediately upon the decease of my said husband, or so soon thereafter as may be, to sell the whole or any part of my real estate for cash, upon credit or ground rent," etc. On October 20, 1890, Charles Still, executor, agreed with the plaintiff in writing, as follows: " . . . . that if Geraldine H. Hickok desire to become a purchaser of that piece of ground or land, with house and appurtenances thereon . . . . of which she is now lessee and occupier at any time during her leasing of the property she may do so for the sum of nine (9) thousand dollars, to be paid as follows," etc. The plaintiff was then in possession under a lease from the executor, which did not end until May 1, 1894. Charles Still died Feb. 13, 1892, and letters of administration *de bonis non cum testamento annexo* were granted to Albanus C. Still, the defendant in the case stated, and the appellee. On December 3, 1893, the plaintiff notified the defendant of her intention to purchase under the agreement.

The power conferred is an authority to sell during the life of the husband, and a peremptory direction to sell immediately after his death. As the husband of the testatrix was the executor, and during his life the sole possessor of the power, he might have made a sale deferring the time of settlement. This however he did not do. He did not sell the property, but entered into an agreement with the plaintiff which gave her the privilege of buying at any time within three and a half years. By this agreement she was entirely free; she was not bound to purchase. But he, and in the event of his death his successor, in the trust, was bound to sell to no one else during the period fixed. The vice of the agreement is this: that it bound the trust estate, no matter what the detriment to it might be, without giving it any corresponding advantage. This was not a use of the power, but a surrender of it for the time. It suspended the exercise of the discretion which had been given the executor, and defeated the direction in the will for an immediate sale upon his death. A trustee cannot be permitted to deprive himself of

Digitized by Google

a power conferred for the benefit of the trust, or so to fetter its exercise by himself or his successor as to defeat the purpose of the trust.

We do not find that the question involved has been decided in our cases, but it has been considered in two English cases, Clay *v.* Rufford, 5 De Gex & Smale, 768, and Oceanic Steam Navigation Co. *v.* Sutherberry, L. R. 16, Ch. Div. 236, which, while differing somewhat in their facts from the one under consideration, are decided upon principles which are fully applicable to it. Although they are against his contention, our notice has been directed to these cases by the learned counsel for the appellant, with the highly commendable purpose of aiding the Court in the examination of a question which is almost barren of authority.

We are of opinion that the contract made with the plaintiff by Charles Still was not a valid exercise of the power of sale conferred upon him by the will of Sarah K. Still, and the judgment of the Court of Common Pleas is affirmed at the cost of the appellant.

W. M. S., Jr.

Jan. '95, 310. May 1, 1895.

Long's Estate.
Barner's Appeal.

Orphans' Court—Practice—No appeal from interlocutory order—Petition and answer raising issue of fact—Executors' commissions.

An order was made by the Orphans' Court opening a decree of confirmation of an executor's account upon application promptly made by one who was a minor when the account was filed and unrepresented by guardian or otherwise:

Held, that the order was interlocutory and no appeal lay therefrom.

The petitioner prayed that the account might be re-examined as to several specified items of credit, alleging that they had been improperly allowed. The accountant filed a responsive answer raising issues of fact on all these points:

Held, that the answer must be treated as conclusive until overcome by evidence, and without such evidence the only question the Orphans' Court could pass upon is that of the accountant's commissions.

Motion to quash.

Appeal of John L. Barner, executor of the estate of Christian Long, deceased, from the decree of the Orphans' Court of Cumberland County, vacating the confirmation of his first and partial account as such executor, and authorizing James H. Loh, guardian of Mabel M. Wade, to file exceptions thereto.

Subsequent to the confirmation of appellant's account, appellee filed a petition on behalf of his ward setting forth that she had a contingent interest in the estate and had not been represented at the audit, and that the accountant had claimed and been allowed improper credits including a payment made for board of the decedent, and a charge of commissions. Accountant filed an answer denying the allegations of the petition and accompanied by a declaration of five of the six children, and three of the grandchildren, of the testator, expressing their satisfaction with the account and disapproval of the proceedings instituted by petitioner.

The charge of commissions excepted to was $15,810.08. There was a dispute as to the value of the estate on which commissions were properly chargeable, how much of the assets had been administered, etc. The debit side of the account amounted to $342,793.81.

The Court, SADLER, P. J., said:—

"No depositions were taken and the matter must be disposed of on the petition and answer. According to the latter the payments made to Charles Geiger were entirely justified, his bills were not exorbitant and the claim was a lawful one. The answer must prevail in the absence of any proof to the contrary. The only question for consideration is whether the allowance for which credit was taken is so excessive as to justify interference on our part by affording the petitioner an opportunity to contest his right to the same. There is no inflexible rule fixing the commissions of an accountant. It may be stated that it is usual to allow two and one-half per cent. on realty and five on personalty, but much depends, however, upon the size of the estate and the trouble and time required of the accountant. The proper and usual course is to ascertain what the services of the trustee may be naturally worth and to award a fair and just compensation therefor. In Stevenson's Estate, where owing to the number of bequests and difficulties in collecting the money, etc., a considerable portion of the time and attention of the executor was required during two years, a commission of three per cent. was allowed the estate amounting to $350,000. This was reported 4 Wh., p. 104. In Whelen's Appeal, 70 Pa. 410, three per cent. was allowed on an estate of $168,000. This was settled on a review of the account of the executors. In Montgomery's Appeal, 86 Pa. 230, but five hundred dollars were allowed on an estate exceeding $42,000. As heretofore stated the compensation allowed where the matter has been adjudiciated by the Supreme Court has depended upon the time and effort required on the part of the trustee to discharge the duties of his trust. In the present case we have not placed before us either by the petitioner or the respondent sufficient information to enable us to determine with exactitude, what compensation ought to be allowed to the

Digitized by Google

latter. We do not know what the exact amount of the estate (personal) of C. Long is. The amount actually collected or converted into money does not clearly appear. Whether the stocks and bonds and mortgages included in the inventory have in any considerable degree been converted into cash, does not appear. What proportion of the debit side of the account may be uncollectible is not estimated. To enable the Court to fix a lawful allowance, it ought to be possessed of information as to the amount of the estate converted, its actual value, and the time and effort required on the part of the executor to discharge the duties of the trust. For this purpose testimony had better be taken. [We are satisfied that under the circumstances, as they appear to us, that the allowance claimed, and for which credit has been taken, is excessive, and that the Court has power to direct a review of the account of the executor. Indeed, we believe it to be a matter of right in this case and to refuse it would be error on our part.] (Second assignment of error.) See Kinter's Appeal, 62 Pa. 318; Meckel's Appeal, 112 Pa. 554. It must be remembered that the petitioner in this case is a minor and that at the time of the confirmation of the account had no guardian to attend to her interests (see McGrew's Appeal, 14 S. & R. 396). In Bishop's Appeal, 26 Pa. 470, one of the items complained of was the allowance to the accountant, which was reduced after the granting of the bill of review. If to the account permission is given to file exceptions and testimony is taken, a Court can determine what compensation should be allowed with greater certainty than can be done with the information now before us. . . . .

"And now, the fifth day of January, 1895, the confirmation of the first and partial account of John L. Barner, executor of Christian Long, made on the 14th day of March, 1893, is hereby vacated and set aside and James H. Loh, guardian of Mabel M. Wade, is authorized to file exceptions on her behalf to said account, provided the same is done within twenty days from the date of this order." (First assignment of error.)

The accountant appealed, assigning errors as above. Appellee moved to quash the appeal.

A. G. Miller, for appellee, in support of the motion.

There is no authority for an appeal from such an interlocutory order in the Orphans' Court. The practice is to let the parties wait until the power of the Court has been exhausted and a final decree made.

Eckfeldt's Appeal, 13 Pa. 171.
Barbara Gesell's Appeal, 84 Id. 238.
Bishop's Appeal, 26 Id. 470.
Jones's Appeal, 99 Id. 124.

We have with considerable care made an extended examination of the cases in this State in which appeals have been taken. We have found no case in which there had not been a final decree, either in the sense of a decree against the petitioner and a refusal to grant the bill of review, or where the rehearing was granted and the questions therein were heard and considered and then a final decree made.

The cases may be classified as follows:—

1. Cases where there was a refusal to grant the bill of review:—

Neisly's Appeal, 8 Pa. 457.
Hartman's Appeal, 36 Id. 70.
Le Moyne's Appeal, 104 Id. 321.
Green's Appeal, 59 Id. 235.
Kachlein's Appeal, 5 Id. 95.
George's Appeal, 12 Id. 260.
Bunting's Appeal, 4 W. & S. 469.
Meckel's Appeal, 112 Pa. 554.
Yeager's Appeal, 34 Id. 173.
Russell's Appeal, 34 Id. 258.
Hartz' Appeal, 2 Gr. 83.
Keim's Appeal, 125 Pa. 480.
Kuhns's Appeal, 87 Id. 100.
Hamill's Appeal, 88 Id. 363.
Milligan's Appeal, 82 Id. 389.
Gosner's Estate, 133 Id. 528.
McNeel's Estate, 68 Id. 412.
Bishop's Estate, 10 Id. 469.

2. Cases showing that a readjudication followed the opening of the account, and no appeal except from the final decree.

Briggs's Appeal, 5 Watts, 91.
Simpson's Appeal, 18 WEEKLY NOTES, 175.
Young's Appeal, 99 Pa. 74.
Cramp's Appeal, 81 Id. 90.
Whelen's Appeal, 70 Id. 410.
Priestley's Appeal, 127 Id 420.
Milne's Appeal, 99 Id. 483.
Scott's Appeal, 112 Id. 427.
Lehr's Appeal, 98 Id. 25.
Kost's Appeal, 107 Id. 143.
Kinter's Appeal, 62 Id. 318.
Jones's Appeal, 99 Id. 124.
Bishop's Appeal, 26 Id. 470.
Riddle's Estate, 19 Id. 431.
Stevenson's Exr's. Appeal, 32 Id. 318.
Stewart's Appeal, 86 Id. 149.
Charlton's Appeal, 88 Id. 476.

We respectfully submit, therefore, that this appeal must be quashed.

Edward B. Watts, for appellant, contra.

May 20, 1895. WILLIAMS, J. Christian Long died in January, 1892, disposing by his last will and testament of an estate estimated at about one-half million of dollars. The appellant John L. Barner was named as his executor, and after the death of Long proceeded to make probate of the will and take letters testamentary. In March, 1893, he settled an account, which is described in the petition as a partial account, and which was at that time confirmed nisi. It was finally

Digitized by Google

confirmed early in May. On the 8th day of May the petition of Mabel M. Wade of Alexandria, Va., by her guardian James H. Loh, was presented in the Orphans' Court asking to have the decree of confirmation set aside or opened and the account re-examined as to several items specified in the petition. A rule to show cause was granted, upon which the appellant came in and made answer distinctly denying the several allegations on which the prayer for relief in the petition rested. No testimony seems to have been taken to dispose of the issues so made, but the rule was taken up for hearing on petition and answer and made absolute generally. The order appealed from is thus seen to be an interlocutory one. It opens a decree of confirmation upon an application promptly made by one who was a minor when the account was filed, and unrepresented by a guardian or otherwise. No appeal lies from such an order: Jones' Appeal, 99 Pa. 124. But as we have the papers before us we feel that it is proper for us to speak of the practice in these cases and the course this proceeding ought now to take. The only item among those enumerated as mistaken or erroneous that could be disposed of by the Orphans' Court without testimony was that of compensation. A distinct issue of fact was raised by the answer as to the others, and upon this issue the answer must stand until overcome by evidence. The only subject that is open to examination therefore under the order now made by the Orphans' Court is that of the compensation to which the executor is entitled for his services between the probate of the will and the filing of his account.

If the petitioner desires to go further than this he must take up the burden that the answer imposes upon him and satisfy the Court by the evidence that he shall produce that such items or some of them should be re-examined; and the order made should state the items as to which the account is opened and a re-examination allowed.

The motion to quash is sustained and the record remitted to the Orphans' Court that further proceedings may be had in accordance with this opinion.

J. D. B., Jr.

Orphans' Court.

April, 1894, 528.

Lippincott's Estate.

Wills—Interpretation—The word "effects"—The phrase "personal effects."

The word "effects" embraces, in its widest scope every form and species of personal estate.

The phrase "personal effects" has a distinctly defined meaning, namely: articles associated with the person.

When a testator enumerates particular kinds of chattels, and couples with them "effects," or equivalent words, the generality of his expression is to be restricted to such species of property as are *ejusdem generis* with the particular words.

There is another class of cases, in which the same words of large significance have been preceded or followed by words of limited meaning, and the former words are allowed their full extent of operation. In this class, there is no gift of the residue, and, if the larger word has not full play, a partial intestacy will be created.

Exceptions to adjudication.

The facts are sufficiently set out in the opinion.

Arthur Biddle and *J. Rodman Paul*, for the exceptions.

George Tucker Bispham, contra.

April 27, 1895. ASHMAN, J. In a will written with the intelligent regard for legal accuracy which characterizes this will, we may take it for granted that every material word was intended to contribute its share in the expression of the testator's meaning. The fact that, as to all of its many and varied dispositions, with the single exception of the gift to the niece, we are left without any manner of doubt as to the exact purpose of the testator, is proof of the care with which the instrument was prepared. He gave to her in fee, by apt words, his real estate in the city of New Orleans, and he added, "also all my jewelry, wearing apparel and personal effects, except such of the same as are herein otherwise disposed of." In choosing the word "effects," he used a word of the widest scope, which, as Lord MANSFIELD said, "is synonymous with worldly substance" (Hogan *v.* Jackson, 1 Cow. 299), and which, therefore, embraces every form and species of personal estate, and has even, in exceptional cases, passed realty. When a testator accompanies a word of general meaning, like "effects," with particulars which are embraced within that meaning, he is influenced by one of two motives—a fear that the particulars may be overlooked, or an intent to restrict the meaning of the general word. It is very certain that this decedent was not actuated

Digitized by Google

by the former consideration; he knew that if he gave his effects to the legatee, he gave her all the personalty he possessed, and he would hardly commit the superfluous folly of particularizing his jewelry and clothing. But, while he could not increase a term which was universal, he could diminish it. And he did this in a double way; by associating it with particulars, and by prefixing to it the adjective "personal." The phrase "personal effects" has obtained, by frequent use, as distinctly a defined meaning as the phrase "household effects." It designates articles associated with the person, just as the opposite phrase denotes articles belonging to the house. But it usually gets this meaning by being contrasted in some way with household effects, as when the testator bequeaths his personal *and* household goods. In this instance, the testator intended to give, specifically, only his personal belongings, and not those of his house, and he did it by connecting personal effects with articles so intimately personal to himself as his jewelry and apparel. He excepted from the personal effects "such of the same" as were otherwise disposed of. We concede that if the excluded articles were not such as were associated with his person, a grave doubt would be cast upon our reasoning. On the other hand, if they proved to be *ejusdem generis* with the items he enumerated, they would emphasize his meaning. They were a watch and a small tea set, the latter going to the daughter of the legatee. This tea set had been in constant use by the testator, and was kept in or adjacent to the dining-room; and the only other silverware he owned, consisting of spoons, tongs and a cream jug, was sometimes placed in a box in an upper story. He lived alone in the house, and he used the utensils, or most of them, upon his table for his own convenience. This strictly personal use by the testator gave them a distinctive character wholly different from that of other articles of domestic use or ornament. It was the same as if they had been marked with his name, and had been the subject of a personal gift to him; the same, indeed, as the pen or the inkstand upon his desk, or the watch which he gave to his nephew; so that, as well by the articles which he named, as by those which he excepted, the testator seems to have intended by his "personal effects," not his personal chattels in the general, but only such as were associated with his person. The contestant is either afraid of her own logic, or is too magnanimous to push it to its proper conclusion. If the term "personal effects" is not limited to the meaning we have assigned to it, it must denote everything that is personal, for, except in the way which has been suggested, the testator restricted it by no bounds whatever. But the exceptant has anchored midway in her voyage after results, and demands only, in addition to the jewelry and clothing, the furniture which was in the dwelling of the decedent. She can, however, only establish her title to that by showing that she is equally entitled to his money and stocks and every other item of his personal property. There is no escape from this position. If the excepted plate was furniture, then the gift of personal effects included the remaining furniture. But certain bequests of money were also excluded; the remaining moneys would therefore go to the exceptant, and money comprehends the securities which belong to the estate and likewise pass as effects.

We have, thus far, reasoned our way towards reaching the intent of the testator without being fettered or guided by the rules which have been laid down for the interpretation of wills. From the necessities of the case, these rules are so flexible that they lose all pretensions to scientific exactness. They are intended to render clear to other parties what, perhaps, was cloudy in the mind of the testator himself. Such are the vagaries of expression indulged in by men, when they propose to finally apportion their property, that the identical phrase which in one will means one thing, may, by the variation of a word in the context, mean in another will a different and opposite thing. Hence, it is just to say, as was asserted in Hoge *v.* Hoge, 1 S. & R. 156, that "cases on wills have no great weight unless exactly similar in every respect." One rule, formulated in different shapes by the text writers, is, that when a testator enumerates particular kinds of chattels, and couples with them "effects," or equivalent words, the generality of his expression is to be restricted to such species of property as are *ejusdem generis* with the particular words. A vast body of reported decisions rest for their authority upon this principle.

In another class of cases, in which the same words of large significance have been preceded or followed by words of limited meaning, the former words have been allowed their full extent of operation. Fortunately the badge which distinguishes the latter class is so conspicuous, that little danger exists of assigning a case to it which should belong to the former class. The distinction is, that in the one set of cases the testator has added a residuary clause which would be wiped out if the larger word of gift was not restricted, and in the other there is no gift of the residue, and, if the larger word has not full play, a partial intestacy will be created. We do not say that this is the sole distinction which, in every instance, has determined the mind of the Court. Sometimes the circumstances surrounding the testator, and sometimes peculiarities of expression in his will, have been

Digitized by Google

the factors. An opinion which should attempt to analyze the cases which are to be found under these divisions would swell into a legal treatise, which we do not propose to write at present. In Crichton *v.* Symes, 3 Atk. 61, a testatrix bequeathed all her "goods, wearing apparel of what nature and kind soever, except her gold watch." Lord HARDWICKE held that "goods" must be restricted to household furniture, and did not imply the residue of the estate, because a legacy of £50 had followed the gift. In Cavendish *v.* Cavendish, 1 Bro. C. C. 467, the bequest was of a cabinet of curiosities, viz., gems, medals, coins, etc., "and other valuable things." Lord THURLOW decreed that the general words were confined to things *ejusdem generis* with those described, and that personal ornaments did not pass to the legatee. In Woolcomb *v.* Woolcomb, 3 P. Wms. 112, it was held that cash and bonds did not pass under a gift of "all the furniture, plate, household goods and other goods (except books and papers), and all the stock within doors and without," because, while "all other goods" were words of the largest extent, they must be restricted to things of the nature of household goods, and because, if taken in any other sense, the residuary gift which followed would be defeated. So in Rawlins *v.* Jennings, 13 Ves. 39, where the testator gave to his wife certain bank stock and all his "household furniture and effects of what nature or kind soever," and then bequeathed cash and stock to others, Sir WILLIAM GRANT held that, part of the property having been given specifically to the widow, the word "effects" must receive a limited interpretation, and be confined to articles of the same character as those particularly designated. Fisher *v.* Hepburn, 14 Beav. 627, Patterson *v.* Huddart, 17 Beav. 210, Hotham *v.* Sutton, 15 Ves. 319, and Ellis *v.* Selby, 7 Sim. 352, illustrate the same principle. It was recognized in Planter's Bank *v.* Sharp, 6 How. U. S. 321, WOODBURY, J., saying: "When the word 'effects' is used alone or *simpliciter*, it means all kinds of personal estate. But if there be some word used with it, restraining its meaning, then it is governed by that, or means something *ejusdem generis*." It was said in Ennis *v.* Smith, 14 How. 421, "*effects* in connection with something particular and certain, is limited by its association to other things of a like kind. . . . In some instances, in wills, the word has carried the whole personal estate. When in connection with words of themselves of larger meaning, or of fixed legal import, such a clause in a will is residuary." The larger meaning prevailed in Campbell *v.* Prescott, 15 Ves. 500; Michell *v.* Michell, 5 Madd. 59; Flemming *v.* Burrows, 1 Russ 276; Kendall *v.* Kendall, 4 Russ. 360; Arnold *v.* Arnold, 2 Myl. & K. 365; Swinfer *v.* Swinfer, 29 Beav. 207. Carefully examined, each of these cases will be found to have turned upon the need of avoiding an intestacy, or, as in Kendall *v.* Kendall, upon the unmistakable anxiety of the testator to enumerate every species of property, in order that the legatee might take everything. Reimer's Estate, 159 Pa. 212, which was weighted with a dissenting opinion, was a gift to testator's brother of "any and all of my household goods, books, clothing, furniture, etc., that he may desire; the balance of the personal effects to be divided among the children of my sister." If the brother took the specified articles, as he was entitled to, there would have been nothing, under a restricted meaning of "personal effects," to go to the children, and there would have been an intestacy as to the great bulk of the personal estate.

We think that the contestant is entitled to those articles, forming part of the tea service, which were not the subject of the specific bequest to her children.

The exceptions are dismissed.

F. B. N.

July, 1880, 9.

Springer's Estate.

Minors' estates—Guardians—Voidable payments by—Ratification, when minor sui juris—Neglect to disaffirm.

The guardian of a minor paid, out of the principal of the estate, various sums to her which she gave her mother for household expenses:

Held, that the guardian would be surcharged for amounts so paid.

The minor arrived at age in 1882 or 1884, but demanded no account until October, 1894. Upon the audit, she demanded that the guardian be surcharged as above:

Held, that she had slept so long upon her rights that she must be considered to have ratified and confirmed the acts of her guardian.

Exceptions to adjudication.

The facts are sufficiently stated above and in the opinion.

Leonard Myers, for exceptions.

John Shallcross, contra.

March 30, 1895. FERGUSON, J. The small estate of this minor appears to have been all paid to her, at various times during her minority, by the administrator c. t. a. of the will of her uncle, from whom it was derived, or by her guardian, who was subsequently appointed, and whom it is now sought to surcharge. The minor, as she received the money, appears to have handed it to her mother, who used it in

Digitized by Google

the family for different purposes, which are fully detailed in the evidence, and which it is not necessary to recapitulate. It is sufficient to state that the money was not used in the education and maintenance of the minor, although she, no doubt, participated, with the other members of the family, in some of the benefits of its use. It was not spent for necessaries for her, and therefore all the payments were improvidently made. While it is true that a guardian has the right to spend his ward's money, either principal or income, for any purposes of maintenance or education within proper limits, considering the size of the estate and the future expectations of the minor, without any order of this Court (Flade's minors, 16 Phila. 227), yet it is also true that he has no right to hand over to a minor the principal of her estate, to spend at her will and pleasure, or to give to some one else to spend for her.

In this case, the minor, who was nineteen years old, and whose intellect was then, perhaps, as mature as it is to-day, as the auditing Judge says, "either from motives of generosity or of filial duty, or, probably, as the result of her mother's importunities, applied to the administrator, while the money was in his hands, and afterwards to her guardian," for these sums, which she received on account of the principal of her estate. Neither the administrator nor the guardian had any right to pay the same to her; and while there may be no doubt that she fully knew what she was doing when she received the money, and fully understood all the purposes for which it was being applied by her mother, yet she was just as much an infant, in the eyes of the law, as if she were being carried in her mother's arms. Any payments, therefore, made to her during her minority might as well have been made to a stranger, so far as concerned the accountant's justification in vouching his account in this Court.

If, on attaining full age, this minor had demanded an account, her guardian would, undoubtedly, have been surcharged with every dollar that had thus been improperly paid to her, because what money he did not pay himself was paid by the administrator, whose account he allowed to be confirmed without objection or exception, notwithstanding these improper disbursements were shown by it, and he accepted, as his ward's share of the estate, a sum much less than was due to her.

But while there has undoubtedly been dereliction of duty upon the part of the guardian, there has also been such laches upon the part of the late minor, in asserting her rights, as would amount to a confirmation or ratification of his actions.

The minor arrived at full age in 1882 or 1884. There is a conflict in the evidence upon this point, but whichever is correct is immaterial, as it is sufficient for the decision of this case to accept either date. No account was demanded from the guardian until October, 1894, at least ten years after her majority. It is true that the minor alleges that, in 1890, when the payment of a note which she and her husband had given the accountant was demanded, she requested an account, but this was eight years after she had received all of her money, and at least six years after her arrival at age; besides, if she wanted an account, there was a legal method of getting it, to which she resorted in 1894, when she petitioned for a citation.

Admitting that all the payments made to this minor were improper, and this must be conceded, the only inference to draw from her delay in asking for an account is, that when she became *sui juris*, recognizing the fact that she had received into her own hands all that belonged to her, she confirmed the said payments, which were not void, but only voidable, and therefore subject to her confirmation.

In the recent case of Dolph *v.* Hand, 156 Pa. 97, where the minor executed a deed when only seventeen years of age, the Supreme Court say: "The deed, as James M. Dolph executed in his minority, did not bind him if, upon coming of age, he decided to disaffirm it. He could affirm or disaffirm at the proper time. His deed was therefore not void, but voidable, and the right to avoid it was personal to himself. This right ought, in justice to all the parties and as a matter of public policy, to be exercised within a reasonable time or be treated as lost by waiver. If one who has the right to elect does not exercise it within a reasonable time, but, with full knowledge of his privilege, omits or neglects to assert it, his omission may fairly be regarded as the equivalent of an act of affirmance and amounting in fact and in law to ratification."

This decision settles the case now under consideration. While the auditing Judge very fully considered the law upon this subject, and cited numerous authorities to show that the views expressed in the above opinion are correct, yet, as this is the last utterance of our Supreme Court on the subject, it is not necessary to go further. Applying the principles therein laid down to this case, there is no escape from the conclusion, that the late minor has slept so long upon her rights that the same must now be considered as having been waived by her, and that she has ratified and confirmed all that her guardian has done in the premises.

The exceptions are dismissed and the adjudication confirmed.

F. B. N.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, JUNE 21, 1895.* [No. 19.

Supreme Court.

July, '94, 98. March 4, 1895.

Schwartz's Estate.

Orphans' Court—Jurisdiction of—Powers of appointment—Execution of—Estates passing under.

The Orphans' Court has no jurisdiction to make a decree upon a conveyance by an executor or trustee under a power conferred by will, unless the aid of the Court is required to supply some omission in the terms of the instrument creating the power.

Such a decree would add nothing to the efficacy of the power, if properly exercised, nor give it validity if improperly exercised.

S., by his will devised to his wife A., during her natural life, the use and occupancy, rents, issues and profits of all his real estate, with power "to divide and parcel out the same amongst my five sons, upon such conditions and terms as she shall deem just and right." S. left to survive him his widow, five sons, and the children of two daughters. His widow A. petitioned the Orphans' Court to ratify and confirm the division of the real estate made by her among four of the sons of S. and a daughter of the fifth who had died since the death of his father:

Held, that the Orphans' Court had no jurisdiction of the matter.

Held, further, that the five sons of S. took a vested estate in remainder in their father's real estate, which upon the death of any one of them passed to his heirs.

The question as to whether under the power of appointment, the widow could make unequal distribution among the remaindermen, not decided.

Appeal of Sarah Ann Schwartz, from the decree of the Orphans' Court of Berks County, dismissing her petition praying the Court to ratify and confirm the division and allotments of the real estate of Levi Schwartz, deceased, to and among his sons, as proposed by the said Sarah Ann Schwartz, in pursuance of the power vested in her by the last will and testament of Levi Schwartz, deceased.

The facts of this case were as follows: Levi Schwartz, of Longswamp Township, Berks County, Penna., died on May 3, 1889, leaving to survive him, his widow, Sarah Ann Schwartz, five sons, Reuben, Samuel, George, Jonathan, and Francis, a daughter Eliza, intermarried within Edwin H. Trexler, and the children of another daughter Mary, intermarried with Manoah S. Long. By his will dated January 17, 1882, and duly probated September 20, 1889, he provided, *inter alia*, as follows:—

"I give and bequeath unto my said wife the use and occupancy, rents, issues, and profits, (without any account to be rendered for the same during her lifetime, subject, nevertheless, to the legacies, hereinafter to Edwin H. Trexler and Manoah S. Long) of all of my real estate of which I shall die seized wheresoever the same be situated, during her natural life."

"And, I do hereby authorize and empower my said wife to let my said real estate or any part thereof to such person or persons, for such term or terms and for such rent or rents as she may deem proper, or divide and parcel out the same amongst my five sons, Reuben, Samuel, Jonathan, George and Francis upon such conditions and terms as she shall deem just and right. And in case no such division be made during the lifetime of my said wife then the same shall descend and pass to the said five sons and their heirs according to the intestate laws of the Commonwealth of Pennsylvania, relating to the partition of real estate."

He gave to Edwin H. Trexler and his children by testator's daughter, Eliza, $1,200 to be paid by his wife, Sarah Ann, out of the rents, issues and profits of the real estate, if she could conveniently do so, in biennial payments of $200, without interest; and to Manoah S. Long and his children by testator's daughter, Mary, a like legacy of $1,200, to be paid by his wife, Sarah Ann, out of the rents, issues and profits of the real estate, if she could conveniently do so, in biennial payments of $200, without interest; and in case the legacies are not so paid by the widow in her lifetime, the legacies, or the parts of them remaining unpaid, "shall be a charge upon and first paid out of the devise to my sons Reuben, Samuel, Jonathan, George and Francis."

Samuel Schwartz died on June 8, 1893, leaving a widow, and a minor child, for whom the Pennsylvania Trust Company, of Reading, was appointed guardian. For the purpose of exercising the power conferred upon her, under the control of the Orphans' Court, on January 6, 1894, the widow presented her petition to the Orphans' Court of Berks County, setting forth, *inter alia*, that in pursuance of the power conferred upon her by the last will and testament of Levi Schwartz, she has determined to divide the real estate among the sons, "upon such terms and conditions as she deems just and right." That she allotted to George W. Schwartz, purpart No. 1, being a farm which she valued at $12,325, and purpart No. 2, a tract of woodland, which she valued at $800, upon the condition that he paid to the petitioner annually dur-

Digitized by Google

ing her natural life the sum of $350 and furnish her with some grain and provisions, and also pay the legacies in favor of the two daughters of $1,200 each, charged on the land; and to Jonathan W. Schwartz $2,275, to Francis W. Schwartz $1,575, to Reuben Schwartz $1,775, and to Bessie Eva Schwartz, the minor child of Samuel Schwartz, deceased, $1,500. That she allotted to Francis W. Schwartz purpart No. 3, being a house and lot of ground, which she valued at $700; and to Reuben Schwartz purpart No. 4, being a house and lot of ground, which she valued at $500; and to George W. Schwartz, Reuben Schwartz, Francis W. Schwartz and Jonathan W. Schwartz, as tenants in common, purpart No. 5, being a tract of woodland. She prayed that the allotments so made be ratified and confirmed by said Court, and that the same be adjudged to them respectively, their heirs and assigns forever, upon the conditions, charges and stipulations above named.

George W. Schwartz, Francis W. Schwartz and Reuben Schwartz accepted in writing the allotments so made to them respectively, which acceptances were attached and filed with the petition.

On January 20, 1894, Jonathan W. Schwartz, Ellen Schwartz, widow of Samuel Schwartz, deceased, and the Pennsylvania Trust Company, of Reading, Pa., guardian of Bessie Eva Schwartz, filed an answer, alleging that the widow had no power under the will of Levi Schwartz, to divide and allot the real estate in the manner and proportions set forth in her petition; that the valuation of real estate was unjust, unfair and inadequate; and that the proceedings were illegal.

A replication was filed on behalf of the widow, and the case came on for hearing, when the Court, BLAND, P. J., dismissed the petition, filing, *inter alia*, the following opinion:

"My conclusions are:—

"1. That Sarah Ann Schwartz is clothed with power by the will of Levi Schwartz to divide and parcel out his real estate among his surviving sons, viz.: Reuben Schwartz, George Schwartz, Jonathan Schwartz and Francis Schwartz, upon such conditions and terms as she shall deem right and just.

"2. That Bessie Eva Schwartz is not a proper object of the power vested by the will of Levi Schwartz in Sarah Ann Schwartz, and the scheme of division submitted to the Court which directs the payment of $1,500 to the Pennsylvania Trust Company is unlawful as in excess of the power.

"3. That a proper exercise of the power requires the allotment of land to each of the said surviving sons of Levi Schwartz, and that the correct mode of execution of the power is by a declaration in writing reciting the power, and assigning to the appointees respectively, by special description, the land intended to be alloted to each in the division made.

"The division proposed by the petitioner being in excess of her power, in giving a part of the valuation money of the land to Bessie Eva Schwartz, the prayer of the petition is refused."

Whereupon the petitioner took this appeal, assigning for error, this action of the Court.

D. Nicholas Schaeffer, for appellant.

The Orphans' Court has power to control testamentary trustees in the exercise of power over real and personal estate.

Dundas's Appeal, 64 Pa. 325.
Daily's Appeal, 87 Id. 487.
Mussleman's Appeal, 65 Id. 480.

Where a power of appointment is given by will to distribute property among certain classes of persons, the power is to be treated as a trust.

2 Strong's Eq. Juris., sec. 1062.

That it was the intention of the testator, that the issue of a deceased son should share in the distribution is clear, from his provision, that in case the power of appointment was not executed, the property should descend to the five sons and their heirs.

Swaby's Appeal, 14 WEEKLY NOTES, 553.
Ingraham *v.* Meade, 3 Wall. Jr. (C. C.) 32.

The allotment of the real estate to some of the sons, with directions that they pay owelty to the others is a legal exercise of the power, because: 1st, such was the intention of the testator, and, 2d, the money so paid by one son to another as owelty, is in law realty.

Postlethwaite's Appeal, 68 Pa. 478.
Follweiler's Appeal, 102 Id. 581.
McCune's Appeal, 65 Id. 450.
Sayers's Appeal, 79 Id. 428.
Pennell's Appeal, 20 Id. 515.

Fitz Daniel Ermentrout, (with him *Ermentrout* and *Ruhl*), for appellees.

By the terms of the will, immediately upon the death of the testator, the remainder in fee vested in his five sons, and their respective estates cannot be divested by the exercise of the power, since it is not one of selection, but distribution.

Wickersham *v.* Savage, 58 Pa. 365.
Fidelity Company's Appeal, 4 WEEKLY NOTES, 265.
Pepper's Appeal, 21 WEEKLY NOTES, 388.
Neilson's Estate, 17 WEEKLY NOTES, 158 and 326.

Further, the Court has no jurisdiction of the case; the whole proceeding was an attempt to give an act, the right to perform which the petitioner claimed to be in her, the sanction of a judicial decree.

May 20, 1895. FELL, J. We agree with the learned Judge of the Orphans' Court that

Digitized by Google

the will of Levi Schwartz conferred upon his widow, the petitioner in this case, power to divide and parcel out his real estate among his five sons. We do not agree with him in the opinion that no division or allotment could be made by her to Bessie Eva Schwartz, the daughter of one of the sons who died after his father. The mother had a life estate with no testamentary power. The testator's object appears to have been to confer upon her the power, to be exercised at her discretion, to make partition. As a necessary incident of this power to divide upon terms and conditions to be fixed by her she could determine the purparts of each, the amounts to be paid as owelty, and the manner of payment. The gift to the sons, subject to the mother's life estate, is of a fee, the five taking as tenants in common. The power was to distribute and divide among those in whom the estate was vested, and its exercise could not divest an estate or reduce it from a fee to a life estate. Such a construction cannot be adopted in the absence of express words or necessary intendment, neither of which can be found in the will. Upon the death of one of the sons the remainder vested in him by his father's will descended to his daughter, and an apportionment to her was a proper exercise of the power.

Whether under the power to subject the shares to terms and conditions she could determine the relative proportions of the shares and make an unequal distribution it is unnecessary to consider, as the whole proceeding was outside of the jurisdiction of the Court and any expression of opinion upon the subject would be a mere dictum. The question of jurisdiction was distinctly raised by the supplemental answer to the petition. There is no express grant of power to the Orphans' Court which will support the decree asked for, and it cannot be sustained as an incidental power. Even a Court of general equity jurisdiction does not possess the power here invoked. No decree can properly be made upon a conveyance by an executor or trustee under a power conferred by will, unless the aid of the Court is required to supply some omission in the terms of the instrument creating the power—as in the case of a sale under a will directing a conversion but not saying by whom it shall be made. In other cases the decree of the Court would add nothing to the efficacy of the power if properly exercised, nor give it validity if improperly exercised. Here there is no trust; the power is a mere naked power, purely discretionary with the donee and not subject to the control of any Court: Perry on Trusts, sec. 248, *et seq.* Whether it has been properly exercised can be determined only when the question properly arises. If after the death of the life tenant proceedings in partition or ejectment should be instituted, no decree of the Court made now would conclude the rights of the parties.

The order of the Court denying the prayer of the petition is affirmed.

S. H. T.

Jan. '95, 93. March 28, 1895.

Smith v. Ervin.

Partnership—Evidence of dissolution.

In this case notice having been given by a partner of his intention to withdraw in accordance with the articles of association, but the subsequent conduct of the partners being inconsistent with his having severed the partnership relation, it was held by the Court upon the facts of the case that the partnership relation continued.

WILLIAMS and MITCHELL, JJ., dissented.

Appeal of Spencer Ervin and Edward D. Toland, trading as Ervin & Toland, defendants, from decree of the Common Pleas No. 4, of Philadelphia County, in favor of Frank W. Smith, plaintiff, sustaining exceptions to the report of J. Levering Jones, Esq., to whom the case had been referred.

Exceptions to the report of the referree having been sustained in an opinion by THAYER, P. J., the defendants appealed, assigning the action of the Court as error. The facts are stated in the opinion of the Supreme Court.

J. Bayard Henry and *Richard C. Dale*, for appellants.

John G. Johnson, (*Frank P. Prichard* with him), for appellees.

May 20, 1895. DEAN, J. On the 13th of January, 1890, Smith, Ervin and Toland, in firm name of Ervin & Toland, formed a limited partnership as stock-brokers, under Act of 21st March, 1836, and supplements; the place of business was Philadelphia. Ervin and Toland were general partners, and Smith special. Capital $166,000. Of this, $116,000 was to be contributed by the general partners, and $50,000 by the special partner. The term of partnership was three years, but it was provided, that it might be dissolved by any one of the partners giving three months' notice in writing to his copartners of his desire to dissolve at the end of the year. All were to be paid six per cent. interest semi-annually on capital respectively contributed by them. After payment of all expenses in carrying on the business, and interest to each partner on the capital contributed by him, the special partner, Smith, was to receive ten per cent. of the annual profits, and Ervin and Toland, the general partners, were to have the

Digitized by Google

balance equally; this balance to be ascertained and divided at the end of each year. In addition, each of the general partners had the right to draw each month a sum not exceeding $500 for his personal expenses; this, however, to be charged to their personal accounts.

At the date of the formation of the partnership, the special partner, this plaintiff, paid in $30,000, and within a few months afterwards, $16,464, leaving a deficiency in his stipulated contribution, $50,000, of $3,536. During the first year of the business, Ervin & Toland organized the "Reading Syndicate," and undertook to carry on margin for customers, about two hundred thousand shares of Reading Railroad stock; they also took a partnership interest in about seven thousand additional shares of the same stock. In October of the same year, while the partnership was thus involved, Mr. Smith notified the general partners of his intention to withdraw his capital. Sometime after this, the general partners informed him of the condition of the firm's business; that the securities they were carrying had fallen greatly in the market, and the withdrawal of his capital meant heavy loss to all, and insolvency for the partnership. The conferences ran along until the close of the year. The books then showed a net loss of over $37,000. As a result of a thorough examination of the business by Mr. Smith, it was agreed between them that he should be paid ten thousand dollars at once; for this he gave his receipt thus:—

"Philadelphia, Jan. 9, 1891.

"Received from Ervin & Toland ten thousand dollars on account of my capital, the balance of my interest to be settled as soon as possible, when certain accounts that show a shrinkage are closed out, I agreeing to pro-rate equally with Spencer Ervin and Edward D. Toland, my partners, if any loss is sustained in so closing these outstanding accounts. FRANK W. SMITH."

Besides this $10,000 there was paid Smith during the year 1891, $8,000 more. The Reading stock steadily declined, and that owned by the partnership in June, 1891, showed a net loss of $72,000. In that month it began to go up, and the stock was gradually sold on the advancing market until the last of it was closed out November 9 following. The net loss on this, and some other securities of less amount, footed up $21,942.89.

Mr. Smith then received a statement from the firm of the business of 1891, taking as a basis the results of 1890, of which he had knowledge by personal examination of the books, and which year showed a net loss, according to trial balance, of over $37,000. In this statement he was allowed for the year 1891 interest at six per cent. on $30,000, this sum being estimated as the average amount of his capital in the business for that year; at the same time he was charged with one-third the losses on the business of 1890, and credited with ten per cent. of the profits of 1891. To this Mr. Smith made objections; he claimed the business for both years should be considered together, and after allowing to each partner interest on the capital contributed by him, he, as special partner under the partnership agreement of 13th of January, 1890, should be awarded ten per cent. of the aggregate profit, as shown at the end of the year 1891. He averred he had a right to be treated as a partner for the full two years, because there had been no dissolution until January 1, 1892, when the partnership ended by the formal withdrawal in writing of Mr. Toland. Ervin & Toland alleged the partnership was dissolved on Jan. 1st, 1891, Mr. Smith having given them notice in October previous of his intention to withdraw, and having actually drawn out thereafter his capital, as fast as a prudent consideration for all their interests warranted.

If the relation of Mr. Smith as partner ended January 1, 1891, as Ervin and Toland claim, then he gets back the actual capital paid in by him, and about $1000 more; Ervin & Toland get in profits something over $11,000 each. If there was no dissolution of the partnership until January 1, 1892, then Mr. Smith gets $5,120 more than Ervin and Toland now admit is his due.

The issue raised is as to the date of dissolution of the partnership, and is purely one of fact; the statement of the account and balance due Smith are determined as we determine that fact.

By agreement of the parties, the whole matter was referred to J. Levering Jones, Esq., to take testimony and make report as to law and the facts, as if a bill in equity for account had been filed. The referee took the testimony and made a very clear and concise report on the facts. He says:—

"The primary question to be considered in this cause, is, when did the partnership, made on January 13, 1890, between Spencer Ervin and Edward D. Toland, as general partners, and Frank W. Smith, as special partner, terminate?" He answers, on 1st of January, 1891, and states the account and suggests decree accordingly.

His finding of fact was not approved by the learned Judge of the Court of Common Pleas, who, nevertheless, agrees with the referee, that "the dispute in the case arises over the question, when was the firm dissolved as regards Mr. Smith?" He then draws the very opposite conclusion from the same evidence on which the referee based his conclusions. His opinion is, that the partnership terminated at the end of the year 1891, instead of at the beginning of it, and he directs the account to be stated accordingly.

Digitized by Google

This leaves to us the duty of determining between them.

At the outstart, it may be conceded the case is a close one on the evidence, and if the referee and Court had been in accord, under our well-settled rule not to disturb the findings of facts in the Court below, unless for manifest error, a decree for either party would probably have been sustained.

There are two leading significant facts; one is wholly inconsistent with the claim now set up by plaintiff, the other with that now set up by defendants.

The receipt for $10,000, signed January 9, 1891, by Smith, is, on its face, susceptible of no reasonable interpretation other than, at that date, by his request and by consent of the others, the partnership had terminated; and that he, according to the language of the writing itself, had the right to withdraw all the money he had paid in, "as soon as possible, when certain accounts that show a shrinkage are closed out."

The claim of Smith now, that his relation as partner was not severed until nearly twelve months afterwards, is flatly contradicted by this writing.

Then, on the other hand, the act of Toland on 26th September, 1891, is an unequivocal assertion that Smith nine months afterwards was still a partner, and would so continue until January 1, 1892. On a paper headed with the names of Ervin and Toland as general, and Smith as special partner, dated September 26, 1891, he serves this notice on Smith: "Dear Mr. Smith, This is a formal notice that I intend to withdraw from the firm of Ervin & Toland on January 1, 1892. Yours sincerely, EDWARD D. TOLAND."

If Smith had ceased to be a partner, as Toland now claims, nine months before, at the end of the year 1890, judging of the usual operations of men's minds and their conduct in business affairs, there is no reasonable theory which will account for this contradictory act. It is consistent, and only consistent, with the idea that Toland believed Smith to be still a partner, and acting in accordance with Stipulation 6, in the partnership articles, desired to terminate the partnership on January 1, 1892. That stipulation reads thus: "The partnership shall continue for a period of three years from the 12th of January, 1890. Provided, however, that any one partner, whether general or special, may dissolve the said partnership by giving his co-partners three months' written notice before the expiration of any calendar year of his desire to terminate the same at the end of that year."

That is, the partnership still existed; Mr. Toland desired to end it; he could only do so in the way provided in that agreement; he adopted that very way. On this supposition, only, is this conduct explicable. The explanation given by Mr. Toland, in his testimony, is this: "I simply gave Mr. Smith this notice, as during that period there were certain accounts which were in process of liquidation, in which we were all interested, and this was simply notice to him that I intended to retire from business on 1st of January, 1892." If the act had been equivocal, this explanation would have helped but little in ascertaining its true import; but being manifestly significant of a continuing partnership, the explanation is wholly unsatisfactory. It is within common observation that a cautious, intelligent business man not seldom neglects those formalities which are indispensable proof of important transactions; but it is a rare case that such a man will take pains to formally assert a fact which does not exist, a fact, too, highly prejudicial to his own interests. In effect, this conduct of Toland's was an assertion that Smith was still a partner, and therefore entitled to receive $5,120 more money than Toland now admits was due him.

But Toland's conduct is not more significant of the continuance of the partnership to January 1, 1892, than Smith's receipt, that it had terminated in January, 1891; nor is Smith's explanation of that paper any more satisfactory. He says: "My partners represented to me that if I stayed in the firm and the firm was allowed to go quietly on without disruption, we would undoubtedly, by virtue of new customers and new business which we had acquired, make up our loss, and most likely enjoy a good profit besides, during the coming year. . . . . I said, if it seems impossible to do any business, and things do not get any better, and there is no business and no money, I will stand by you if I have to stand these losses equally; then they gave me this paper, and I carelessly signed it with that understanding, that the loss that I agreed to stand *pro rata* with them, was a loss that was to be made up, if possible, by a continuation or extension of the partnership which I then had a right to dissolve."

The substance of the explanation is, that wishing to terminate the partnership, and having the right to terminate it, he consented to its continuance, and then accepted a written agreement which expressed the very opposite. Agreements are presumed to express the assent of two minds to the same thing; this one, according to Smith's explanation, plainly expressed that to which neither assented.

In considering this vague and unsatisfactory explanation, however, we are not without some help from Mr. Toland. This interrogatory is put to him: "Q. I understand, then, that there was a partnership in 1890, which Mr. Smith, giving notice in the latter part of that year, de-

Digitized by Google

sired terminated? A. Yes, sir. Q. But you continued it for another year by agreement of all the parties? A. Yes, with the understanding with Mr. Smith, that his capital could be liquidated as fast as possible, commencing with $10,000 January 9." Then, further on, this question is put: "Q. In point of fact the firm of Ervin & Toland, formed under that written agreement of 1890, was not dissolved until December, 1891? A. Well, I don't know about that."

Smith's explanation of his receipt is, that it expressed the very opposite of what was agreed upon; Toland almost positively corroborated him in some parts of his testimony, and in no part of it contradicts him. Then, taking the two statements in connection with the unequivocal conduct of Toland nine months afterwards, in treating Smith as a partner by giving notice of his intention to terminate the partnership, we are moved, not without some hesitation, to adopt the conclusion of the learned Judge of the Court below, that taking all the evidence together, it shows there was no dissolution of the partnership until January 1, 1892. The decree is therefore affirmed, and the appeal is dismissed at costs of appellant.

Eo die. MITCHELL, J., dissenting. The matters which led to this controversy having occurred between partners who were on entirely friendly terms, were unfortunately not carried on with the formality and precision desirable in business transactions, and it is not therefore surprising that the parties failed to have the same understanding at the time, and their recollections now differ. But with the written documents as a basis I am of opinion that the substantial agreement is clear. Mr. Smith desired to dissolve the partnership, and had the legal right to do so, but became convinced that it would involve very serious loss not only to his partners but to himself to do so openly at that time. He therefore agreed that no public change should be made, but as between the partners themselves the notice was not withdrawn, and liquidation commenced at the beginning of the year 1891. The receipt shows this beyond all doubt. Smith received ten thousand dollars of his capital and the rest was to be repaid "as soon as possible when certain accounts that show a shrinkage are closed out." The losses on these special accounts were to be equally divided, but it is nowhere said or indicated that general losses, or any losses at all on new business, were to be paid in part or in whole by Smith. The business of 1891 was a new business on a new basis, and so far as the partners themselves were concerned, if it had proved a losing one Smith could not have been charged with any share of the losses, and on the other hand he had no claim for any of the profits.

I do not see the difficulty that my brethren find in regard to the notice by Mr. Toland to Mr. Smith in September, 1891. The firm of Ervin & Toland continued during 1891 so far as the public were concerned. The use of the firm heading and paper was therefore not only natural but imperative. A change would have given notice to the public of what the circumstances required should not be known. And as to the partners themselves the firm still continued under the same name so far as Mr. Ervin and Mr. Toland were concerned. It was this latter firm from which Toland desired to withdraw, and his doing so involved the winding up of the business to the public eye as well as in fact between the partners, and therefore the termination of the temporary arrangement which had run through the year 1891. In this arrangement Smith of course was interested and he was entitled to notice of its intended termination. The letter of Toland to Smith was therefore not only a courteous and friendly but a proper business act.

I would reverse this judgment and approve the findings of the referee.

WILLIAMS, J., concurred in this dissent.

GREEN and FELL, JJ., absent.

J. D. B., JR.

Jan. '95, 18. April 12, 1895.

Manhattan Brass Company v. Reger.

Rescission of contract—Fraud—False representation — Change in Partnership—Retention of old name.

Where an alleged false representation as to its credit is made by a firm to a mercantile agency and subsequently a new firm is formed containing one of the partners of the old firm and a new man, which new firm retains the name of the old, one who sells goods to the new firm cannot rescind the sale on the ground of the false statement as to the old firm's credit, especially when the false statement has not been learned by him until after making the sale.

Appeal of the Manhattan Brass Company from the judgment of the Common Pleas No. 2, of Philadelphia County, in a feigned issue framed under the Sheriff's Interpleader Act to test the ownership of certain goods and chattels levied on by Albert P. Reger as the property of Parry A. Reger and Charles E. Heckman, trading as Parry A. Reger & Bro.

On the trial of the cause the following case appeared from the plaintiff's testimony:

Digitized by Google

The Manhattan Brass Company received sundry orders during the months of June, July, and August, 1891, for brass from Parry A. Reger & Bro., which they filled from time to time. In the latter part of July, 1891, the person in charge of the credit department of the brass company, applied to the Bradstreet Company for information as to the financial condition of the purchasers. He received on July 30, 1891, a copy of a statement made by Parry A. Reger to the Bradstreet Company on December 30, 1890, which statement had been made for the purpose of procuring a rating for his firm for the year 1891. Parry A. Reger then stated that his firm, which at that time was composed of Parry A. Reger and C. Albert Reger, owed no borrowed money, that there were no judgments outstanding, and that they owed only current accounts, say $2,000 to $3,000. This statement was absolutely false, and was well known so to be at the time it was made. On March 1, 1891, the firm, Parry A. Reger & Bro., was dissolved, and a new firm composed of Parry A. Reger and Charles T. Hickman was formed under the old firm name.

On August 28, 1891, a judgment was entered against the firm of Parry A. Reger & Bro. upon a single bill under seal, dated May 15, 1891, in the sum of $8,000 in favor of Albert P. Reger, the father of Parry A. Reger & Bro. This judgment note was a renewal of an old judgment note, dated October 26, 1888, for $6,000, for moneys loaned prior to that date. No portion of this had been repaid when the statement was made to the Bradstreet Company on December 30, 1890, that the firm owed no borrowed money, nor had it been repaid at the date of the entry of the judgment. A writ of fieri facias was immediately levied upon all of the stock of goods of the firm defendant, whereupon the Manhattan Brass Company claimed to rescind their contract of sale by reason of the false representation aforesaid, which had induced the credit, and claimed all the brass shipped by them to Parry A. Reger & Bro., which they found on the defendant's premises.

A feigned issue was framed to determine the ownership of the brass in question.

JENKINS, J., directed a verdict for the defendant.

Verdict accordingly.

The plaintiff took this appeal, assigning for error the direction of the verdict for defendant.

John Sparhawk, Jr., for appellant.

Charles Francis Gummey (with him *M. Hampton Todd*), for appellee.

May 30, 1895. FELL, J. For some years prior to March 1, 1891, P. A. Reger and C. A. Reger were partners, trading as Parry A. Reger & Bro. On the date named, the partnership was dissolved, and a new partnership, the members of which were P. A. Reger and C. T. Hickman was formed and the same firm name was retained. The statement as to the financial condition of Parry A. Reger & Bro., which it is claimed was the basis of the credit given, was made by the old firm to a mercantile agency on December 30, 1890, and not communicated to the plaintiff until July 30, 1891. The merchandise in question was sold to the new firm in June, 1891.

From these facts it follows that the learned Judge was clearly right in directing a verdict for the defendant in the interpleader. The right to rescind the contract of sale was based upon the alleged falsity of a statement made, not in relation to the defendant in the execution, but in relation to another party, and not communicated to the plaintiff until after the goods were sold. The facts do not raise the legal questions elaborately argued by the appellant's counsel, and it is unnecessary to consider them.

The judgment is affirmed.

H. B.

Jan., '95, 386. March 14, 1895.

Commonwealth v. Harris.

Criminal law—Shipment of goods—Whether consignment for sale or purchase—Fraudulent misappropriation of proceeds.

Where the Court gives a definition sufficiently comprehensive to direct the attention of the jury to the nature, and the distinction between a consignment for sale on consignor's account, and a purchase where the title passed, though the goods were not paid for, there is no error.

Looseness of method is not fraud, and upon a failure of the Commonwealth to prove fraudulent misappropriation by a consignee or factor, the Court should direct a verdict of not guilty.

Appeal of Robert P. Harris, defendant, from the judgment of the Quarter Sessions of Northampton County.

The facts are stated in the opinion of the Supreme Court, *infra*. On the trial, SCHUYLER, P. J., charged as follows:

"Gentlemen of the jury: The indictment which you have been sworn to try, charges the defendant, Robert P. Harris, with having received into his possession as consignee, a quantity of grapes belonging to the prosecutor, and with having sold the grapes, and with having appropriated the proceeds of sale fraudulently to his own use. [The indictment has been framed under the following Act of Assembly: 'If any consignee or factor having the possession of merchandise, with authority to sell the same, or having possession of any bill of lading, permit, certificate, receipt or order for the delivery of merchandise with the like authority,

Digitized by Google

shall deposit, or pledge such merchandise or document, consigned or entrusted to him as aforesaid, as a security for any money borrowed, or negotiable instrument received by such consignee or factor, and shall apply or dispose of the same to his own use, in violation of good faith, with intent to defraud the owner of such merchandise, and if any consignee or factor shall, with like fraudulent intent, apply or dispose of, to his own use, any money or negotiable instrument, raised or acquired by the sale or other disposition of such merchandise, such consignee or factor in every case shall be guilty of a misdemeanor, and sentenced to pay a fine, not exceeding two thousand dollars, and undergo an imprisonment, not exceeding five years.'] (Fourth assignment of error.) [To constitute this offence, the Commonwealth must have satisfied you that the defendant received these grapes as consignee. Many of you among the jury understand what is meant by consignee as distinguished from purchaser. A consignee is a person to whom merchandise or personal property of any kind is committed for the purpose of sale.] (First assignment of error.) Where there is a sale, the title to the property, whether the property is paid for or not, passes to the purchaser, but in the case of a consignment, there the title to the property remains in the consignor, and all that the consignee receives is the right to sell that property for and on account of the consignor. [But you know, gentlemen, the difference between a sale of property and a consignment for the mere purposes of a sale.] (Second assignment of error.)

"[The first question for you to determine is, what was this contract between the prosecutor and defendant? Was it a sale, or was it a consignment? That question you will determine from the letters which have been given in evidence on both sides, and from all the other facts and circumstances in the case. If you examine these letters and the other facts in the case and you are unable to say whether, beyond a reasonable doubt, the defendant is guilty or not, then you must give the defendant the benefit of that doubt and return a verdict of not guilty. If, however, after a careful review of all the evidence in the case, you are satisfied beyond a reasonable doubt that the contract was a consignment, then you will inquire further whether the defendant sold the property and appropriated the proceeds to his own use with a fraudulent intent.] (Third assignment of error.)

"It is an element in the case that the defendant must have received the property into his possession. There is no dispute about that. That is admitted. There is another element in the case that the defendant must have sold the property. That is also admitted.

"In the third place, it is necessary for the Commonwealth to satisfy you that the defendant appropriated the proceeds of the property to his own use. It is admitted by the defence that he did appropriate a part of the money received from the sale of these grapes to his own use. If that was done with fraudulent intent and the property was consigned to him instead of having been sold to him, then it would be your duty to return a verdict of guilty. If, however, you have a reasonable doubt whether the money was appropriated by the defendant with a fraudulent intent, you must give the defendant the benefit of that doubt and return a verdict of not guilty.

"It has been said to you, and very properly, that in the eye of the law this is a very grave and a very serious offence against which this Act of Assembly is directed. It has been said with reason, that you ought not to convict the defendant upon slight evidence. That is very true and a very proper caution to give to the jury, and, I repeat it to you now, as I have in substance said, that you must be satisfied from the evidence beyond a reasonable doubt of the guilt of the defendant; and, if you have a reasonable doubt as to any one of the essential features of this case, you must give the defendant the benefit of that doubt and return a verdict of not guilty.

"[But there is another view of the case which it is proper I should call your attention to. Whilst beyond all question in contemplation of the Legislature, this offence of a consignee appropriating property consigned to his own use, is a most serious offence, and because it is a most serious offence, if you are satisfied beyond a reasonable doubt of the defendant's guilt, then all the more important it is that the defendant, who is guilty of such an offence should not escape the punishment which the enormity of the offence entitles him to receive.] (Fifth assignment of error.) Upon these remarks gentlemen, I submit the case to you.

"If you find the defendant not guilty, then you will have to dispose of the costs. Whilst this offence is a high crime in contemplation of the law, still it is only a misdemeanor, and if you do not find the defendant guilty, you must make some disposition of the costs; these you can put on the defendant or upon the prosecutor or upon the county, or you can divide them between the prosecutor and defendant in such proportion as you think just and proper. If you find the defendant guilty, then you will have nothing to do with the costs."

Verdict of guilty. The defendant took this appeal and assigned as error the portion of the charge above included in brackets, and that the Court refused to direct the jury to return a verdict of not guilty.

Russell C. Stewart, for appellant.

Digitized by Google

The Act of Assembly is directed against offences committed by "consignees or factors." It is important to determine just what is meant by these words. In common usage anyone who receives an express parcel is the "consignee" of that parcel whether he has bought it on credit or for cash. The popular use has no reference to the use that is contemplated by the Act. The word "factor" means "an agent employed to sell goods or merchandise consigned or delivered to him by or for his principal for a compensation, commonly called factorage or commission." In the sense in which the word "consignee" is to be interpreted in this Act, it and "factor" are synonymous. The word "or" should read "and" in the Act of Assembly, that is if any consignee and factor, etc. The assumption, that the jury knew the difference between a purchaser and a consignee, is an unwarranted one for the Court to make. The Court should have charged the jury what made a consignee, what was essential to constitute Harris, McKeel's consignee in this case. The Court is also wrong in the definition which we complain of in our first assignment of error. The Court said, "a consignee is a person to whom merchandise or personal property of any kind is committed for the purposes of sale."

In section 114 of the Penal Code embezzlement by an agent is provided against. The Courts in England have placed the strictest construction upon the word "agent" in the statute from which the Pennsylvania Act was taken. They have held that the word "agent" applied only to one who follows the profession or business of an agent. This construction is that which our own Court placed upon this word in a criminal case tried in Northampton County some years ago, and not reported. The same point was presented to the Supreme Court in Com. *v.* Newcomer, 49 Pa. 478, but not decided, as the question was not properly presented. In Massachusetts the same strict construction prevails.

Com. *v.* Thomas Stearns, Jr., 2 Met. 343.
Com. *v.* Libbey, 11 Id. 65.

It has been held the agent must be an agent in a mercantile transaction.

Wood *v.* Rowcliffe, 6 Hare, 183.
Monk *v.* Whittenbury, 2 B. & Ad. 484.
Wharton's Criminal Pleading and Practice, 8th Ed. 709.
Meyers *v.* Com., 83 Pa. 143.

In this case the sole evidence for the Commonwealth was contained in three letters. These being in writing were for the Court. The Court not only allowed these letters to go to the jury room, which, under the authorities seems to be in the discretion of the Court, but the Court told them, (third assignment) that they must examine the letters, and determine from their examination of them the guilt or innocence of the defendant. The Court did refer to other facts, but there were no other facts in the Commonwealth's case.

The Commonwealth contended that one of the other facts was that Harris' letterheads were too enticing, too presumptuous for an ordinary huckster to use. If it is the law that a man could be convicted of fraud by the kind of advertisements he uses to put his wares before the public, a good many so-called honest men would be criminals. Again they contended that because he received his mail at his dwelling house where he lived with his mother and sister, and stored his goods in another building, which he explained was sufficient for his needs, he being a wholesale dealer, that this was evidence of fraud. These trivial things were the only "facts" that the Commonwealth had.

Instead of telling the jury they were to judge, the Court should have construed these written instruments, these letters, and said there was nothing in them to convict the defendant. The jury is not to be judge of the law.

Com. *v.* McManus, 143 Pa. 97.
Wharton's Criminal Pleading and Practice, 8th Ed. 807.
People *v.* Bennett, 49 N. Y. 137.

The Court first read the entire section of the Act to the jury, gave them the definition and the punishment. Courts should never refer to the punishment prescribed by the Act. It is a matter with which the jury in this State have nothing to do. In States where they fix the punishment it might be proper. The Court not only read this clause of the Act, but at the close of the opinion referred the jury's attention to the consequences of the offence, and clearly told the jury that in the Court's opinion the defendant ought to be convicted, by inferentially saying that the community should be protected in such cases.

Commonwealth *v.* Switzer, 134 Pa. 389.
Catasauqua Mfg. Co. *v.* Hopkins, 141 Pa. 45.

When the Commonwealth closed, the Court was asked to direct a verdict in favor of the defendant of not guilty. This would have left but one question, that of costs, for the jury to pass on. If we are correct in our position that the Court should pass on the legal question, the letters being in writing, the Court should have done so, and should have directed the jury to return a verdict of not guilty.

Bishop on Criminal Procedure, 3d Ed. 977.

A. C. La Barre, district attorney, for Commonwealth.

"A commission merchant or factor is an agent for the sale of goods in his possession or consigned to him. The terms 'commission mer-

Digitized by Google

chant' and 'factor' are synonymous, and mean one who receives goods, chattels or merchandise for sale, exchange or other disposition, and who is to receive a compensation for his services to be paid by the owner, or derived from the sale of the goods."

Am. and Eng. Ency. of Law, Vol. 3, page 317.

The jury could best judge in what manner Harris received the property from all the evidence submitted, the written as well as the oral, and for that reason letters written by Harris were allowed to be taken by the jury to the jury room. There was no objection made at the time by defendant, and therefore, with his consent, the letters were given to the jury.

If, as the appellant alleges, the letters bore upon their face and contained matter and propositions favorable to the defendant, then more futile is his complaint. The Court repeatedly charged that if the jury had a reasonable doubt the defendant should have the benefit of the doubt. The charge, as well as the testimony, is to be considered as a whole, was so considered undoubtedly by the jury, and specious and astute arguments based upon extracts from the charge of the Court, or from the testimony, have little weight.

"Although parts of a charge when taken separately may seem to be erroneous and indicate a leaning to one side or the other, there is yet no error, if taken as a whole, the questions at issue are fairly left to the jury."

Reese *v.* Reese, 90 Pa. 89.
Lehigh Valley R. R. Co. *v.* Brandtmaier, 113 Id. 610.
Reeves *v.* Del. Lack. & Western R. R. Co., 30 Id. 454.
Irvin *v.* Kutruff, 152 Id. 609.
Pierson *v.* Duncan, 162 Id. 187.

The Court did not refer "to the definition of the word consignee as being a matter of no importance," nor did the Court treat the matter of consignment indifferently. Whether Harris was consignee in the transaction, and whether the contract was one of consignment, were to be gathered from the evidence submitted, from the facts in the case, and it was the province of the jury, not of the Court, to be judge of the facts.

The reading of the section of the Act was at the beginning of the charge, and has no immediate connection with the latter part of the charge, whereby the Court said if the jury were "satisfied beyond a reasonable doubt of the defendant's guilt, then all the more important it is that the defendant, who is guilty of such an offence, should not escape the punishment which the enormity of the offence entitles him to receive."

The case of Commonwealth *v.* Switzer, 134 Pa. 389, cited and relied on by appellant, is different from the one at bar. In that case the Court below in the charge alluded to "the probable result of a verdict of guilty," and in such a manner, though unintentionally, that "a jury might be apt to understand it as in some degree a subject for their consideration." That cannot be said of the charge of the Court in the present case.

Catasauqua Mfg. Co. *v.* Hopkins, 141 Pa. 38.
Henry *v.* Klopfer, 147 Pa. 178.

The contents of the letters are not questions of law but of fact, and were rightly submitted to the jury, and being matters of fact for the jury to decide, the Court could not direct a verdict of not guilty as requested by the defendant.

May 30, 1895. MITCHELL, J. The law was correctly given to the jury by the learned Judge below. The turning point in the case was the capacity in which appellant received the grapes, whether as consignee or as purchaser. The definition of consignee by the Judge was accurate, and sufficiently comprehensive to direct the attention of the jury to the nature of the contract, and the distinction between a consignment for sale on consignor's account and a purchase where the title passed, though the goods were not paid for.

Nor was there any error in reading the Act of Assembly to the jury. It was done at the beginning of the charge as a concise and accurate mode of informing the jury of the exact offence for which the prisoner was on trial. That in reading the whole section of the Act, the Judge necessarily informed the jury what the penalty was which the law imposed for the offence, was merely an incidental result, not at all analogous to the specific direction of the jury's attention to the consequences of a verdict of guilty, which was held to be erroneous in Com. *v.* Switzer, 134 Pa. 383; Catasauqua Co. *v.* Hopkins, 141 Id. 30 (45); and Rosenagle *v.* Handley, 151 Id. 107.

The learned Judge, in his charge, called the attention of the jury to the fact that the law regarded the act of a consignee in appropriating consigned property to his own use as a very serious offence, which should not escape punishment, but he also cautioned them in equally explicit terms that for the very reason of the seriousness of the charge the prisoner should not be convicted upon slight evidence. We are unable to perceive anything in this of which the appellant has any cause to complain.

On the main issue, however, we think the case is with the appellant. It is peculiar in the respect that substantially the whole evidence is

Digitized by Google

in writing. The dealings between the prosecutor and the prisoner were entirely by letter and telegram, and the Judge submitted the case to the jury on these papers, and "all the other facts and circumstances." These other facts were, first, the shipment of the grapes at prisoner's request and their receipt by him, facts not disputed, but which were equally consistent with guilt or innocence; secondly, failure of the prisoner to make immediate returns, a fact also undisputed, but depending for its character on the capacity in which the receipt and sale of the goods were made; and thirdly, the prisoner's announcement of himself on his letter headings as a commission merchant, and putting his dwelling place in the same heading, where it might well be understood as his business address. This was but a mere make-weight at the most. None of these outside facts and circumstances bore directly on the issue, which was the fraudulent appropriation by a consignee or factor of the proceeds of sales of consigned goods. Without a foundation of evidence of this crucial fact, all the other matters are immaterial, and the evidence of this fact, as already said, must be found, if at all, in the writings. The parties never met personally until after the transactions were passed, and when they did meet, nothing is testified to by the prosecutor which is material to the issue. We must turn therefore to the letters. The first of these is from appellant to the prosecutor, asking to open business with him, and suggesting a "consignment." This word and the printed letter-head of "commission merchant" by themselves might, as the Commonwealth contends, sustain the inference that the consignment was to a factor, but it is plain from the context that the word "consignment" was used in the sense of "shipment," for the offer immediately follows to "handle all the grapes you can possibly ship on commission or will buy outright from you." To this letter the prosecutor replied by telegram, "Will ship you a mixed lot . . . for sample," and, two days later, by letter announcing the shipment as having been made. Neither telegram nor letter took any notice of the alternative to sell on commission or to buy outright which appellant's letter had offered, nor made any mention of prices or terms either for sale or commission. Both parties seem to have regarded this first transaction as preliminary and experimental, and left it indefinite in all respects. A week later appellant wrote the second letter, ordering more grapes of specified kinds, mentioning the price at which he had sold some, "got 18c. for Delawares wholesale," but concluding, "send bill with this order and I will forward you a check for full amount you forgot to state in your letter how much the grapes was, write and let me know send bill for full amount." While the mention of the price which he got for the Delawares, points somewhat toward a sale on commission, this construction is clearly overborne by the call for a bill, the promise to send check for full amount, and the reminder that the shipper had forgotten to state how much the grapes of the first lot were to be. The substantial part of this letter, if not entirely inconsistent with a sale on commission, indicates much more clearly a purchase, and was so understood by the prosecutor, for in his answer, after acknowledging the receipt of the letter, he says, "will ship . . and forward bill of the amount," and further on, "write prices of different kinds that you will take." A few days later the appellant wrote the third letter, ordering more grapes, offering 12 cents outright for mixed lots, and repeating the direction to send bill for full amount and the promise to forward check. This closed the transactions. Two days after the date of the last letter, the prosecutor came to South Bethlehem and saw appellant for the first time, but nothing took place between them which throws any light on the transactions by letter, for though the prosecutor testifies that the goods were sent "on commission," yet he nowhere says that fact was communicated to the appellant, and his cross-examination indicates apparently that he used the words "on commission" as synonymous with "on credit."

As already said, the case must be sustained, if at all, on the letters. They show that the business was conducted with almost incredible looseness on both sides. The prosecutor did not know what he was to get for his goods, which on his present theory was to depend entirely on what the appellant sold them for, a question he never asked; while on the other hand the appellant on his theory was selling goods without knowing what they had cost him, and whether he was making a profit or a loss. Neither version is consistent with the most ordinary principles of business care and prudence. But looseness of method is not fraud, and something more was necessary to sustain the indictment. The basis of the whole case was fraudulent misappropriation by a consignee or factor, and the Commonwealth failed to prove that that was the prisoner's relation to these transactions. Without that foundation there was nothing to which any of the other evidence in the case could be material, and the Judge should have affirmed the appellant's request, and directed a verdict of not guilty.

Judgment reversed. W. C. S.

Digitized by Google

Common Pleas.

Chester County. Miscellaneous No. 1462.

In re Old Eagle School Property.

Dedication of land for public uses—Hearsay evidence, admissibility of—Trust over land dedicated to public uses—Re-establishment of—School directors—Control of land dedicated for purposes of education—Act of June 13, 1836—Title by adverse possession—Evidence necessary to prove—Costs.

In matters of general public interest, as to which there is no inducement to collusion for a particular end, the declarations of deceased witnesses made before the controversy arose as to reputation in ancient things and ancient documentary evidence may be received.

The 14th section of Act of June 13, 1836, relating to common schools, confers no power on school directors to take possession of real estate held by trustees for the general use of a neighborhood as a school house and its appendages except by conveyance from said trustees. The possession of such property by the school directors with the assent of those interested, while jointly occupied for Sunday-school purposes, church meetings and public gatherings, is not such adverse possession as would confer an absolute title or raise a presumption of a grant to them.

Trustees of such property will be appointed by the Common Pleas on petition, and appropriate decree made for the re-establishment and protection of such trust.

The defence of their title by the school board against proceedings to establish, by evidence not of record, a trust for religious and burial as well as educational uses, is justifiable, and warrants a division of costs.

Sur exceptions to master's report.

The petition filed in this case alleged that "some time prior to the year 1800," a certain lot situate near Strafford Station, Penna. Railroad, was "donated by the then owner or owners thereof as hereinafter set out for the general use of the neighborhood," and a deed therefor, duly executed to trustees but never recorded, was lost. That until about 1872 the place was used as a public school and for religious and burial purposes, and in 1873, owing to the erection of a new school house, the building thereon was used only by a Sunday school. That this possession was in 1874 interrupted by a trespasser, who after occupying the building as a private dwelling, notwithstanding criminal and civil proceedings to oust him, surrendered it to the school board of Tredyffrin, who rented it also as a private dwelling, refused its use for other purposes, and in March, 1891, conveyed part of it in fee simple to Martha Wentworth for private purposes.

The prayer was for the appointment of trustees, to "take charge of the said property in accordance with the provisions of said trust, and to take such other and further action in the premises for the re-establishment of said trust as to justice and equity shall appertain."

Citations on this petition issued and were duly served upon the school board of Tredyffrin, their vendee and tenant above mentioned.

The answer of the school board claimed fee simple ownership in the property excepting the graveyard. It denied the execution of any deed to trustees or the existence of any trust as set out in the petition, and averred that, "The original grant of the same which is now lost, was made a century ago to the said township for school purposes;" and alleged title in the school board by possession for seventy years and that the use during that time for religious purposes was only permissive. It admitted the conveyance complained of and averred that, "They contemplate now selling the balance for a good price and appropriating the proceeds to the school district's indebtedness." No other answer was filed.

Petitioners filed a general replication; and the matter was referred to Robert Emmet Monaghan, Esq., as master and examiner.

At the hearing, before the master, petitioners submitted testimony of the declarations of aged persons since deceased, made before this suit, that a Lutheran church formerly stood on or near the present site of the school house; that certain persons for many years had the management of the property as trustees and that they claimed to act under the authority of a deed conveying the property for religious, educational and burial purposes. This testimony was admitted under objection, as hearsay evidence.

Petitioners also offered sundry records of legal proceedings in reference to this property indicating its control by trustees for general public uses and also the declaration of individual members of the board of school directors that they had no title to it.

Respondents offered no testimony.

The master filed an elaborate report from which the following are extracts:—

". . . . The deed having been lost, or mislaid, both parties have to rely upon hearsay testimony as to their legal rights in the premises." "In matters of general interest, as to which there is no such controversy existing as to induce concocting testimony for a particular end, the declarations of deceased witnesses as to reputation in ancient things and ancient documentary evidence may be received to prove matters of public interest."

After reviewing the testimony at length the

Digitized by Google

master found that the school, religious and burial societies, had each a common right, originally, in this lot; that the alleged trust, "For the general use of the neighborhood for religious, educational and burial purposes is a subsisting trust," and that "trustees should be appointed to hold title to the real estate, and administer this charity, ... so that the said trust may be most effectively applied to the general use of the neighborhood."

And recommended, "That the Court shall further decree in relation to the premises for the re-establishment of said trust, and that full and complete possession of the premises shall be placed under the control of said trustees appointed."

"That the costs of these proceedings be placed upon the respondents."

To this report the school directors filed, *inter alia*, the following exceptions:—

1 to 6. To the finding of facts and admission of hearsay testimony.

7 and 8. To the ruling that the terms of the trust as set out in the petition and evidence overcame the averments of the answer and were sufficiently clear to warrant the establishment of the trust.

9. To the imposition of the costs on respondents.

Thomas W. Pierce, for exceptions.

Petitioners' title under the pleadings depends on an alleged deed of trust. If this is lost, its existence as a valid instrument must be proved before proof of its contents.

McCredy *v.* Schuylkill Nav. Co., 3 Whart. 424.
McReynolds *v.* McCord, 6 Watts. 288.
Slone *v.* Thomas, 12 Pa 209.
Porter *v.* Wilson, 13 Id. 641.
Krise *v.* Nelson, 66 Id. 253.
Logan *v.* Gardner, 136 Id. 588.
Laubach *v.* Meyers, 147 Id. 452.

The evidence of Ivester and Mrs. Rush did not sufficiently identify the deed as a valid instrument.

If the trustees had been appointed and this were an ejectment case to try the title, such hearsay evidence as was here offered could not have been received.

Hearsay evidence is not competent to establish title or trusts.

Whether a trust be by writing or parol the evidence must be clear and definite, so that the Court can declare the duties of the trustees.

Dyer's Appeal, 107 Pa. 446.
Brickell *v.* Early, 115 Id. 473.

Even if trustees are appointed the school board stand on their possession for a prescriptive period, with the presumption of a grant and the equity powers of the Court do not extend to determining the title.

Am. & Eng. Ency. of Law, Vol. 27, page 375, note.

The proofs here taken were essential to the petitioners if they sought to establish the alleged trust and it is unfair to compel respondents to pay for them.

Charles H. Pennypacker, for Elijah Wilds *et al.*, petitioners, contra, submitted no brief.

Henry Pleasants, (with him *Alfred P. Reid*, of Chester County, *Benjamin H. Lowry*, *H. Gordon McCouch*, *Samuel Hinds Thomas*, and *John B. Thayer*, of Philadelphia County), for Thomas R. Jaquette *et. al.*, petitioners, contra.

Where rights of the public are involved hearsay evidence is admissible within recognized limits.

Wharton on Evidence, sec. 186, etc.
Starkie on Evidence, 47.
Greenleaf on Evidence, sec. 128–135–136.
Carr *v.* Mostyn, 5 Exch. Rep. (Eng.) 68.
Drinkwater *v* Porter, 7 Car. & Pay. Rep. 181.
Queen *v.* Bliss, 7 Adolph & Ellis Rep. 550.

In Pennsylvania it is admitted to prove age, boundaries, pedigree, or corroborate other testimony.

Watson *v.* Brewster, 1 Pa. 383.
Bender *v* Pitzer, 27 Id. 335.
Moul *v.* Hartman, 104 Id. 46.
Sturgeon *v.* Waugh, 2 Y. 476.

Petitioners' evidence was not confined to, but only supplemented by hearsay testimony. In addition to much record evidence, the undeniable existence of the graveyard there, was strong evidence of the religious element in the trust.

Brown *v.* Lutheran Church, 23 Pa. 501.

A grant prior to the Common School Act of 1836, to a township "for school purposes," as alleged in the answer, confers no title in the school board. Their rights are wholly statutory.

Constit. of 1790, Art. VII., sec. 1.
Act April 4, 1809, P. L. 193.
Act March 29, 1824, P. L. 137.
Act April 1, 1834, P. L. 170, sec. 23.
Act June 13, 1836, P. L. 531, sec. 14.
Act May 8, 1854, P. L. 620, sec. 18.

If title is in township, supervisors should maintain the action.

Act April 15, 1834, P. L. 538, sec. 5.

Even under the most liberal construction of 14th section of Act of June 13, 1836, school directors could only maintain school rights against private claims and only in cases where there were no trustees.

School Directors *v.* Dunkleberger, 6 Pa. 32.
Klinkener *v.* School Directors, 11 Id. 449.
Pott *v.* School Directors, 42 Id. 132.
Stallman's Appeal, 38 Id. 202.

See also—

Com'th *v.* Jarrett, 7 S. & R. 461.

Digitized by Google

Barr *v.* Weld, 24 Pa. 87.
In re Pennsbury Sch. Hse. (Ches. Co. Miss. Doc., 2, page 210).

Acts and declarations of individual directors are evidence to disprove statutory title in the board.

Magill *v.* Kauffman, 4 S. & R. 320.
Pickle *v.* McKissick, 21 Pa. 236.

See—

Wentworth *v.* Mullen, 2 Ches. Co. Rep. 544.

Renting school houses for revenue is not contemplated by school laws.

Courtney *v.* Keller, 4 Penny. 38.

See—

Gumbert's Appeal, (Old Brick Church,) 110 Pa. 501.

Similar charities are favored by Pennsylvania law.

Wright *v.* Linn, 9 Pa. 433.
McKissick *v.* Pickle, 16 Id. 140.

They have been sustained in total absence of record title or great ambiguity of grant.

Morrison *v.* Beirer, 2 W. & S. 81.
Martin *v.* McCord, 5 W. 493.
Beaver *v.* Filson, 8 Pa. 329.
Klinkener *v.* School Directors, 11 Id. 444.
Pott *v.* School Directors, 42 Id. 132.
McLain *v.* Sch. Directors, 51 Id. 196.
School Directors *v.* Dunkleberger, 6 Id. 29.
Beatty *v.* Kutz, 2 Pet. (U. S.) 566.

Trustees appointed would have such full discretionary powers that uncertainty in the object of the charity would be immaterial.

Whitman *v.* Lex, 17 S. & R. 88.
Pickering *v.* Shotwell, 10 Pa. 28.
Martin *v.* McCord, 5 W. 493.

See—

Magill *v.* Brown, Bright. Rep. 408.

The Court having equitable jurisdiction of this case in its supervision and control of unincorporated societies and associations, are warranted in making an end of the whole controversy and passing directly and finally on rights of property and questions of title.

Wilhelm's Appl., 79 Pa. 141.
Kisor's Appl., 62 Id. 435.
Kerr *v.* Trego, 47 Id. 292.
Roshi's Appl., 69 Id. 462.
Henry *v.* Dietrich, 84 Id. 291.
Gass's Appl., 73 Id. 48.
Eaton's Appl., 66 Id. 493.

The evidence submitted of contents of the alleged deed, showed it to have been "a deed" and "of this property;" and that it was read "at a public meeting on the premises" to ascertain rights of public therein.

These facts distinguish this case from those ruled by McReynolds *v.* McCord, 6 W. 288 *et. seq.*

The allegation in the petition that the property was "donated," is broad enough to cover either a dedication or a grant, but even were this not so, yet if the evidence submitted supported the general allegations of petitioners it would be sufficient; and all necessary amendments to this end would be considered made.

Danziesen's Appl., 73 Pa. 65.
Wilhelm's Appl., 79 Id. 137.

THE COURT. WADDELL, P. J. The Master finds from the evidence before him, together with the pleadings in the application, that the school, religious and burial societies, have each a common right in the property in question. The extent of this interest is not shown. He finds that the property has been used for school and various religious purposes, and for the burial of the dead, for about one hundred years, and he concludes that each of these rights was founded upon an original grant.

He further finds, that the parties interested in these respective rights, have not entirely abandoned nor withdrawn from the use of the premises. The result of these findings is, that this property was more than a century ago dedicated to the public for educational and religious purposes, and that a right to these uses still remains in the people of that neighborhood.

We have examined the evidence submitted to the master and the pleading in the application, and cannot say his findings and conclusions are manifestly wrong. "We should not hastily set aside the conclusions of a master upon the facts of the case submitted to him. This ought to be done only upon the discovery of some plain and obvious error, or where the whole evidence shows such a preponderance against his finding, that were it a verdict of a jury in a Court of Common Pleas a new trial should be granted:" Thompson's Appeal, 103 Pa. 607.

It is alleged that the property in question was granted over a century ago to the neighborhood by the then owner for educational and religious purposes, and that the trust thus created was at some time placed in the hands of certain trustees to be carried into effect. The testimony shows that many years ago certain residents of the neighborhood were recognized as such trustees. All the parties thus connected with the property as trustees are dead, and this is an application by a large number of citizens interested for the appointment of five trustees to take the place of those originally appointed and now deceased.

It is resisted by the school directors of Tredyffrin township, because they claim to be the owners of the property in question, and deny the allegation that it was ever conveyed to trus-

Digitized by Google

tees under the trust set forth in the petition; and aver that it was granted over a century ago to said township for school purposes. It will thus be seen that both parties to the controversy base their respective claims upon a grant from the former owner but differ as to the extent of it. They both admit that the deed is lost.

The petitioners claim that the grant extended to educational and religious objects, while the respondents assert it was confined alone to educational purposes.

The petitioners claim they have produced sufficient evidence to show the existence of such a trust as they allege, and, therefore, ask for the appointment of trustees to carry it into effect. If the witnesses are believed, the petitioners have shown the existence of a deed upwards of fifty years ago, relating to the property in question and the manner of its use. Those who heard the paper read say it described this building and granted the liberty to any religious denomination to hold services in it, except the Roman Catholics; that as long ago as 1815 the building was used for school and religious purposes, and this continued down until 1873; that during those early days it was managed and controlled by committeemen or trustees, and they name some, among them being John Ivester; these trustees or committeemen, and the wants of the property were appointed and provided for at public meetings of the neighborhood called for the purpose; that when the new school house was built in 1872 or 1873 the school board abandoned this property, and individual members then declared they had nothing to do with it, that in former years the repairs to the property were paid for by public subscriptions; that the school directors were not asked for the use of the property for religious purposes, but those who wished to hold meetings of this character simply obtained the key, which was kept in the neighborhood, and used the building.

Some of the facts testified to by the witnesses were within their own knowledge, and some were derived from old people of the neighborhood, now deceased. The information of the latter was furnished before the present controversy arose. The master admitted this testimony, and no doubt considered it, upon the authority of 1 Greenleaf on Evidence, 7th ed., Chapter 6, sect. 127–140; 1 Wharton on Evidence, 2d ed., sect. 185, *et sequiter*.

The respondents offered no testimony, but insisted that the prayer of the petition should be refused, because the school board of Tredyffrin had been in visible, exclusive, and notorious possession of the property since 1835, and had thus become owners of the same; and because, further, the facts shown fail to establish any trust as claimed, or show any interest in the premises on the part of the petitioners.

The master, considering the evidence and the circumstances connected with the possession of the property, found, as we have said, the trust to exist as claimed, and advised the appointment of trustees to carry it into effect. We cannot say his findings and conclusions are so erroneous as to justify us in setting them aside.

This is not an effort to establish a trust by parol. The existence of a deed for the property is shown, and its present whereabouts is now not known. More than one witness speaks of its contents, and while they are unable to detail all its provisions, they give us in substance the terms of the trust. This is supplemented by the general understanding of the neighborhood. The property appears to have been used in a way consistent with the terms of the trust. The allegation is, that the grant was for school and religious purposes, and the uncontradicted testimony is that a school was kept in the building, and a Sunday-school and religious meetings were held there from 1815 down to 1873. It is true, the respondents assert that these religious gatherings were held by their permission, but there is no testimony to show this. In fact it is positively denied by the witnesses for the petitioners, and more than one asserts that the building was used for such purposes whenever wanted, without obtaining permission from any one.

Attached to the grounds on which the building stands is a graveyard, where the people of the neighborhood have been buried for more than a century past. This gives the place a semi-religious character, and tends to disprove the allegation that the property was originally granted for school purposes exclusively. It goes to sustain the imperfect recollection of some of the witnesses who say they think a Lutheran church stood somewhere on these grounds years ago.

Neither do we see how the school board can set up an exclusive right to the property by reason of their possession. We are unable to understand from the evidence how they got possession, unless it was they merely took it, when the Act of June 13, 1836, known as the Common School System, went into effect. This Act gave the school board no such power. It authorized them to erect, rent or hire suitable school houses, or to purchase and hold such real estate as might be necessary for the establishment and support of the schools; or, where real estate was held by trustees for the general use of the neighborhood, as a school house, or its appendages, it authorized such trustees to convey the same to the school directors. There is no testimony to show this property was ever rented or purchased by the school board of Tredyffrin. It was certainly being used by the neighborhood as a school house

Digitized by Google

when the Act of 1836 went into operation, and it is more than likely the school directors assumed to take charge of it as one of their houses, with the assent of those interested. They undoubtedly took charge of and conducted a school therein, from 1836 until 1872, but was it in a way to give them exclusive control of the property? They now claim title by adverse possession, if not by actual grant. To sustain a title by adverse possession they must show an adverse, exclusive, continuous and notorious possession. No such possession is shown. It is clear from the testimony that during all these years and down until the fall of 1873, the people of the neighborhood occupied it jointly with the school board for Sunday-school purposes, church meetings, and public gatherings. Since 1873 no public school has been held in the building, but the school board has rented it as a dwelling, and thus prevented its use for religious purposes from that time.

The petition upon which these proceedings were instituted to re-establish the religious part of the trust was filed on the 8th day of June, 1891.

During these intervening years an action of ejectment was instituted by one of the citizens of the neighborhood against one of these tenants, which resulted in a verdict for the defendant, because the possession of the plaintiff was shown to be in common with others. An application was made to the Court during the same period for the sale of the property, which being resisted by citizens of the neighborhood, was withdrawn. Thus, while the school board has been in possession of the property, yet at no time has this possession been adverse and exclusive for a continuous period of twenty-one years. Their title cannot be, therefore, established by adverse possession, and if the petitioners have shown the existence of a trust entitling them to use the property for religious purposes, it is proper the prayer of this petition in this particular should be granted.

The master has found in their favor, and, as we have already stated, we cannot say he is wrong.

In disposing of the costs the master has imposed them all upon the respondents. In this we think he has erred. The trust here set up was required to be established by evidence. It was not a matter of record.

The management of the property has been in the hands and under the direction of the school board of Tredyffrin township for many years. This management has been acquiesced in by those interested in the trust. In fact some of the present petitioners had recognized it during the period indicated. It was proper, therefore, for the school board to endeavor to establish their rights when they were questioned, or at least to defend them. This is all they have done. In our opinion they did no more than was justifiable, and we think the costs of the proceeding should be divided equally between the petitioners and the school board. In this particular the report of the master is set aside.

The exceptions are therefore dismissed, except the ninth, which is sustained to the extent herein indicated, and the counsel for the petitioners will prepare the proper decree.

The Court subsequently entered a decree:—

First. "That the premises" (particularly describing them) "be held by the trustees hereinafter named and their successors for the general use and good of the neighborhood for religious and educational purposes and the repose of the dead."

Second. "That Thomas R. Jaquette, Elijah Wilds, Daniel S. Newhall, Henry Pleasants and John S. Angle be and hereby are appointed trustees to hold title to said real estate and to administer this charity; and in the exercise of a reasonable discretion, subject always to the further order of the Court, to regulate the manner in which the property can most effectively be utilized for the general use and good of the neighborhood for religious, educational and burial purposes as aforesaid."

Third. "That the right of possession of said premises is in the trustees so appointed, and the said respondents, the school district of Tredyffrin township, Martha Wentworth and Elizabeth Dickensheet (tenant) be and hereby are ordered and decreed to surrender full and complete possession of any part thereof now in their seisin or possession to the trustees so appointed, and said respondents be and hereby are specially enjoined henceforth from molesting or interfering in any wise with said trustees in their use and enjoyment of said premises for the purpose aforesaid. Provided that nothing in this decree shall be understood as depriving Martha Wentworth, one of the respondents in this cause, of the right of trial by jury upon any question of title other than those arising under deed of the school board of Tredyffrin to Martha Wentworth, dated March 21, 1891, and recorded at West Chester in deed book V. 10, page 260, etc."

Fifth. "That the ninth exception is sustained, and said respondents do pay one half and the petitioners do pay one-half of the costs of these proceedings within thirty days after the same are duly taxed and allowed by the Court."

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, JUNE 28, 1895.* [No. 20.

Supreme Court.

July, '95, 197. March 20, 1895.

Freedman v. Fire Association of Philadelphia.

Insurance—Fraud—Waiver.

Where a policy of insurance is obtained upon a stock of goods of a married woman, the policy being applied for without stating either her sex or her Christian name or coverture, but speaking of her as 'R. F.," her agent representing that "Mr. F." is a successful business man, and the insurance company believes that it is insuring the property of a man of business, there is such fraud as will entitle the company, when it has not discovered the fraud until after a loss by fire, to disaffirm the contract even after such loss.

When after such a loss the husband of the insured so deals with the agents of the company as to lead them to believe that he is the insured person, the mere facts, that pending the negotiations the wife makes out proofs of loss which reveal her sex and sends them to the central office, and as a result receives a reply addressed "R. F. Madam," and calling her attention to a defect in the proof but not admitting liability, do not justify the Court in submitting to the jury the question whether the defendant has or has not waived the right to insist upon the fraud of the plaintiff as a defence in an action upon the policy.

Appeal of the Fire Association of Philadelphia, defendant, from the judgment of the Common Pleas of Bradford County, in an action of assumpsit brought by R. Freedman to recover upon a policy of fire insurance.

The action was brought in the name of *R.* Freedman, the Christian name being nowhere set out in the pleadings.

On the trial before PECK, P. J., the facts appeared as follows: C. W. Tidd was employed to obtain insurance upon the stock of a store owned by Rosa Freedman, the wife of Barnhardt Freedman, at Laceyville, Wyoming County, Pa. Tidd's instructions were given to him by Barnhardt. Tidd went to Eastman, an insurance agent in Tunkhannock, and asked for an insurance of $2,000 on the goods of "R. Freedman," and said that "Mr. Freedman" was a good business man and that he knew him well. Eastman, believing that "R." and "Mr." Freedman were the same person, had the policy in suit issued. Eastman certified that had he known that R. Freedman was a married woman he would not have issued the policy.

On the night of March 15, 1892, the goods covered by the policy were destroyed by fire. The next day Barnhardt Freedman met Eastman at Laceyville, and it was agreed that the former should meet the company's adjuster, B. F. Walker, on the third day after the fire. B. Freedman, Walker and Eastman met at Tunkhannock. At this time both Walker and Eastman supposed their interview was with the man to whom the policy was issued. He was asked to bring his books and bills there. He did so, and the latter were all to R. Freedman or Mr. R. Freedman. The only other interview had with any agent of the company was at Athens on the 12th of April, the same year, when the same bills were looked over and nothing occurred to excite any suspicion that the man Walker then met was not R. Freedman. At the time of the fire, in addition to the policy in suit above mentioned, there were other policies in other companies. There were circumstances connected with the fire which led the companies to think there ought to be an investigation as to its cause and as to the value of the property destroyed. While this was being made, the plaintiff, at the suggestion of no one, made out and sent to the defendant proof of loss, which reached the home office May 9, 1892. It appeared from the indorsements on it that this was sent to Walker, special agent.

On May 28th Walker wrote and sent the following letter:—

"WILLIAMSPORT, Pa., May 28, 1892.
"R. FREEDMAN, ATHENS, PA.:

"Madam: We are in receipt of papers purporting to be proofs of loss under our policy No. 1,322,576, Tunkhannock, Pa., Agency. By reference to your policy you will learn that it is necessary to have the magistrate residing nearest to where the fire occurred furnish a certificate if required by the Association. We now ask you to furnish such certificate, according to the terms and conditions of said policy. Neither admitting nor denying liability under said policy, and holding subject to your orders the papers first above referred to, we remain

"Yours truly,
(Signed) "BEN. F. WALKER,
"Special Agent of the Fire Association of Philadelphia."

Barnhardt Freedman being on the witness stand, made the following offer:—

"We offer to ask the witness on cross-examination whether he assumed the name of 'R. Freedman,' whether he has not done business as 'R. Freedman,' and whether he has not registered when stopping in hotels in the very town

Digitized by Google

where the policies were issued and written as 'R. Freedman.'"

Objected to as irrelevant and immaterial, and not cross-examination. Objection sustained. (Eighth assignment of error.)

In his charge to the jury the learned Judge said, *inter alia*: "[Did Mr. Walker know at this time when he was at Athens, or did he learn there before this interview with B. Freedman, that R. Freedman was a married woman? Did he with such knowledge require R. Freedman to furnish proofs of loss,] (third assignment of error,) when he knew that he was putting the plaintiff to useless expense and trouble if the company intended to claim that the policy was void? . . . When the defendant learned the truth about this policy, that the plaintiff was a married woman, and if they had been deceived as claimed by the evidence of Mr. Eastman they could have adopted two courses: First, they could elect to declare the policy void and notify the plaintiff of that fact; or, second, they could affirm this policy and then adjust the loss, if any, which the plaintiff had sustained." (Fourth assignment of error.)

"If the defendant by the conduct of its agent has caused the plaintiff labor, expense and loss, which she would not otherwise incurred had she been notified that the company intended to claim that the policy was void, on the ground of misrepresentations, I am of the opinion that the company would be estopped from setting up that the policy was void. When the defendant learned the truth about this policy that the plaintiff was a married woman, and if they had been decided, as claimed by the evidence of Mr. Eastman, they could have adopted two courses: First, they could elect to declare the policy void, and notify the plaintiff of that fact; or, second, they could affirm this policy and then adjust the loss, if any, which the plaintiff had sustained. Or, I think that they might have relied upon both; that the policy was void, and also contest the amount of the loss. But I am of the opinion that if they took the latter course they should notify the plaintiff of their real defence. Because, if this policy is void, that is one thing. If it was in force and required proof of loss, that would be inconsistent with declaring the policy void, and if they notified the plaintiff that she must produce proofs of loss, after they had knowledge of the true state of affairs, and required her to go to expense in getting copies of bills, making proof of loss, getting certificates from the nearest magistrate, or any other expense which she would not have done had they made known to her their real cause of defence, then we think, as we have stated to you, that they would be estopped." (Second and fifth assignments of error.)

Verdict for plaintiff for $2,195 and judgment thereon.

The defendant took this appeal, and filed, *inter alia*, the assignments of error above noted.

I. McPherson, (with him *E. Overton* and *E. J. Angle*), for appellant.

The defendant never agreed to indemnify R. Freedman, a married woman, but R. Freedman, a successful business man. It insured the property of a man successful in business, not the property of a married woman, who necessarily could not exercise the same personal care and supervision over it.

An applicant for insurance should exercise good faith, and in giving information required, like a witness on the stand, should always speak the truth.

Smith *v.* Ins. Co., 17 Pa. 253.

The policy in this case contains the following clause: "This policy shall be void . . . if the interest of the insured be not truly stated herein." Such a clause requires a disclosure of title, interest and ownership.

Its object is to enable the insurance company to know whom it is insuring. It might be willing to insure the property of A. and yet refuse to insure the property of B. upon any terms.

Diffenbaugh *v.* Union Fire Ins. Co., 150 Pa. 270.

A fraud in law, if not in fact, was perpetrated upon the appellant by the appellee in procuring the policy, and it cannot in any legal sense be said that a contract between the appellant and the appellee was ever entered into or intended to be.

1 Biddle on Ins. Sec. 578.
Diffenbaugh *v.* Union Fire Ins. Co., *supra*.
Zimmerman *v.* Farmers' Ins. Co., 76 Iowa, 352.
Mead et al. *v.* Ins. Co., 64 N. Y. 453.
Smith *v.* Ins. Co., 17 Pa. 253.

The rule of estoppel or waiver does not apply in this case.

There is not a particle of proof that the plaintiff was in any way misled by the defendant, or that she was induced to do anything which she would not otherwise have done by any acts or declarations of the defendant.

Nor does the evidence show that the agent, when he investigated the loss and negotiated for a settlement, or even when he wrote the letter, had any knowledge of the facts on which the defence set up on the trial was based.

Where the insured alleges a waiver by the company of the performance by him of an act which renders the policy void, it is incumbent on him to establish the facts constituting the alleged waiver thereof by a clear preponderance of evidence.

McFarland *v.* Kittanning Ins. Co., 134 Pa. 590.

Digitized by Google

The insured must by a preponderance of proof establish the fact that the company had full knowledge of the facts on which it could avoid the policy, and that with such knowledge, it misled the insured in some way to his disadvantage, and put him to such trouble and expense that it would be inequitable and unjust to enforce the forfeiture.

Nat. Ins. Co. *v.* Brown, 128 Pa. 386.
Gould *v.* Ins. Co., 134 Pa. 588.
McFarland *v.* Kittanning Ins. Co , *supra.*
McCormick & Son *v.* Royal Ins. Co., 163 Pa. 184.

Even if the agent of the defendant did request the preliminary proofs of loss required by the policy, it would not constitute a waiver of the right to avoid the policy.

Niagara Ins. Co. *v.* Miller, 120 Pa. 516.

H. F. Maynard, (with him *I. N. Evans* and *William Maxwell*), for appellee.

The letter of Walker was a waiver of the right to insist on a forfeiture of the policy on the ground of misrepresentation. The appellant was informed by the proof of loss that R. Freedman was a married woman, and after this its agent wrote requiring certain additional proof of loss. It is therefore estopped from insisting on forfeiture.

W. & A. Pipe Lines *v.* Home Ins. Co., 145 Pa. 346.
McCormick *v.* Royal Ins. Co., 163 Id. 184.
Welsh *v.* London Ass. Corp., 151 Id. 607.
Penn. F. Ins. Co. *v.* Dougherty, 102 Id. 568.
Insurance Co. *v.* Erb, 112 Id. 149.

The question of waiver is for the jury.

Bonnert *v.* Penna. Ins. Co., 129 Pa. 558.

May 20, 1895. FELL, J. The policy of insurance upon which suit was brought was upon a stock of general merchandise in a country store. It was insured as the property of R. Freedman. It was owned by Rosa Freedman, a married woman, and was in charge of her brother-in-law, Louis Freedman, who conducted the business at the store. She resided with her husband some fifty miles distant from the place where the business was carried on, and gave it no supervision whatever. The evidence at the trial was uncontradicted that the insurance had been procured by her agent on the representation made to the agent of the insurance company that "R. Freedman was a successful business man," and that the policy was issued under the belief based upon representations made that the company was insuring a stock of goods owned by a business man who was personally conducting the business, and that the risk would not have been accepted had the truth been known. It was also undisputed that the agents of the company had no knowledge that the representations were incorrect until after the loss.

The jury was instructed that if the defendant accepted the risk because of these representations and would not otherwise have done so, the policy was void because of the fraud practiced. It was clearly an imposition upon the company to procure a policy upon the representation that the property insured was owned by and in charge of a successful business man, when in fact the title was in a married woman who exercised no supervision over it. The actual business risk because of the want of personal supervision by the owner, and the moral risk were both greater. Whether greater or less they were different. It was important to the company to know whose property it was insuring, in whose charge it was, and every fact which affected the risk; and any fraud or imposition in these matters went directly to the foundation of the contract. The charge of the learned Judge clearly stated the law on the points involved, and the only question now to be considered is whether there was sufficient evidence upon which to submit to the jury the question of a waiver of forfeiture, after knowledge, by the defendant.

Our cases have gone very far in holding acts of the insurer consistent with or evincing a recognition of liability as sufficient ground for the inference of a waiver of the right of forfeiture. The difficulty has been to give fair effect to the stipulations guarding against fraud without defeating the general purpose of the contract as one of indemnity. A waiver in this case could grow only out of a necessary inconsistence between courses of action adopted at different times by the insurer, upon the faith of one of which the insured has acted or refrained from acting. Waiver is essentially a matter of intention, and cannot arise out of acts done in ignorance of material facts, and its proof is inadequate unless it is shown that the insurer knew of the right of forfeiture at the time of doing the act. We find nothing in the testimony in this case which will sustain a finding that the defendant had waved its right to declare the policy void because of the fraud practiced at the time it was procured, or which justifies the submission of the question to the jury.

The third day after the fire the plaintiff's husband and the agent of the insurance company met by appointment. The agent supposed he was meeting R. Freedman, the insured. Bills were produced made to "Mr. R. Freedman" for goods claimed to have been burnt, and after some examination with a view to ascertain the amount of the loss the parties separated. Proofs of loss were made out and mailed to the company's office without any request or suggestion from the officers of the company. The parties were standing upon their rights and dealing at

Digitized by Google

arms' length. The insurance had been procured upon the representation that the insured was a business man. In accepting the risk, in issuing the policy, as shown by the pronoun used, in sending a bill for the premium to "Mr. R. Freedman," and in all its dealing up to this time it is clear that the company supposed the insured to be a business man. It is not pretended that they had any knowledge to the contrary until after the fire, and the only evidence of knowledge in the case is based upon the fact that the special agent after the receipt of the proof of loss wrote a letter to the insured in which she was addressed as "madam." The letter was written under these circumstances: the policy required that a certificate of the nearest magistrate should be attached to the proof of loss, and the proofs furnished were defective in this particular. The special agent of the company wrote to the plaintiff calling her attention to the omission and requesting that the certificate be furnished. In the affidavit which she had previously sent the pronoun "her" was used, and his letter was addressed to "R. Freedman, Athens, Pa.—Madam." This is the only evidence in the case of knowledge by anyone acting for the insurance company that the policy had been issued to a woman, and it is the only fact upon which a waiver can be based. Under our cases this would be evidence of a waiver of any defect in the proofs of loss other than the one mentioned, and it might raise the question of the right to defend for the breach of other conditions or for the failure of the plaintiff to take any steps that were merely formal prerequisites to a suit.

The trend of our decisions has been to hold insurance companies to good faith and frankness in not concealing the ground of defence and thus misleading the insured to his disadvantage. They may remain silent except when it is their duty to speak and the failure to do so would operate as an estoppel; but having specified a ground of defence, very slight evidence has been held sufficient to establish a waiver as to other grounds. The most recent case, and one in which the subject is fully considered by the present Chief Justice, is McCormick *v.* Royal Ins. Co., 163 Pa. 184. In Gould *v.* Dwelling House Ins. Co., 134 Pa. 570, the cases are classified and the distinction in them between an attempted compliance with the requirements of a policy within the stipulated time and a failure without valid excuse is pointed out by MITCHELL, J.

The question here was the right of the defendant to insist upon a forfeiture of the policy for the reason that it was obtained by fraud. There could be no waiver of this right unless such was the intention, and no act would be evidence of a waiver unless done with knowledge of the imposition. The only evidence of intention or knowledge in this case is the letter referred to. It contains a distinct statement that liability under the policy is neither admitted nor denied; and while it may be evidence that the company had knowledge at that time that the insured was a woman, it indicates no intention to waive any ground of defence. The invalidity of the policy being established, the burden of proof was on the plaintiff to show that with knowledge of the facts upon which it could be avoided the defendant did that which would make it inequitable to enforce the forfeiture.

The charge in this case is a very clear and fair presentation of the issues involved, but we regard the testimony as to a waiver insufficient to sustain a finding for the plaintiff. The learned Judge should have gone a step further and directed a verdict for the defendant. The assignments of error touching this question are sustained, and the judgment is reversed. H. B.

Jan. '95, 127. March 28, 1895.

Gangawer v. Philadelphia & Reading Railroad Company.

Railroad crossing—Contributory negligence—Non-suit.

A judgment of non-suit is warranted when plaintiff's evidence fails to show negligence of defendant, or having shown such negligence, discloses the fact that the injured party was guilty of contributory negligence.

Where plaintiff's evidence disclosed that her husband, to recover for whose death the action is brought, was killed by defendant's train at a grade crossing of defendant's road, and that in approaching this crossing at a point about forty feet from the track an approaching train can be seen for eight hundred or one thousand feet, and as this distance diminishes in approaching the track the view of the railroad is rapidly extended until at the crossing, and before getting on it a train can certainly be seen for more than a third of a mile, it is proper to enter a judgment of non-suit.

Under such evidence, assuming that no sufficient warning was given, the train that killed deceased was in full view before he drove upon the track, and it is absolutely impossible that he should have been upon the crossing with too short a time to get off before the train was in sight. That he stopped, looked and listened forty feet from the railroad does not exempt him from the charge of negligence.

In such a case the rejection of testimony tending to show affirmatively that deceased stopped, looked and listened at a point forty feet from the crossing does plaintiff no harm. The law would presume this fact in the absence of testimony, and the negligence here consists in the fact which plaintiff's evidence discloses that deceased, who must have seen the train coming, drove on into great peril. The law calls this negligence and will not permit a jury to call it something else.

Digitized by Google

Appeal of Mary Gangawer, plaintiff, from the judgment of the Common Pleas No. 4, of Philadelphia County, refusing to take off a non-suit entered in an action brought by her against the Philadelphia & Reading Railroad Company, to recover for the death of her husband, alleged to have been caused by the negligence of the defendant.

The facts are stated in the opinion of the Supreme Court.

The assignments of error were to the entry of the non-suit and the refusal to take it off; to the refusal of plaintiff's offer to show that after the accident defendant changed the point at which the signal for this crossing was given by an approaching train (removing the point about six hundred feet further from the crossing); refusing to admit evidence of the point at which the deceased stopped; and refusing to admit evidence as to the point at which it was customary for persons approaching this crossing to stop, look and listen.

Preston K. Erdman, for appellant.

The sufficiency of the warning under the circumstances is a question for the jury.

Ellis *v.* R. R., 138 Pa. 506.
Childs *v.* R. R., 150 Id., 73.

Removing the signal post after the accident to a greater distance from the crossing is a quasi admission that defendant was negligent in not giving warning before reaching the former signal post.

R. R. *v.* McElwee, 67 Pa. 311.
R. R. *v.* Henderson, 51 Id. 315.
McKee *v.* Bidwell, 74 Id. 218.
Specht *v.* R. R., 24 WEEKLY NOTES, 317 (C. P. No. 2, Philadelphia).

The proper place to stop is a question of fact and the testimony of witnesses is a proper and competent method of establishing it.

Ellis *v.* R. R., 138 Pa. 506.
McGill *v.* R. R., 152 Id. 331.
Groner *v.* Canal Co., 153 Id. 390.
Newhard *v.* R. R., Id. 418.

It has often been contended that negligence while in the act of crossing, should under the evidence be judicially predicated, but this Court has uniformly held it to be a question of fact in the province of the jury.

Schum *v.* R. R., 107 Pa. 8.
Keng *v.* R. R., 160 Id. 644.
Hoffmeister *v.* R. R., 160 Id. 568.
Downey *v.* Traction Co., 161 Id. 131.
Ely *v.* Railway, 158 Id. 233.

Gavin W. Hart, for appellee, cited—

Carroll *v.* R. R., 12 WEEKLY NOTES, 348 (1882.)
Moore *v.* P. W. & B. R. R., 108 Pa. 349 (1885).
Bell *v.* R. R., 122 Id. 58 (1888).
Marland *v.* R. R., 123 Id. 487 (1888).
Irey *v.* R. R., 132 Id. 563 (1890).
Kraus *v.* R. R., 139 Id. 272 (1891).
Cleary *v.* R. R., 140 Id. 19 (1891.)
Blight *v.* R. R., 143 Id. 10 (1891).
Hauser *v.* R. R., 147 Id. 440 (1892).
Ash *v.* R. R., 148 Id. 133 (1892).
Schmidt *v.* R. R., 149 Id. 357 (1892).
Matthews *v.* R. R., 148 Id. 491 (1892).
Myers *v.* R. R., 150 Id. 386 (1892).
Urias *v.* R. R., 152 Id. 326 (1893).
Smith *v.* R. R., 160 Id. 117 (1894).

May 20, 1895. DEAN, J. The plaintiff is the widow of Edwin G. Gangawer. Her husband, while driving a two-horse farm wagon near Bingen station, over a grade crossing of defendant's railroad, about eight in the morning of 11th of June, was struck by an express train and killed. The plaintiff averred her husband's death was caused by defendant's negligence in not giving travellers on the highway, at a proper distance from the crossing, warning of the approaching train. The defendant replied by denying its negligence, and averring negligence on part of deceased. When plaintiff closed her evidence, the learned Judge of the Court below, being of opinion she had not made out a case clear of contributory negligence, directed a compulsory non-suit; which afterwards on motion he refused to take off, and from that judgment we have this appeal.

Appellant prefers here seven assignments of error; three of them to the entry of judgment of non-suit, and four to rejection of evidence. To warrant the judgment of non-suit, either plaintiff's evidence must have failed to show negligence of defendant, or, having adduced evidence tending to make out her case in that particular, must also have disclosed the fact that her husband was guilty of contributory negligence. Assuming there was some evidence of negligence on part of the railroad, and sufficient so far as concerns that question, to have sent the case to the jury, did plaintiff's evidence also show that her husband by his negligence contributed to the accident?

The general direction of the railroad at this point is north and south; there are two tracks, one for north, the other for south bound trains; the deceased came from the highway, travelling eastward; crossed the south bound track, and was struck by the train bound north on the north track; at a point about forty feet from the track a train can be seen coming from either direction for eight or ten hundred feet; as this distance diminishes on approaching the track the view of the railroad is rapidly extended, until at the crossing, and before getting on it, a train can certainly be seen for more than a third of a mile. There is no dispute as to these facts. There was evidence that two or three cars stood on a siding some distance above the crossing; but the same

Digitized by Google

evidence showed that these did not obstruct the view of the track, as it was approached in the direction from which deceased drove. One of plaintiff's witnesses, Jacob Weaver, testified that he saw the accident when standing alongside the railroad nineteen hundred feet from the crossing in the direction from which the train came. So, assuming that no sufficient warning was given, the train that killed deceased was in full view before he drove upon the track; it is absolutely impossible that he should have been upon the crossing, with too short a time to get off, before the train was in sight; unquestionably, taking the undisputed evidence adduced by plaintiff, the train that killed deceased could have been seen, if he had looked, when he was fifteen to twenty feet from the track; was in sight when he was that distance from danger and could have stopped in safety until it had passed. It is urged that he stopped, looked and listened forty feet from the railroad; let this be so; surely that does not exempt him from negligence if he drove forty feet to the crossing, with an approaching train in view. It is wholly immaterial, in the face of these facts, whether the deceased stopped, looked and listened at the best place before approaching the track; the law presumes that he did, and in the absence of other evidence, this presumption would have carried the case to the jury; but the plaintiff went further, and proved, that after stopping where he is presumed to have stopped, he then drove for forty feet to a point where he was bound to know a coming locomotive which he saw would probably strike him. That is not the care, according to the circumstances, which the law demands; previous care in stopping does not absolve from subsequent negligence any more than care at a crossing one day will dispense with care the next.

As to the assignments of error, to the rejection of testimony, tending to show affirmatively that deceased stopped, looked and listened at a point forty feet from the crossing, the ruling of the Court did plaintiff no harm. The offer was to prove what, in the absence of the other undisputed facts, the law presumed. He did stop, and then drove a distance of forty feet, with a train in full view every step of it. The appellant argues it was for the jury to answer whether deceased was guilty of contributory negligence; this is so, where the plaintiff's case is clear of contributory negligence and defendant has put in evidence tending to establish it; or even where the plaintiff's evidence, as in Ely *v.* Railway Co., 158 Pa. 233, warranted opposite inferences. But this case comes under neither head. Assume that the speed of this train was the unusual one of a mile a minute, of which there is no proof; then, take the uncontradicted testimony of Weaver, plaintiff's own witness, that standing alongside the rail on which passed the train, nineteen hundred feet from the crossing, he saw and now describes the accident, then deceased, before he was on the north track must have seen the train coming when it was nineteen hundred feet distant, where Weaver stood and so plainly saw him. At that time, when it was nineteen hundred feet off, he was somewhere on the forty feet over which he drove to reach the south bound track, and at any one foot of the forty was safe if he stopped. Why did he drive on into great peril? The only reasonable theory on which to account for the unfortunate man's conduct is the one which explains many such disasters; ten, fifteen, twenty, or perhaps forty feet from the track, he saw the approaching train; it was then apparently a long distance off; as to a vehicle of like speed as his own, would really have been so; he supposed he could easily clear the crossing before the train reached it. In this he miscalculated, for the train ran nineteen hundred feet while he moved less than forty, and he thus lost his life. The law calls this negligence, and will not permit a jury to call it something else; will not permit them to say that it is care according to the circumstances, for a man to drive in front of a locomotive which he sees, even if he is ignorant of its speed as compared with that of a two-horse wagon.

The case here, on the facts, is not distinguishable from Myers *v.* Railroad Co., 150 Pa. 386, and Urias *v.* Railroad Co., 152 Pa. 326, except that the contributory negligence of the injured party, is, if possible, here clearer than in either of those cases. The judgment is affirmed and the appeal dismissed. J. D. B., Jr.

Jan. '94, 416. March 18, 1895.

Barker v. Fairchild et al.

Affidavit of defence—Statement of claim—Allegations of and inferences of liability.

While the construction of an affidavit should be in favor of the plaintiff and against the party making it, the defendant is under no duty to deny a liability not fairly arising from the statement.

Where the affidavit of defence, while not full, is quite as full as the statement of claim, and squarely meets all its allegations and all inferences fairly to be drawn from it which impose liability, it is sufficient to take the case to a jury.

Appeal of A. C. Fairchild and George Grace, defendants, from the judgment of the Common Pleas of Bradford County, in an action of assumpsit, wherein George S. Barker was plaintiff.

This action was brought originally to recover three separate and distinct claims for goods al-

Digitized by Google

leged to have been sold to the firm of Fairchild, Grace & Co., at Ogden, Utah, to wit: (1) one of Andrew Wilson of $48.82, which was alleged to have been assigned to the plaintiff; (2) one of J. T. McIntyre of $49.79, which was also alleged to have been assigned to the plaintiff; and (3) one in favor of plaintiff himself. In the first affidavit of defence filed, the two defendants served, demurred and set up the misjoinder of these claims, whereupon the plaintiff obtained leave to withdraw the first and second claims. The remaining claim was set forth in the statement as follows:

"Also Geo. S. Barker, the plaintiff in the above case, on the 31st day of October, 1891, sold and delivered to said defendants certain goods and merchandise as follows, and the following is a copy of the book entry thereof: October 31, 1891, 23,908 lbs. Onions @ 80c., $189.65.

"And said plaintiff says that no part of the pay for any of said goods and merchandise has been made by said defendants."

A supplemental affidavit of defence was permitted to be filed.

In the affidavits of defence filed, the two defendants served, alleged that plaintiff never sold and delivered the said goods to them or said firm, on said date, and that they nor the said firm ever received them or any portion of them, at any price, on said date, or at any subsequent time. The Court made absolute the rule for judgment for want of a sufficient affidavit of defence, and to this ruling this appeal was taken.

Rodney A. Mercur (*Ulysses Mercur* with him), for appellants.

The plaintiff was not entitled to judgment on the statement of claim filed, which is too defective to sustain the judgment. The copy of his book entries does not charge the defendants, Fairchild, Grace & Co., or any one of them, nor does the statement say that the original does so. The copy reads as follows: "October 31, 1891, 23,908 lbs. Onions @ 80c., $189.65." Without the copy of the instrument, which is the foundation of the action, the case is not brought within the affidavit of defence law; and therefore, the copy filed must be such as to entitle the plaintiff to judgment. The plaintiff's statement does not call for an affidavit of defence, for the copy is a necessary appendix or exhibit to the statement of claim by the Procedure Act of May 25, 1887 P. L. 271, under which a correct copy of the book entries is required; and the fact that the copy filed is such, should be made to appear either upon its face or by categorical averment in the statement.

Fritz *v.* Hathaway, 135 Pa. 274.

Under the Act of 1887, the plaintiff must file not only a copy of the writing, if there be one, on which his case is founded, but also a concise statement of his demand, which must include every ingredient of a good cause of action, averred with the same completeness, accuracy and precision that were required in a declaration at common law.

Byrne *v.* Hayden, 124 Pa. 170.
Fritz *v.* Hathaway, *supra.*
Newbold *v.* Pennock, 154 Pa. 591.
Winkleblake *v.* Van Dyke, 161 Id. 5.

If the plaintiff's statement was sufficient in form to call for an affidavit, then we say, that even if the first affidavit was insufficient the supplemental one was sufficient to put the plaintiff to proof. It is not necessary that they be drawn with so much nicety as to meet every objection or argument against the defendant's case which fine critical skill can deduce, and that no critical skill can suggest an objection.

Leibersperger *v.* Reading Savings Bank, 30 Pa. 531.
Thompson *v.* Clark, 56 Id. 33.
McPherson *v.* Allegheny Nat. Bank, 96 Id. 139.
Kaufman *v.* Cooper Iron Co., 105 Id. 542.

To construe with such critical nicety, and to require them to negative expressly every possible point that might be objected to, would go near to destroy them altogether, and deprive a defendant of the opportunity of a trial where he had a good defence.

Hugg *v.* Scott, 6 Whart. 274.
Kountz *v.* Citizens Oil Refinery Co., 72 Pa. 396.

A party should not be held "to a rigor of statement so severe as to catch him in a mere net of form."

Lawrance *v.* Smedley, 6 WEEKLY NOTES, 42.
Rockhill *v.* Moore, 1 Clark, 392.

They are sufficient if they aver, with reasonable precision, distinctness and with certainty to a common intent, facts which will constitute a defence.

Hugg *v.* Scott, *supra.*
Markley *v.* Stevens, 7 WEEKLY NOTES, 357.
Bronson *v.* Silverman, 77 Pa. 94.
Moeck *v.* Littell, 82 Id. 356.
Noble *v.* Kreuzkamp, 111 Id. 68.
Selden *v.* Neemes, 43 Id. 421.
Comth. *v.* Speakman, 1 Chester Co. R. 329.
Endlich on Affidavit of Defence, Sec. 364.

What construction shall be placed upon them and in whose favor? The authorities say they should receive a reasonable one in favor of the defendant, and a reasonable intendment is to be made in his favor.

Roberts *v.* Austin, 5 Whart. 313.
Twitchell *v.* McMurtrie, 77 Pa. 383.
Markley *v.* Stevens, *supra.*

As the question here presented is upon the

Digitized by Google

sufficiency of the affidavits, all the material averments contained in them must be assumed to be true.

Knerr *v.* Bradley, 105 Pa. 190.

The defendants in their affidavits denied the purchase of the goods, and in the supplemental one also denied their receipt, which was all that was necessary.

Endlich on Affidavits of Defence, Sec. 383.
Reis *v.* Herman, 1 WEEKLY NOTES, 84.
Hunsicker *v.* Arnold, Id. 589.

S. W. Little, (*William Little* with him), for appellee.

It will be noticed that in neither of the affidavits filed do the defendants deny that they had the onions; that the quantity is correct; that the price is truly stated; that they agreed to pay the amount claimed; or that they are justly indebted to said plaintiff in the sum claimed by him. And nowhere do they claim they have ever paid said indebtedness. Their only claim is that they did not have them on October 31, 1891, (the time alleged by plaintiff) nor on any subsequent date. All that the defendants allege may be true, and yet the plaintiff may be entitled to judgment. It may be the onions were delivered the day before the entry in the book. If that were true, does it prevent a recovery by the plaintiff? If the defence had any merit, why did the defendants decline to swear that they did not receive these goods within six years before suit brought. Or that they had paid for them or that they were not indebted to plaintiff as claimed by him? Can an affidavit of defence be sufficient which leaves a good cause of action to the plaintiff? If so, we fail to see the object or purpose of making them. The statement of plaintiff's claim was clearly sufficient, and the case of Fritz *v.* Hathaway, 135 Pa. 275, has no analogy. There the account showed upon its face that plaintiff's claim was barred by statute of limitations; and nothing appeared to show any right in plaintiff to recover.

Class *v.* Kingsley, 142 Pa. 639.

May 20, 1895. FELL, J. It is alleged in the statement of claim filed that "the plaintiff on the 31st of October, 1891, sold and delivered to the defendant certain goods and merchandise as follows, and the following is a copy of the book entry thereof: 'October 31, 1891, 23,908 lbs. onions @ 80c. $189.65.'" The affidavit and supplemental affidavit of defence contain averments that the plaintiff did not sell and deliver to the defendants or either of them or to the firm of Fairchild, Grace & Co., the merchandise mentioned on the day named, and that neither the defendants nor the firm received the said merchandise or any portion of it at any price on the said date or at any subsequent time. The caution with which both parties to the action have avoided entering into the details of the transaction suggests that on each side something material has been kept in the background, and makes applicable the remark of MITCHELL, J., in the opinion in Fritz *v.* Hathaway, 135 Pa. 280: "It is not always possible to determine whether an affidavit of defence is skillfully drawn to suggest a defence without really swearing to it, or on the other hand whether the statement is with equal skill so worded as to avoid a defence."

The copy of the book adds nothing to the statement, as it does not show a charge against anyone, and the plaintiff's case rests upon the allegation of a sale and delivery of merchandise on a day fixed. These averments are squarely met by the affidavit, and the only suggestion of evasion arises from the fact that the denial is so exact and literal. An affidavit of defence is sufficient, which denies the grounds of liability averred in the statement and those which arise by implication from the averments made. While the construction of an affidavit should be in favor of the plaintiff and against the party making it, a defendant is under no duty to deny a liability not fairly arising from the statement. The defendants deny a sale and delivery of the goods on the day fixed for both in the statement, and their delivery at any subsequent date. They were not bound to make further denial. If the sale was on some other date the defendants were not liable under the statement filed. At a trial no recovery could be had against them without an amendment, and to permit one here with the record in its present state would subject them to the peril of another action for the price of the same goods. There may be a fair presumption that in the course of business the delivery was on a date following the sale, but this is expressly denied, and there is no presumption that the delivery was before the sale. The affidavit of defence, while not full, is quite as full as the statement of claim, and squarely meets all its allegations and all inferences fairly to be drawn from it which impose liability.

The judgment is reversed with a procedendo.

W. C. S.

Digitized by Google

Jan. '95, 391. May 9, 1895.

National Bank of Jamestown v. Scofield et al.

Affidavit of defence—Allegations of fact—Sufficiency thereof to carry the case to a jury.

Where an affidavit of defence states with sufficient clearness a state of facts which entitles the defendant to a trial by jury, it must be assumed that he is prepared to introduce testimony tending to prove, at least, all the material averments, and he should not be deprived of an opportunity of presenting his defence.

Appeal of Oscar E. Madden, receiver of the Tidal Oil Company, terre tenant, and Anna B. Scofield and Carl W. Scofield, defendants, from the judgment of the Common Pleas of McKean County, in a suit wherein the First National Bank of Jamestown, New York, was plaintiff.

This case was a scire facias sur mortgage. The affidavit of defence set forth the following case:—

On the 16th of September, 1891, and during the time of a great depression in the oil business, the defendant, Anna B. Scofield, wife of C. W. Scofield, who was largely engaged in the oil business, delivered certain mortgages and other securities to the First National Bank of Jamestown, N. Y., the appellee, as collateral security for prior endorsements of her husband upon notes discounted in that bank. These notes and mortgages were made by oil men, but owing to the depressed condition of the oil market, there was not a very encouraging prospect for an immediate conversion of these securities into money. The defendant, Mrs. Scofield, thereupon on September 16, 1891, gave her own mortgage to the plaintiff upon a very valuable oil property in McKean County, but upon condition that the pledged securities should first be collected. Her husband did not join in this mortgage. On November 13, the plaintiff having learned that this first mortgage of September 13 was void, sent its agent and attorney to New York, for the purpose of obtaining a valid mortgage from them. The agent obtained the mortgage in suit, agreeing on the part of the plaintiff to hold the mortgage for the protection of Anna B. Scofield and merely as an ultimate security for her husband's debt after the collection of the securities aforesaid. No steps were taken by the plaintiff to collect the notes and mortgages transferred to it by Mrs. Scofield. Sometime before bringing this suit the plaintiff turned over one of said securities, viz., a mortgage of F. E. Wood upon a very valuable oil property in Allegany County, N. Y., to the Fredonia National Bank, and afterward and before this action was brought this mortgaged property was turned over to the plaintiff bank by Wood to save a foreclosure, but no account was ever made of the oil produced from it or for the value of the property and no credit was ever given therefor to defendant. The defendant, Mrs. Scofield, claimed that as she as a guarantor of her husband, gave her own mortgage under an express agreement that it should not be resorted to until the other securities had been converted into money, the action was prematurely brought, even if the mortgage debt were not fully paid by the plaintiff's acceptance of the Allegany County property from Wood, the owner.

The Court made absolute a rule for judgment for want of sufficient affidavit of defence.

Oscar E. Madden, receiver of the Tidal Oil Company, terre tenant, took this appeal, and assigned as error, *inter alia*, the action of the Court in making absolute the rule for judgment.

Samuel T. Neill, (*R.* and *H. E. Brown* with him), for appellants.

Samuel Grumbine, for appellee.

The defences attempted to be set up, as near as it is possible to arrive at the meaning of the excessive verbiage of the affidavits are: (1) Want of consideration; (2), undue influence in procuring the mortgage; and (3), collateral agreement.

The first and second were abandoned at the argument of the rule for judgment and are not argued here. But it is claimed that the agreement of Sept. 16, 1891, is somehow to be read into the mortgage in suit made two months later. That this is a theory only and not predicated upon facts appearing in the record is made evident by reading the evidence in the case—the mortgage and the affidavits of defence. Where in an affidavit of defence reference is made to a paper a copy must be annexed in order that the Court may judge of its legal effect.

May 20, 1895. STERRETT, C. J. Our consideration of the affidavits of defence relied on in this case has led us to a different conclusion from that reached by the learned Judge of the Common Pleas. While some of the averments contained therein are not as clear and specific as they might have been, we think that, considered as a whole, the affidavits fairly and with sufficient clearness present a state of facts which entitles the defendants to a trial by jury. For the purposes of this appeal, it must be assumed that they are prepared to introduce testimony tending, at least, to prove all their material averments. That being so, they should not be deprived of the opportunity of presenting their defence.

In view of the fact that the case goes back for

Digitized by Google

trial, it is neither necessary nor desirable to refer specifically to the allegations of fact upon which the defendants rely. They are sufficiently set forth in the affidavits; and, assuming them to be true, it is enough to say they are sufficient to carry the case to a jury. The assignments of error are sustained.

Judgment reversed and procedendo awarded.

W. C. S.

July, '95, 28. May 9, 1895.

Scofield's Appeal.

May 20, 1895. STERRETT, C. J. This appeal, by defendants, Anna W. Scofield and her husband, is from same judgment as the appeal of Oscar E. Madden, receiver, etc., No. 391 of January term, 1895, in which an opinion, reversing the judgment, etc., has just been filed. Both appeals were argued together, and involve substantially the same question. For reasons, briefly stated in the opinion referred to, the judgment should be reversed not only as to the terre tenant, represented by the receiver, etc., but also as to these appellants.

Judgment reversed and a procedendo awarded.

W. C. S.

Jan. '95, 481. May 2, 1895.

Bryson v. Home for Disabled and Indigent Soldiers, et al.

Pension money—Inmates of soldiers' homes—Requirement of admission—Voluntary payments—Affidavit of defence.

The statements of an affidavit of defence are to be taken as absolutely true, and a judgment for want of sufficent affidavit must be refused where the averments of the affidavit are a positive denial of the plaintiff s claim, or show facts that, *prima facie*, amount to a defence.

Appeal of James Bryson, plaintiff, from the judgment of the Common Pleas of Erie County, in an action against the Home for Disabled and Indigent Soldiers, Sailors and Marines of Pennsylvania, at Erie, and the trustees of the home, Major W. W. Tyson, commander.

The facts are fully stated in the opinion of the Supreme Court, *infra*.

The error assigned was that the Court refused to enter judgment against the defendant for want of sufficient affidavit of defence and discharged the rule to show cause.

J. Ross Thompson, for appellant.

The board of trustees of the home had no power or authority to make a rule requiring the inmates to pay to the home any portion of their pension money or to make and impose upon the applicant for admission or the inmates of the home, any conditions other than that provided in the Acts of Assembly. Nowhere does the Act of Assembly say that the inmates or members shall pay to the general fund for the maintenance of the home eighty per centum of the small pittance of bounty given them by the general Government.

F. Carroll Brewster, (*E. L. Whittelsey* with him), for appellee.

In deciding the question raised by this record the statement of facts contained in the affidavit must be accepted as true, and the Court may not go outside of the plaintiff's statement and the defendant's affidavit of defence and consider extraneous facts.

Kaufman *v.* Cooper Iron Co., 105 Pa. 537.
Third Ref. Church *v.* Jones, 132 Id. 462.
City use Kelley *v.* Bowman, 36 WEEKLY NOTES, 138.

We contend that these facts show a complete defence to a recovery against the defendant Tyson.

The payment was purely voluntary on the part of the plaintiff, and it is well settled that money paid voluntarily cannot be recovered back, although the payor could not have been compelled by law to pay the same.

McCrickart *v.* Pittsburgh, 88 Pa. 133.
Union Ins. Co. *v.* Allegheny, 101 Id. 250.
Peebles *v.* Pittsburgh, Id. 304.
De La Cuesta *v.* Insurance Co., 136 Id. 62.
Neely's Appeal, 124 Id. 406.

The most that has been said or that can be urged to sustain the plaintiff's allegation that he was compelled to pay the money in question is that on failure to do so he would be discharged from the home. That is, he would suffer an inconvenience in not being allowed to remain in the home; and keep his money and enjoy the benefits of the home, and be fed, clothed and maintained therein in the place of some other worthy soldier who had no home and no money. He had his money in his pocket and could go or stay as he thought best. No doubt he would be better off in every way to comply with the reasonable rule adopted by the board of trustees to pay over all his pension money in excess of $4 per month and remain in the home, than he would to leave the home and try to provide for himself elsewhere.

May 20, 1895. WILLIAMS, J. The plaintiff sued to recover certain sums of money which he alleged he had been compelled to pay to the home out of his quarterly instalments of pension money received from the United States. These

Digitized by Google

exactions he alleged were illegal and in plain violation of the spirit if not the letter of the pension laws.

An affidavit of defence was made by the commanding officer of the home, in which he set out the following facts: First, the adoption of a rule by the board of managers of the home, requiring the inmates to turn over eighty per cent. of their pension money to the treasurer of the institution. Second, that upon the admission of the plaintiff he signed an agreement in writing binding himself to comply with the rules of the home of which he knew this to be one. Third, that the payments for which he now sues were made by him voluntarily in accordance with the contract so executed by him on his admission. The learned Judge of the Court below held this affidavit to be sufficient to prevent a judgment on motion, and this appeal is from that ruling. The learned gentleman who represents the appellant has argued with great earnestness that the rule under which the money was paid to the treasurer is wholly unauthorized. We are not inclined to decide that question at this time. It is not necessary to the decision of this case. If the payments shall turn out to be voluntary, as is alleged, and in pursuance of an agreement under which the plaintiff's admission was obtained, and that admission depended upon the contract and not upon the positive provisions of the statute organizing this institution, then the plaintiff cannot recover.

The record before us does not afford the means of determining these questions. They will be developed on the trial. Meantime all that we can now decide is that the affidavit is to be taken as absolutely true, and assuming its truth, we think so far as this record enables us to see that the Court below was right in refusing the motion for judgment and its action therein is now affirmed.

W. C. S.

July, '94, 96. February 12, 1895.

Commonwealth v. Heckler.

Liquors—Act of May 13, 1887—Nature and intent, not the place, to determine—Hospitality, act of.

The Act of May 13, 1887, is an Act "to restrain and regulate the sale" of intoxicating liquors, and its provisions are not applicable to the table, or the personal habits of citizens within the precincts of their own homes.

Commonwealth *v.* Carey, 151 Pa. 368, followed.

The place of an act is not material except as a matter of evidence bearing on the intent. It is the nature and intent of the act, not the place where it is done, that determine its character as lawful or otherwise.

Appeal of Calvin T. Heckler, defendant, from the judgment of the Quarter Sessions of Bucks County.

An indictment was found against Calvin T. Heckler, containing two counts. The first, setting out that Heckler on the fifth day of November, 1893, the said day being Sunday, unlawfully furnished by sale, gift and otherwise, spiritous, vinous, malt and brewed liquors to one Tobias Kile, contrary to the Act of Assembly. The second, that he on said Sunday also furnished by sale, gift or otherwise spiritous, vinous, malt and brewed liquors to one Isaac Kile. On the trial the Commonwealth admitted that the defendant was not engaged or connected in any way with the liquor traffic, but showed as follows: on Sunday the fifth of November, 1893, he went in his wagon to the house of Tobias Kile, in Rockhill township, Bucks county, arriving there about three o'clock in the afternoon; got out of his wagon, and went into the yard. He asked Kile whether he was going to the election the following Tuesday. Kile said he did not know. Heckler said he would send a team to take him to the polls and he should go. He then invited Kile to come into the wagon house, took a small flask out of his pocket and gave him a drink of whiskey out of the flask. After a short consultation he gave him another drink of whiskey out of the flask. Kile did not pay anything for it. Kile was eighty years old. Heckler, on the same day, also stopped at the house of Isaac Kile, a brother of Tobias, and gave him a drink of whiskey out of the same flask. Heckler had left his house to go to Rockhill township to get out the vote at the coming election, and he had the flask of whiskey with him for his personal comfort. The defendant requested the Court to charge the jury, first, that if they found that the defendant was not the keeper of a hotel or restaurant, and in no way engaged in the sale of liquors, there could be no conviction, inasmuch as the seventeenth section of the Act of 1887, under which the indictment was laid, did not apply to persons not engaged in the sale of liquors, and if it was contended that said section did apply to persons not engaged in the sale of liquors then said section was unconstitutional, because under such construction said Act would contain more than one subject, and that the title to said Act limits it to those engaged in the sale of liquors; second, that so much of section 17 of the Act of 1887 as forbids a person who is not a seller of liquor to give intoxicating drink to any other person on Sunday is in conflict with the Constitution of this State. The Court, YERKES, P. J., refused both points. A

Digitized by Google

verdict of guilty was rendered. Afterwards defendant moved for an arrest of judgment; first, because it appeared by the evidence that the liquors were furnished by the defendant to the parties charged in the indictment in a social way and as a matter of hospitality, and were furnished by the defendant as an individual and private citizen and not otherwise; second, that under the evidence in the case, no offence or crime was shown to have been committed and the judgment should be arrested.

The Court refused to arrest the judgment, and filed the following opinion:—

"The defendant is a lawyer and editor of a newspaper. He has used and abused both these trusts by approaching the Court outside of the open forum of the Court room and attempting to influence its judgment. For such gross impropriety in one of his understanding there can be no excuse. We herewith file his letter and marked copies of his newspaper with the hope that hereafter he will give no occasion to take further notice of this evidence of his misconduct. Whoever seeks to gain an advantage in this way prejudices his case and must expect that questions of doubt will be regarded unfavorably toward him.

"The defendant was indicted and convicted under the seventeenth section of the Act of 1887 for furnishing intoxicating liquors on Sunday. The proof clearly sustained the charge and the only question raised in the case is, whether the defendant is within the Act. The following point states the question:—

"'If the jury find that the defendant is not the keeper of a hotel or restaurant and in no way engaged in the sale of liquors, there can be no conviction in this case, inasmuch as the seventeenth section of the Act of 1887, under which the indictment is laid, does not apply to persons not engaged in the sale of liquors. If it is contended that said section does apply to persons not engaged in the sale of liquors, then said section is unconstitutional because under such construction said Act would contain more than one subject. The title to the said Act limits it to those engaged in the sale of liquors.'

"2. 'That so much of section seventeen of the Act of 1887 as forbids a person who is not a seller of liquors to give intoxicating drinks to any person on Sunday is in conflict with the Constitution of this State.'

"The point was refused. It raises an interesting and perhaps doubtful question which the Supreme Court, in at least two recent cases where the question was before them, declined to pass upon, notwithstanding their attention was called to the circumstances that, in several cases, Judges of Courts of Quarter Sessions had held the seventeenth section of the Act inapplicable and unconstitutional as to persons not engaged in the sale of intoxicating drinks, although applicable and constitutional as to persons engaged in such trade.

"The Constitution of the Commonwealth declares that no bill shall be passed containing more than one subject, which shall be clearly expressed in its title. The purpose of this provision was that neither the members of the Legislature nor the public should be misled by title, and to fairly give notice of the subject of the Act as to reasonably lead to an inquiry into its body: Potter's Dwarris on Statutes, 104; Allegheny County Home's App., 77 Pa. 77; State Line and Juniata Railroad's App., Id. 429; Mauch Chunk *v.* McGee, 81 Id. 433.

"Bearing in mind, then, the purpose of the Constitution, it is somewhat difficult to accept as sound logic the reasoning which holds that the provisions of the seventeenth section of the Act of 1887 prohibiting the furnishing of intoxicating liquors on Sunday is constitutional so far as relates to liquor sellers, but unconstitutional as to all other persons. It is saying, in effect, that the Legislature and the public would be misled by the title and would therefore not be affected by such notice as to lead them to inquire into the body of the Act, while a tavern keeper or wholesaler would not be so misled and would be amply notified so as to be liable to be fined or sent to jail for doing precisely the same thing for which his neighbor may go free, and under legislation which apparently applies to both. It does seem that if the section is to be declared unconstitutional it ought to be upon broader ground than this, and ought to affect all persons alike. Does the title give such notice of the provisions of section seventeen as contemplated under the Constitution? It is not intended that the title should be a complete index to the Act. In Altenburg *v.* Commonwealth, 126 Pa. 611, the Supreme Court clearly understood and declared the section to be operative against 'any person,' and held it applicable to a farmer, saying that 'when he sells or gives intoxicating liquors to men while visibly intoxicated he becomes a subject of investigation and punishment under the provisions of the Act of 1887.'

"In Commonwealth *v.* Carey, 151 Pa. 370, they approved Altenburg *v.* Commonwealth on the ground, amongst others, that the liquor was furnished with full knowledge of the man's habits; not as a matter of hospitality, exercised in defendant's house, but for the purpose of supplying intoxicating drink to one addicted to its habitual use, and they further declared that 'to the excepted classes and upon the excepted days no man lawfully can sell or furnish for use as a beverage any intoxicating liquors.' Thus, when it comes to furnishing to these excepted classes

Digitized by Google

or on the excepted days, the Supreme Court treats all men, licensed or unlicensed, alike. Under the constitutional provision, intended to give notice of the contents of the Act, all men presumably with equal intelligence must be treated as upon the same footing before the law. The State Constitution, unlike the Federal compact, gives the people, through the Legislature, the right to enact any laws they see proper, unless prohibited by constitutional limitations. The Courts must, therefore, be satisfied that they have exceeded their authority before they can set aside as unconstitutional. Upon this point the Supreme Court says: 'The intention of the constitutional amendment was to require that the real purpose of the bill should not be disguised or covered by the general words "and for other purposes," which was formerly so common, but should be fairly stated, and it must be a clear case to justify a Court in pronouncing an Act or any part of it void on this ground.' SHARSWOOD, Justice, in Commonwealth *v.* Green, 58 Pa. 226.

"In the case of Mauch Chunk *v.* McGee, 81 Pa. 433, C. J. AGNEW said: 'It is the duty of a Court to reconcile the different parts of a law, if it can be reasonably done, rather than to declare any part void, and thus frustrate legislative action.' If a strict application of the Act of 1887 to its title on the lines contended for in this case should be made, it would render all those provisions prohibiting the furnishing of liquors, without sale, to the prohibited class and on the prohibited days, unconstitutional, for such interpretation must turn upon the word 'sale' as used in the title.

But the contention is that persons whose business it is to sell intoxicating liquors are prohibited from furnishing without sale while others are not, and, bearing in mind the judicial interpretation of the purpose of the Constitution, a liquor dealer, therefore, is presumed to be answerable because of a greater knowledge of the law than a farmer, a lawyer or a blacksmith. Yet we fail to find anything in the title which indicates one more than the other. It follows that to reach such a conclusion the Act must be read in full, a proceeding that utterly ignores the purpose of the Constitution. Is it not rather the duty of the Courts to divest the title of all superfluous words which may operate to strip the law of the effect which its makers intended to give it, and to read it as calling attention to enactments relating to the use of spiritous and malt liquors which the Act of 1887 clearly is? But in view of existing conditions we are not required to discuss the constitutionality of the seventeenth section of the Act of 1887 as a new question. It was before the Supreme Court, and on both occasions it appears they hesitated or declined to declare the section unconstitutional. When we have this attitude of the higher Court before us and remember that they have also declared that it must be a clear case to justify a Court in pronouncing a part of an Act void because of a defective title, we see but one course, one duty, and that is to accept and administer as law that which the Legislature has refused to disturb. We cannot follow the decisions of Courts or co-ordinate powers when the higher tribunal so clearly hesitates to adopt their views. If the seventeenth section of the Act of 1887 be constitutional, it clearly is for the Supreme Court to so declare. It would now seem presumptuous for us to attempt to force upon them a view which, when opportunity offered, they failed to adopt.

"In support of the motion for a new trial it is complained that the Court should have instructed the jury that it is not a misdemeanor to furnish intoxicating liquors as a matter of hospitality and in a social way. The request for instructions was presented in writing and contains no intimation even, that the defendant relied upon any such point. Naturally, our attention was directed solely to what the point contained. If there had been no request, and had it occurred to us that the evidence tended to show that the liquor was furnished in a social way, and through hospitality, we would undoubtedly have given such instructions. We did not do so because it did not occur to us that the evidence required it. The evidence of defendant's own declarations shows a design. Such a purpose as under an indictment for a wilful violation of the liquor laws would sustain a conviction. This is not a case of hospitality. It could as fairly be termed a case of bribery. The defendant was not entertaining at his home but was travelling upon the road, soliciting voters to attend the election to occur upon the following Tuesday. He sought the parties to whom he furnished the liquor. He alighted from his wagon, went over to the men and gave them the whiskey from a bottle which he carried with him and at the same time solicited their votes. They were very old men, in their appearance and surroundings allied to the generation to which the grandfather of the defendant may have belonged, simple-minded and innocent, and living in a primitive condition hardly believed to exist in this generation. There was nothing in common between them and the defendant. Their social desires and tastes could not have been similar.

"To say that the circumstances of this case show that the liquor was furnished in a social way is carrying the doctrine of hospitality far beyond what is commonly understood in the usual estimation.

"The practice of using intoxicating liquors, especially on election days for the purpose of

Digitized by Google

controlling and befuddling irresponsible voters, is a growing and dangerous one which needs checking rather than encouragement. It will be most unfortunate for the community and for the purity of the ballot if the Courts are compelled to declare the seventeenth section of the Act of 1887 unconstitutional, for it will mean that intemperate voters are to be debauched by intoxicating drinks at every election poll with impunity and immunity.

"Therefore in view of the law as it stands and of the attitude of the Supreme Court upon this question, we will not take the initiative in throwing down the bars to such practices, because we believe that to hold in this case that the law does not apply to an unlicensed person logically results in finding that it will not apply to such persons furnishing liquors on any of the prohibited days. And now, to wit, April 18, 1894, the motion in arrest of judgment and for a new trial is overruled."

Judgment was entered on the verdict. The defendant took this appeal, assigning as error the refusal of his points and the refusal to arrest judgment.

John M. Arundel and *R. O. Moon*, (with them, *Robert M. Yardley*, *B. F. Gilkeson* and *Wright*), for appellant.

The seventeenth section of the Act of Assembly of May 13, 1887, under which appellant was indicted, applies only to persons engaged in the sale thereof and not to persons nowise engaged in the liquor traffic.

If said Act contemplates persons not engaged in the sale of spiritous, vinous, brewed or malt liquors, it is as to said seventeenth section, unconstitutional, being in violation of Article III., section 3, of the Constitution of this State, which provides that, "No bill except general appropriation bills, shall be passed, containing more than one subject, which shall be clearly expressed in the title." The title to the Act of May 13, 1887, now under discussion, is "An Act to restrain and regulate the sale of vinous, spiritous, malt or brewed liquors, or any admixture thereof," and the seventeenth section thereof, "That it shall not be lawful for any person with or without a license to furnish by sale, gift or otherwise to any persons any spiritous, vinous, malt or brewed liquors on any day upon which elections are now or hereafter may be required to be held, nor on Sunday, nor to a minor," etc., is unconstitutional, so far as it affects the right of private citizens not engaged or interested in the manufacture or sale of intoxicating liquors to give away liquors.

Dorsey's Appeal, 72 Pa. 192.
Union Passenger Railway Co.'s Appeal, 81* Id. 91.
The State *v.* Hutchins, 74 Iowa Rep. 20.
State of Kansas *v.* Barrett, 27 Kansas Rep. 213.
Albrecht *v.* The People, 78 Ill. 510.
Cruse *v.* Aden, 127 Id. 231.
State *v.* Young, 47 Ind. 150
Williams *v.* State, 48 Id. 307.
Com'th *v.* Doll, 6 Pa. C. C. 49.
Com'th *v.* Fowler, 44 Leg. Int. 482.
Com'th *v.* McGee, 7 Pa. C. C. 162.

Paul H. Applebach, for appellee.

Attention is called to the fact that, on the trial in the Court below, the appellant was so well satisfied with the charge of the Court and the instructions to the jury that he did not take an exception either to the charge or answer to the points submitted. This failure disposes of the first and second assignments of error.

Huckenstein *v.* Kelly, 139 Pa. 201.
Haines *v.* Com'th, 100 Id. 317.
Yard *v.* Pancoast, 108 Id. 384.
Thomas & Son *v.* Loose, 114 Id. 35.

Neither can the third and fourth assignments receive any consideration, for the reason that on the trial below there was no request made of the Court to charge the jury in the manner it is now alleged it should have charged.

Gheen *v.* Heyburn, 1 Walker, 148.
Kurtz *v.* Haines, 15 Atlantic, 716.

The appellant could not, after the trial and verdict, by a motion in arrest of judgment, cure this neglect, and thereby convict the Court below of error on the trial. This appeal goes to affect the verdict and judgment. As a matter of fact the record shows that the sentence was so imposed as to expire before its commencement, the purpose of the Court being, as stated at the time, to give the accused every opportunity to raise the question of the legality of his conviction without subjecting him to imprisonment. So far as any punishment is concerned the judgment was practically arrested and the defendant has nothing of which to complain.

The appellant was indicted and convicted under the seventeenth section of the Act of Assembly of May 13, 1887, for furnishing intoxicating liquors on Sunday.

Altenburg *v.* Com'th, 126 Pa. 602.

Counsel for the appellant argue that in the Carey case there was an actual sale of liquor, the consideration being the information obtained from the drinkers as to the parties who placed the obstruction on the tracks. With equal propriety can it be argued in this case that the appellant sold liquor and that the consideration between the parties was that the persons who received it would go to the election and vote a certain ticket; but under the ruling of this Court the question of "sale" does not enter into the case, if the liquor was "furnished" by any person, by "sale, gift or otherwise" upon the prohibited days, or to the excepted classes, because

Digitized by Google

they say that "the furnishing of liquors on Sunday, or to any of the excepted classes that is made punishable, is a furnishing in evasion of the law forbidding sales."

The second point of the defendant is "that if said Act contemplates persons not engaged in the sale of spirituous, vinous, brewed or malt liquors, it is, as to said seventeenth section, unconstitutional, being in violation of Article III., section 3, of the Constitution of this State, which provides that 'no bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in the title.'"

Counsel for the appellant seem to have lost sight of the fact that this point has been before the Supreme Court upon several different occasions and that section of the Act, as well as the Act in general, has been declared constitutional.

Com'th *v.* Sellers, 130 Pa. 32.
Com'th *v.* Silverman, 138 Pa. 642.
Com'th *v.* McCandless, 21 WEEKLY NOTES, 162.

The Common Pleas cases cited by counsel for the appellant, namely,

Com'th *v.* Doll, 6 Pa. C. C. 49.
Com'th *v.* McGee, 7 Id. 162.,

were decided by the respective Courts prior to the decision of this Court in the case of Commonwealth *v.* Sellers, 130 Pa. 32.

May 30, 1895. MITCHELL, J. The summary of the testimony agreed upon by the district attorney and the counsel for appellant, which practically makes the facts uncontested, shows that the appellant was not guilty of any criminal or unlawful act. The case is ruled by Com. *v.* Carey, 151 Pa. 368. We do not need to add anything to what is there so clearly said by our brother WILLIAMS, that the Act of May 13, 1887, P. L. 108, is an Act as its title declares "to restrain and regulate the sale" of intoxicating liquors, and its "provisions are not applicable to the table, or the personal habits of citizens within the precincts of their own homes. . . . . The furnishing of liquors on Sunday or to any of the excepted classes, that is made punishable, is a furnishing in evasion of the law forbidding sales. . . . . If for reasons of health or habit one chooses to supply his own table with his own liquors for use by himself, his family or his guests on Sunday, there is not now, and so far as I am aware there never has been in this State any statute forbidding him to do so." The acts complained of in that case were done at the defendant's temporary abode in a fishing camp set up with the ulterior object of tracing the perpetrators of a series of crimes in that neighborhood, and hence the references in the opinion to the defendant's home, "his own table," etc., but the basis of the decision is the character of the act as one of hospitality and not of evasion of the statute. This appears clearly in the next paragraph to that already quoted where it is said, if the jury found "that the acts complained of were acts of hospitality extended to his guests, they should have acquitted him of the misdemeanor." The place is not material except as a matter of evidence bearing on the intent. It is the nature and intent of the act, not the place where it is done, that determine its character as lawful or otherwise. If the appellant in the present case had taken his neighbor in his buggy to his house and there given him the whiskey the act would have been one of hospitality within the very words of Com. *v.* Carey. The fact that the drink was given in the neighbor's own woodshed made no difference in the character of the act. If not to be called with strict accuracy one of hospitality, it was one of a similar kind, equally innocent, the cultivation of friendly feelings with his neighbors and the stimulation of the interest of two electors who having passed four-score years were doubtful whether they would go to the polls or not. If its elections are never subjected to more sinister influences than that, Bucks County will be entitled to congratulation.

Judgment reversed.

STERRETT, C. J., dissented.

W. C. S.

July, '95, 46. May 15, 1895.

Gemas' License.

Act of June 9, 1891, P. L. 257—Distiller's License.

The discretion given to the Court of Quarter Sessions by the Act of June 9, 1891, P. L. 257, is a judicial discretion and when so exercised will not be reviewed.

Applicants are entitled to a judicial hearing. The fifth requirement set out in section 4 of the Act, "that the place to be licensed is necessary for the accommodation of the public" does not apply to distillers, the proviso which follows expressly exempting them and brewers.

Johnson's License, 156 Pa. 322; Gross' License, 161 Pa. 344, and American Brewing Co's. License, 161 Pa. 378, followed.

Appeal of Mark Gemas from the judgment of the Quarter Sessions of Fayette County in refusing to grant him a license to distill spiritous liquors on his property in Connellsville township for one year from May 1, 1895.

The petition was in due form and was made by forty-six electors of the township, and the bond duly executed and surety justified; the

Digitized by Google

petitioner was a naturalized citizen of the United States. The petition and bond were filed February 8, 1895, and the rules of Court complied with. No remonstrance or objections were filed, and on April 5, 1895, the Court entered the order "License is refused as unnecessary for the accommodation of the public."

This and the refusal of the Court to pass on the sufficiency of applicant's bond were assigned as errors and petitioner appealed.

E. D. Fulton (*Boyd* and *Umbel* with him), for appellant, cited:—

American Brewing Co's. License, 151 Pa. 378.
Mead's License, 161 Id. 375.
Johnson's License, 156 Id. 322.
Gross' License, 161 Id. 344.

No counsel appeared contra.

May 30, 1895. MITCHELL, J. By the Act of June 9, 1891, P. L. 257, the granting of licenses to wholesale dealers, brewers, distillers, etc., of spiritous, vinous or malt liquors, is assimilated to a certain extent to licensing of retailers, and is put within the discretion of the Court of Quarter Sessions. This discretion, as we have frequently said, is a judicial discretion, to be exercised for legal reasons and in a judicial manner. When so exercised it is not reviewable. It has been held accordingly that the applicant is entitled to a hearing, and a decision based on the evidence: Johnson's License, 156 Pa. 322; Gross' License, 161 Pa. 344; though the Court's personal knowledge of certain facts, such as the fitness of the applicant, etc., is a legitimate part of the case before it: Mead's License, 161 Pa. 375. In Gross' License, *supra*, the rules applicable to the subject were very clearly and comprehensively stated by our brother DEAN, and may be briefly summarized as three in number, viz., that there must be a judicial hearing, that a refusal must be for a legal reason, and that where these two points appear this Court will not assume to discuss the correctness of the result reached by the Court below.

In the present case there was a hearing and a refusal of a license for the reason, expressed of record, that it was "unnecessary for the accommodation of the public." We are of opinion that this was not a legal and valid reason. The petition was for a distiller's license, and section four of the Act of 1891, which prescribes the requirements which the applicant shall set out in his petition, includes in its fifth item "that the place to be licensed is necessary for the accommodation of the public," but a proviso immediately adds that this requirement "shall not apply to a brewer, or distiller." It is said in the opinion of the Court below, in the Am. Brewing Co.'s License, which was affirmed, in 161 Pa. 378, that "it seems reasonable that the Court should not have the same kind and extent of discretion in all kinds of licenses, and that the discretion should be greatest in the cases of hotels and restaurants whose principal trade is to sell liquor by the drink to the consumer, and least in those of distillers who are manufacturers and farthest removed from the consumer." And it had been said before by this Court in Pollard's Petition, 127 Pa. 507, 521, which arose under the Act of 1887, that a wholesale license, "is not granted for the convenience of a particular neighborhood, nor does it matter where the place of business is located. . . . The power to close up large establishments, such as breweries, distilleries and wholesale liquor houses, when perhaps hundreds of thousands of dollars are invested therein, is too vast to be exercised by any man or Court excepting on the clearest grant of legislative authority." Such grant has, since that decision, been clearly made by the Act of 1891 in the case of wholesale dealers, but this particular requirement as to the accommodation of the public has been expressly omitted with regard to brewers and distillers.

It is true that section six of the Act in prescribing the mode of proceeding by the Court upon hearing petitions in favor and remonstrances against the applications, gives a discretion to refuse "whenever such license is not necessary for the accommodation of the public, or the applicant is not a fit person," etc., yet as this section is general and prescribes the method for hearing and deciding all applications of every kind under the Act, it must be read as to each kind with reference to the requirements for that kind only, *reddendo singula singulis*. Thus the judgment of the Court as to the personal fitness of the applicant involves considerations of residence, citizenship, interest in other places where liquor is made or sold, conduct in regard to previous license, etc., applying equally to all kinds of licenses asked for. But the consideration of public accommodation applies only to those licenses of which it is a requirement, and among these a distiller is not included. To include him would be to nullify indirectly the express exemption in section four, and to do so most unjustly to the applicant by authorizing a refusal of a license upon a ground that he was expressly relieved from setting forth in his petition, and was nowhere directly or by reasonable implication required to prove.

We are of opinion therefore that the only reason assigned for a refusal of the license was not a valid reason under the statute in the case of a distiller, and unless there is other ground for refusing it, which does not appear, the license should be granted.

Judgment reversed and procedendo awarded.

W. D. N.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, JULY 5, 1895.* [No. 21.

Supreme Court.

Jan. '95, 118. March 29, 1895.

Watt's Estate, No. 1.

Decedents' estates—Legacies—When chargeable upon land—Interest on legacies—When interest begins to run—And at what rate—Bequest to charity—Alteration of, in codicil—Effect of—Act of April 26, 1855.

The blending of real and personal estate in the residuary clause of a will, binds the real estate for the payment of the legacies, theretofore given, by implication; since the "residue and remainder," can only be ascertained after the payments of the debts, legacies, and expenses.

After legacies become due and payable they are matured obligations against the estate, and bear interest as any other liquidated demands would do, at the rate fixed by law.

The mere use of the words "annul and revoke" in a codicil, as to a bequest previously given by a will, is not a revocation of the bequest when it is clearly the intention of the testator only to change the time for the payment of the bequest, so as to give a prior life interest to certain persons named in the codicil.

A testator, W., by his will gave a bequest to a public charity. Some fifteen months later, and within one calendar month of his death, he executed a codicil in which he said: "I hereby annul and revoke the bequest to," said public charity, "and instead thereof I give and bequeath" the same amount, in trust for certain annuitants, and after their deaths to pay the bequest to the same public charity for the purposes mentioned in the will. It was claimed by the residuary legatees that the bequest originally given in the will was revoked by the codicil, and that the bequest given in the codicil was void by the statute:

Held, that the language of the codicil was not a revocation of the bequest to the charity;

Held, also, that the Act of April 26, 1855, had no application.

Appeal of Rebecca H. Sloan, sister, and one of the residuary devisees and legatees of James Watt, deceased, from the decree of the Orphans' Court of Philadelphia County, dismissing exceptions to the adjudication of the account of the Pennsylvania Company for Insurances on Lives and Granting Annuities, executor of the estate of the said James Watt, deceased.

The facts of this case were as follows: James Watt died on April 28, 1886. By his will dated January 3, 1885, he made certain specific devises and bequests, among which was a bequest of $7,000, to the Presbyterian Orphanage, Pa., to build a cottage for a school, and to be named the Findlay Highland Home. He then gave the residue of his estate, both real and personal, to his three sisters, and appointed the Pennsylvania Company for Insurances on Lives and Granting Annuities, his executor, with power to sell all of his real estate, except that specifically devised, at public or private sale, whenever said executor should deem it prudent so to do. By a codicil, dated April 12, 1886, less than a month before his death, he provided, *inter alia*, as follows: "I hereby annul and revoke the bequest of seven thousand dollars to the Presbyterian Orphanage, in the State of Pennsylvania, and instead thereof I give and bequeath to the Penna. Company for Insurances on Lives and Granting Annuities the sum of five thousand dollars, in trust," to pay the income to a legatee for life, "and after his decease to pay said principal sum of five thousand dollars to the Presbyterian Orphanage, in the State of Pennsylvania aforesaid, to build a cottage for a school, and to be named the Findlay Highland Home." He further, by the codicil bequeathed the sum of two thousand dollars upon a similar trust, with remainder to the Presbyterian Orphanage for the same purpose. Upon the death of James Watt, one Mary Elliott, a legatee under the will, claimed to be the widow of the testator, and it appearing to the Court, at the audit of the executor's account, that a distribution could not be made until her claim was determined, an examiner was appointed to take testimony on the question as to whether Mary Elliott was the widow of the decedent. This litigation, in which the executor and several of the legatees, including the residuary legatees, took part, continued until May, 1893, nearly six years, when a compromise was effected, under which Mary Elliott was to release her legacy and all other claims against James Watt, or his estate and his vendees, and in consideration was to receive certain real estate and twenty thousand dollars in money. This compromise was finally completed in 1894, when the parties in interest drew the orders upon their distributive shares payable to the attorney for Mary Elliott. The personal estate amounted to $65,000, and the real estate was valued at about $75,000. The total legacies amounting to $100,000, were in excess of the personalty in the hands of the executor. It was claimed by the legatees that the real estate was liable for this deficiency, and the claim was allowed by the auditing Judge, ASHMAN, J. It appeared that, pending the litigation, the executor was unable to realize more than four per cent. in income from the estate. The legatees claimed interest on their unpaid legacies at the

Digitized by Google

rate of six per cent., which claim the auditing Judge sustained. It was further claimed by the residuary legatees that the effect of the codicil, revoking the bequest to the Presbyterian Orphanage, inasmuch as it was executed within thirty days of the testator's death, was to give this legacy to them. This contention was negatived. Exceptions were filed, and after argument the Court entered a decree, the parts of which essential for the understanding of this appeal were as follows:

"2. The sum of $2,947.21 being the net amount in the hands of the accountant arising from the sale of a part of the residuary real estate by the executors under the power in the will is awarded towards the payment of any amounts due on legacies if the personal estate be insufficient to pay the same as herein decreed, it appearing that such legacies are by the will made a charge on all the residuary real estate of the decedent.

"3. Interest at six per cent. per annum from the date of the death of the decedent shall be paid on all legacies given to the accountant in trust, and the amounts computed and here awarded upon the said respective legacies shall be paid directly to the parties beneficially entitled thereto, and not to the accountant as trustee for such parties. Interest shall be paid on all other legacies at six per cent. per annum from and after the expiration of one year from the date of the death of the decedent.

" . . 6. The gift to the Presbyterian Orphanage as modified by the codicil is not void, but stands good and is payable as so modified *pro rata* with the other legacies." Whereupon Rebecca H. Sloan, one of the residuary legatees, took this appeal, assigning for error this action of the Court.

Francis Rawle, (*Edward Otis Hinkley* with him), for appellant.

Land is not to be charged with the payment of legacies, unless there be words in the will from which an intention can be inferred to so charge it.

In Gallagher's Appeal, 48 Pa. 121, and the cases following it, such intention is to be found; while in the present case, not only is there no blending of the real and personal estate, but the specific devises of realty, in the will, expressly avoid any such intention.

Paxson *v.* Potts, 3 N. J. Eq., 313.
Read *v.* Cather, 18 W. Va. 263.
Lupton *v.* Lupton, 2 Johns. Ch. 628.
Bevan *v.* Cooper, 72 N. Y. 317.
Brill *v.* Wright, 112 Id. 129.
Stevens *v.* Gregg, 10 G. & J. 147.
White *v.* Kaufman, 66 Md. 93.
Gridley *v.* Andrews, 8 Conn. 1.
Swift *v.* Edson, 5 Id. 531.

The power of sale given in the will did not work a conversion, it was a mere naked power, and left the estate vested in the devisees until sale. It did not in any manner alter the rights, titles or interests of the parties interested in the estate, either real or personal. Its object, use and construction, is to facilitate the settlement and distribution of the estate, not to determine interests or property, rights or title to any part of the estate; and the construction as to them remains the same whether there be such a power or not, since the testator himself has not in any manner whatever, not by a single word, indicated any purpose or intention to take away or charge the estate given to his sisters, in the residuary clause.

Perot's Appeal, 102 Pa. 235.
McClure's Appeal, 72 Id. 414.
Chew *v.* Nicklin, 45 Id. 84.
Becker's Estate, 150 Id. 524.

Inasmuch as the earnings of the estate were only four per cent. during the litigation, the full allowance of six per cent. would in this case work great hardship to the residuary legatees, through no fault of theirs; and the cases show that there is no unbending rule on the subject.

Wickersham's Appeal, 16 Phila. 213.
Gaskins *v.* Gaskins, 17 S. & R. 390.
Huston's Appeal, 9 Watts, 472.
Vandergrift's Appeal, 80 Pa. 118.

The codicil revoked the bequest to the Presbyterian Orphanage, and the new legacies thereby given were within the prohibition of the statute.

Act of April 26, 1855, P. L. 328, § 11.
Poulson's Estate, 11 Phila. 151.
Hoffner's Estate, 34 WEEKLY NOTES, 297.

John G. Johnson, for the Penna. Company, etc., executor.

The residuary legatees are entitled to nothing until all the specific legacies are paid.

Tucker *v.* Hassenclever, 3 Yeates, 294.
Davis's Appeal, 83 Pa. 348.

Joseph de F. Junkin and *Augustus W. Bomberger*, (*Robert J. Byron* with them), for the legatees.

The legatees were entitled to interest at the rate of six per cent., from the expiration of one year from testator's decease.

Act of February 24, 1834, P. L. 70, § 51.
Eyre *v.* Golding, 5 Binn. 472.
Hilyard's Estate, 5 W. & S. 30.
Spangler's Estate, 9 Id. 135.
English *v.* Harvey, 2 Rawle, 305.
Penna. Co.'s Appeal, 41 Leg. Int. 26.
Sergeant's Estate, 9 Phila. 346.
Townsend's Appeal, 106 Pa. 268.
Steiner's Estate, 13 Phila. 358.
Flickwir's Estate, 26 WEEKLY NOTES, 374.
Bird's Estate, 2 Pars. 168.
King's Estate, 32 Legal Int. 74.

Joseph de F. Junkin, (*H. S. Prentiss Nichols* with him), for "The Presbyterian Orphanage."

Digitized by Google

The Act of 1855 is in derogation of the common law of the *jus disponendi*, and its effect is to be strictly confined to that which is within its spirit and reason as well as its words.

Manners *v.* Phila. Library Company, 93 Pa. 165. Lutheran Congregation's Appeal, 113 Id. 34.

May 27, 1895. WILLIAMS, J. The appellant is one of three residuary legatees under the will of James Watt. The testator made two specific gifts of real estate and several pecuniary legacies amounting in the aggregate to about one hundred thousand dollars. He then gave all the "rest, residue and remainder" of his estate, real and personal, to his three sisters, share and share alike.

The personal estate is not sufficient to pay the legacies, and the first question raised by this appeal, is over the liability of the real estate for the deficiency. The Court below rightly held that the blending of the real and personal estate in the residuary clause, bound the real estate for the payment of the legacies by implication, since "the residue and remainder" can only be ascertained after the payment of the debts, legacies, and expenses. This has been uniformly held in this State: Hassenclever *et al.* *v.* Tucker, 2 Bin. 525; Brisben's Appeal, 70 Pa. 405; Davis's Appeal, 83 Id. 348.

The testator died in 1886. His estate was immediately involved in litigation with one of the legatees who claimed to be his widow, and this claim was not finally disposed of until 1894, when a compromise was effected and the claim withdrawn. Pending this litigation the executors were unable to realize more than four per cent. in income from the estate. The legatees claim interest at the rate of six per cent. on their unpaid legacies and the appellant contends that they ought to receive no more than the estate has actually earned. The learned Court below awarded interest at the legal rate. We do not see how it could have done otherwise. After the legacies became due and payable they were matured obligations against the estate, and bore interest, as any other liquidated demands would do, at the rate fixed by law. The estate might have consisted of unimproved city property producing no income whatever. In that event, if the contention of the appellant is sound, the legacies would have borne no interest no matter how long they were withheld. It was doubtless to the advantage of the legatees that the claim of the alleged widow should be adjusted, and they may have acquiesced in what seemed a necessary delay in the settlement of the estate, but unless they agreed to forego interest or to accept a less rate than that fixed by law, they were entitled to demand payment of principal and interest as soon as it was practicable for the executors to make it. The residuary legatees are in no position to complain, for the estate is charged with the payment of the debts and the pecuniary legacies first, and not until this is done is the residue ascertained or the extent of their interest in the estate determinable.

The remaining question raised by the assignments of error is over the effect of the codicil upon the bequest to the Presbyterian Orphanage. The will was executed on the third day of January, 1885, and contained the following: "Item (14), I give and bequeath to the Presbyterian Orphanage in the State of Pennsylvania, the sum of seven thousand dollars to build a cottage for a school, and to be named the Findlay Highland Home." Some fifteen months later, on the twelfth day of April, 1886, he executed a codicil, the sole purpose of which was to postpone the time when the money should be payable to the Orphanage, so that the interest upon five thousand dollars thereof should be payable to Jacob Michael while he lived, and the interest upon the remaining two thousand dollars thereof should be paid to Josephine Holbock, widow, during her natural life, and the principal sum should remain invested pending these lives. For the purpose of making this change the testator made the Pennsylvania Company for the Insurance of Lives and Granting Annuities, a trustee, charged with the investment of the money and the payment of the interest to the annuitants until their respective deaths, and thereupon to pay over the respective sums held for the benefit of the deceased annuitants to the Presbyterian Orphanage for the purposes named in the will. The subject is introduced into the codicil by the words: "I hereby annul and revoke the bequest to the Presbyterian Orphanage in the State of Pennsylvania," and then follow immediately the words, "and instead thereof I give and bequeath," to the trustee, for the purposes already stated, viz., for investment and payment of interest to the annuitants during the life of each and then for the payment of the principal over to the orphanage "to build or aid in building said cottage for a school to be named the Findlay Highland Home." Within one calendar month after the execution of the codicil the testator died, and the position is now taken that the bequest to the orphanage is void under the Act of 1855. The contention is that the bequest was revoked by the codicil, and the codicil defeated by the statute, so that the seven thousand dollars the testator intended for the construction of the Findlay Highland Home, must now go to the residuary legatees.

Whether this is so or not depends on the testator's intention. His intention is to be gathered from the codicil as a whole read in

Digitized by Google

the light of the original bequest. Looking at the bequest we find the testator had given the orphanage the sum of seven thousand dollars to be used for a specific purpose, viz., the erection of a cottage to be used as a school building and to be called by the name of the Findlay Highland Home. This would have been payable at the end of one year after his own death. The codicil gives the same sum of money, for the same purpose, to be paid on the death of the annuitants. What the testator did, and all that he intended to do, was to change the time for the payment of the bequest so as to give the interest to the persons named in the codicil while they lived. This is not a revocation. The fact that the testator called it by that name does not make it so. Revoke means to recall, to take back, to repeal. Annul means to abrogate, to make void. The codicil did not recall or make void the bequest in any particular except as to the time of payment, and this it changed. It left the donee, the gift, and the purpose to which it was to be applied unchanged. If the codicil did not revoke the bequest then the Act of 1855 has no application, and the bequest stands as originally made, changed only as to the time for payment. But again, the testator says that the codicil is to be "instead of" the bequest in the body of the will. This expression excludes the idea of revocation in its technical sense, and is equivalent to a declaration that in such particulars as the codicil differs from the bequest it is to take the place of, or to be instead of, the bequest: Jarman on Wills, Vol. I., page 173, states the rule to be that the words "instead of," used in a codicil, are held to mean "instead of so much only as is incompatible with the codicil," and cites several English cases in support of his statement. The codicil is incompatible with the bequest in nothing except the time of payment and it therefore takes the place of the bequest, or stands instead of it, only in that particular. What the codicil really accomplishes is to provide a small life annuity for two of the testator's friends by withholding the bequest from the orphanage during their lives that the interest upon it may be paid to them in the meantime. It really diminishes the value of the gift to the orphanage, for the benefit of the annuitants, and so falls within the purview of the rule declared in Carl's Appeal, 106 Pa. 635. The Orphans' Court made no mistake in dealing with this question and the decree appealed from is now affirmed. The costs of this appeal to be paid by the appellants.

S. H. T.

Jan. '95, 194. March 29, 1895.

Watt's Estate, No. 2.

Decedent's estate—Rentals accruing on real estate of—Not assets in hands of executor—To whom payable.

An executor has no estate in his testator's lands by virtue of his office as executor; and if rents, accruing after the testator's death come into his hands, he can not apply them to the payment of debts or legacies.

Under an order of the Orphans' Court, or by an authority given to him by the will, a testator may sell real estate for the payments of debts and legacies, and the proceeds then become assets in his hands for that purpose; but until the sale is actually effected the title to the real estate descends to the heir under the law, or by gift to the legatee, and until a sale the heir or legatee is entitled to the rentals.

Appeal of the Pennsylvania Company for Insurances on Lives and Granting Annuities, Executors and Trustees of the will of James Watt, deceased, from the decree of the Orphans' Court of Philadelphia County, sustaining exceptions to the adjudication of the account of said executor.

The facts of this case will be found set forth in the preceding case (see Watt's Estate, No. 1, 36 WEEKLY NOTES, page 369). Pending the settlement of the estate, the executor collected the rentals and charged itself with them in its account. At the audit, the residuary devisees claimed that these rents were improperly charged in the account; and that if they were allowed to remain, they should be awarded to them less the proper charges. There was a deficiency of personalty to pay the legacies, and the executor, who was also trustee of certain pecuniary legatees, claimed that these rentals should be appropriated to making up the deficiency. The Court sustained the claim of the residuary legatees, PENROSE, J., filing, *inter alia*, the following opinion:—

"It only remains to consider the exception to the application of rents to the payment of interest on legacies. That the rights of a devisee are not affected by the manner in which the lands devised are charged with the payment of legacies, and that such rights cannot be less where the charge is merely by implication than where it is by express provision is self-evident. In both cases alike the personal estate is the primary fund for payment; the lands can only be resorted to in case of its insufficiency; and in the meantime the devisee is entitled to the occupancy and to all the incidents of ownership, including the right to the rents. The right is not taken away by the fact that a power of sale is given to the executor. Until the exercise of the power, the ownership continues with the de-

Digitized by Google

visee, and the lands are bound by judgments against him in the meantime. The object of the various Acts of Assembly upon this subject (Acts of 1792 and 1834) was simply to do away with the distinction which existed at common law between a power to executors to sell, which did not pass to survivors, and a devise to them of lands to be sold, which did. But even in the latter case, while the executors might collect the profits, such profits did not become assets unless the will so directed. (Co. Litt. 113, *a*.) A mere power to sell does not work a conversion, notwithstanding the Act; and as was said by Judge HARE in Blight *v.* Wright, 1 Phila., 549, where the subject was considered with great care and learning, the estate of the executors is to be regarded in the light of an executory devise or springing use, which has no being until the occurrence of the event on which it is limited, and in the meantime the legal estate vests in the heirs or devisees. See also Campbell *v.* Johnston, 1 Sandf. Ch. R., 148.

"The suggestion that there is a difference in this respect between the rights of heirs and devisees does not seem tenable. In Parsons's Est., 1 Norris, 465, where lands were devised subject to a power of sale for payment of debts, the devisee was held to be entitled to the rents, though she was also the executrix, and her failure to exercise the power of sale thus inured to her benefit as an individual. See also Savings Company *v.* Vincent, 9 Outerb. 315. The collection of rents embraced in the accounts covers a period of more than seven years. A single property (1937 Girard avenue) was sold in June, 1889, and fourteen of the properties composing the residuary real estate still remain. The rents so collected, as we think, belong to the residuary devisees, for whom the accountant must be regarded as having acted as agent; and the net balance, as shown by the accounts, must be awarded to them."

Whereupon the executor took this appeal, assigning for error this action of the Court.

John G. Johnson, for appellant.

Edward Otis Hinkley (*Francis Rawle* with him), for appellee.

May 27, 1895. WILLIAMS, J. The question raised by this appeal may be stated thus: who is entitled to the possession of a testator's real estate after his decease? In the case of an intestate the question would not be regarded as an open one. Upon his decease his personal estate goes to his administrators but his real estate descends to his heirs at law. What persons shall inherit as heirs at law is a question that has been answered differently by the laws of different countries; but when they have been designated they take at once, and in fee, *eo instante*, the death of the owner. The course of descent can be broken or changed only by deed or will, for it is a settled principle of law that the heir cannot be disinherited except by express words or by clear implication. The administrator cannot interfere with the inheritance, and if he goes into possession or receives the rents therefrom he holds the same not as the assets of his intestate but as the agent or trustee of the heir at law: Walker's Appeal, 116 Pa. 419. The same thing is true of an executor. He has no estate in the testator's lands by virtue of his office as executor. If rents accruing after the testator's death come into his hands he cannot apply them to the payment of debts or legacies: Stoop's Estate, 31 P. L. J. 34; Fross's Appeal, 105 Pa. 258.

The general rule is therefore that an executor has no right to the possession of the testator's real estate unless it is given him by the will.

An executor or an administrator may sell the real estate for the payment of debts or legacies when the necessity for so doing is made apparent to the Orphans' Court and an order is made by that Court authorizing such sale, but until then they have nothing to do with it. The testator may, as the testator in this case did, authorize his executor to make such sale, and such authority appearing in the will renders an order by the Orphans' Court unnecessary. In that case the executor may judge in the first instance of the necessity for the sale, and he may then proceed to make it. The proceeds then become assets in his hands and he may and must apply them to the payment of debts and legacies. In this case the executor has the rents of the real estate in his hands amounting to about twenty-five thousand dollars, and the residuary legatees ask that it be paid to them. The executor on the other hand claims the right to treat this money as assets and apply it to the payment of legacies. The contention is, as we understand it, that residuary legatees, being entitled to appropriate so much only of the property, real and personal, of the testator, as remains upon the settlement of all demands against the estate, can not take possession of the real estate until final settlement has been made and the residue precisely ascertained. But the premises do not support the conclusion. The residuary legatee, like the heir at law, takes the title of the testator upon his death. The title descends under the law to the heir. It comes by gift to the legatee. It comes to both subject to such encumbrances as have been suffered or imposed by the former owner, and the title of both may be defeated or divested whenever the discharge of such encumbrances requires it. It is the "rest, residue and remainder" only that the heir at law can finally

Digitized by Google

appropriate. The residuary legatee is no worse off. Until actual conversion becomes necessary the heir, and the residuary legatee as well, is entitled to the possession as an incident to the title, and nothing but a positive provision in the will can deprive him of it. A power of sale does not work a conversion of the land as between the executor and the heir or legatee: Blight *v.* Wright, 1 Phila. 549; but the title which accrued on the death of the testator remains in the heir or legatee until divested by sale made under an order of the Orphans' Court, or the power contained in the will. So long as the title remains undivested the right to the possession remains: Erie Dime Savings and Loan Co. *v.* Vincent, Ex'r., 105 Pa. 315. If the executor collected the rents under an agreement with the residuary legatees that the amount received should be held as assets, and used in the payment of the pecuniary legacies, this agreement should have been proved and relied on in the Court below. No such agreement was shown. It is urged that a power to sell authorizes the executor to take possession, else he could not give possession to the purchaser. The reply is that the residuary legatees do not question his right to take possession for the purpose of making a sale. What they deny is his power to collect the rents and use them as assets of the testator. In this we think they are right, and the learned Orphans' Court committed no error in sustaining their contention.

The decree is affirmed. The appellants to pay the costs of this appeal. S. H. T.

July, '94, 117. January 31, 1895

Strauss's Estate.

Bonowitz's Appeal.

Marriage—Reputation and cohabitation—Admissions of parties — Finding of auditing Judge.

Where the finding of the auditing judge is justified by the evidence, the adjudication based thereon should be confirmed.

The law favors marriage, which is a civil contract, and in civil cases, at least, reputation and cohabitation are sufficient evidence of it; the admissions of the parties of their marriage are in the nature of direct proof of it.

Appeal of Jennie Bonowitz, Rose Sonneberg, Henry Hershberg, Sarah Rice and Benjamin Hershberg, from the decree of the Orphans' Court of Philadelphia County, in the estate of Sophia Strauss, deceased.

The facts of this case are stated in the adjudication filed by FERGUSON, J., as follows:—

"The decedent died on the fifteenth day of November, 1892, intestate and without issue. As the estate is personalty it is all claimed by the committee of her alleged husband Nathan Strauss, who is a lunatic and is now confined in an asylum. Upon the other hand, the brothers and sisters above named claim the balance for distribution, alleging that their sister was never married to Nathan Strauss, although they admit that she, in the year 1883, had a child by him, and that ever afterwards she went by the name of Strauss, her maiden name being Hershberg. There was no evidence of any marriage contract, the mouth of one of the parties to it being closed by death and the other being, as stated, now a lunatic. It appeared that the decedent lived in the same house with Nathan Strauss, who was a widower with several small children. From the time of the birth of this child in 1883, she was known by the name of Strauss and her husband recognized her as his wife by that name in numerous ways. When the child above referred to died, its death was registered at the health office as 'Emily, daughter of Nathan and Sophia Strauss.' He drew a number of checks to her order as Sophia Strauss, which she endorsed by the same name. He insured his life, and made the policy payable to Sophia Strauss, his wife. His children recognized her as their stepmother and called her such. Her own brothers and sisters, who are the claimants here, addressed her by the name of Strauss and corresponded with her by that name. She signed her name, Strauss, to deeds. When her husband was sick she collected the sick benefits from his lodge and signed and made affidavit that she was his wife. She had the reputation among the neighbors of being his wife, and was known by them as Mrs. Strauss, and her aunt who lived in the same house with them, and whose estate was audited the same day that this was, in her will left her a legacy by the name of Sophia Strauss. All the evidence in this case goes to show that since 1883 the decedent was known as the wife of Nathan Strauss. If she were claiming against his estate there would be no doubt of the sufficiency of this evidence to establish her claim. There is everything in this case to show marriage except the evidence of a ceremony. There is cohabitation, reputation, mutual recognition, and acknowledgment of the relation by both parties. The auditing Judge finds that Nathan Strauss was the husband of the decedent, and, as she left no issue, and the estate is personalty, he is entitled to the whole thereof, and it gives him satisfaction to be able to so find, because this case illustrates the meanness of the claimants who for the paltry balance for distribution in this estate were willing to make a public record of their sister's shame."

Digitized by Google

Exceptions were filed, which were dismissed by a divided Court. This appeal was taken and the appellants filed the following assignments of error: (1), Because the learned Court below erred in dismissing the appellants' first exception to the adjudication, which was in these words: "The learned auditing Judge erred in admitting in evidence the policy of insurance on the life of Nathan Strauss;" (2), because the learned Court erred in dismissing the appellants' second exception, which was in these words: "The learned auditing Judge erred in finding and reporting that the deceased 'had the reputation among the neighbors of being' the wife of Nathan Strauss;" (3), because the learned Court below erred in dismissing the appellants' third exception, which was in these words: "The learned auditing Judge erred in finding and reporting that since 1883 the deceased was known as the wife of Nathan Strauss, and in finding and reporting that there was cohabitation and reputation;" (4), because the learned Court below erred in dismissing the appellants' fourth exception, which was in these words: "The learned auditing Judge erred in finding and reporting that Nathan Strauss was the husband of the deceased;" (5), because the learned Court below erred in dismissing the appellants' fifth exception, which was in these words: "The learned auditing Judge erred in awarding the balance for distribution to Morris Strauss, committee of the estate of Nathan Strauss;" (6), because the learned Court below erred in dismissing the appellants' sixth exception, which was in these words: "The learned auditing Judge erred in not awarding the balance for distribution to Jennie Bonowitz, Rosie Sonneberg, Henry Hershberg, Sarah Rice and Benjamin Hershberg, brothers and sisters of the deceased;" (7), because the learned Court below erred in finding as a fact that Nathan Strauss was the husband of the deceased; (8), because the learned Court below erred in awarding the balance for distribution to Morris Strauss, committee of the estate of Nathan Strauss, the husband of the deceased, a lunatic, there being no evidence before the Court sufficient in law to warrant the finding that Nathan Strauss was the husband of the deceased; (9), because the learned Court below erred in not awarding the balance for distribution to Jennie Bonowitz, Rosie Sonneberg, Henry Hershberg, Sarah Rice and Benjamin Hershberg, brothers and sisters of the deceased; (10), because the learned Court below erred in deciding as follows, viz.: "The question raised by the exceptions is one of fact purely, and under well-settled principles the finding of the auditing Judge is conclusive unless the evidence upon which it is based is insufficient to justify it;" (11) because the learned Court below erred in deciding as follows, viz.: "The official certificate of birth of the child named the parents as if husband and wife;" (12), because the learned Court below erred in deciding as follows, viz.: "The proof of subsequent marriage did not rest upon mere reputation. There was direct evidence of admissions and declarations quite sufficient to establish it;" and (13), because the learned Court below erred in deciding as follows, viz.: "In the present case it (the finding of the auditing Judge) cannot be said to be without evidence or against the weight of the evidence."

Henry N. Wessel, for appellants.

To prove marriage in civil cases, other than by solemnization, there must be evidence as to long-continued cohabitation as man and wife, combined with general reputation thereof, and the testimony relied upon to establish this must be most satisfactory.

Chambers *v.* Dickson, 2 S. & R. 475.
Senser *v.* Bower, 1 P. & W. 450.
Guardians of the Poor *v.* Nathans, 2 Brewster, 149; 3 Clark, 139.
Covert *v.* Hertzog, 4 Pa. 145.
Thorndell *v.* Morrison, 25 Id. 326.
Railroad *v.* Hall, 61 Id. 361.
Drinkhouse's Appeal, 151 Id. 294.

It is admitted there was no solemnization of marriage between Sophia Hershberg and Nathan Strauss, no evidence to this effect was adduced, but the conclusion that there was a marriage was arrived at by what is pretended was sufficient evidence of a general repute and cohabitation between the parties, the auditing Judge having expressly found that "there was no evidence of any marriage contract."

The counsel for the committee in lunacy of the husband relied greatly upon the fact that the deceased had changed her name from Hershberg to Strauss. This is satisfactorily explained by the testimony of the witnesses. It is conclusively proved that not until after the birth of the child did she assume the name of Strauss, and not until after all the entreaties of the woman he had wronged, and all the powers of persuasion of her relatives and friends had been brought to bear upon him, did he, in order to hide her shame, avoid a scandal and arrest, and prevent the stigma which would be cast upon his children by the knowledge of outside parties of his actions, permit her to use his name. The natural equities of the case would not seem to favor such a distribution as would place a premium upon lawlessness or such as would permit a crime against the laws of the land to be made the means by which those who had shared her shame would be deprived of their natural and legal rights.

But even though the law will raise a presumption of and establish a marriage between these parties, is the committee of the husband's estate entitled to the balance for distribution?

Digitized by Google

It is clearly shown that Nathan Strauss left Philadelphia immediately after the birth of the child, and that until her decease, a period of eleven years, Sophia Hershberg, or Strauss, supported herself by her labor at service and that during all that time Nathan Strauss contributed nothing to her support. It is respectfully submitted that under the Act of 4th May, 1855, P. L. 431, P. D. 1154, Nathan Strauss has forfeited by his non-support, all right to claim any part of her estate. The learned Judges of the Orphans' Court, notwithstanding the argument upon this point, considered only the graver question as to marriage.

Act of May 4, 1855, P. L. 431, P. D. 1154.
Tyson's Appeal, 10 Pa. 220.
Starrett *v.* Wynn, 17 S. & R. 129.
Wilson *v.* Coursin, 72 Pa. 306.
Foreman *v.* Hosler, 94 Id. 418.
Orrell *v.* Van Gorder, 96 Id. 180.
Elsey *v.* McDaniel, 95 Id. 472.
Ellison *v.* Anderson, 110 Id. 486.
Holbrook's Estate, 20 WEEKLY NOTES, 79.
Moninger *v.* Ritner, 14 WEEKLY NOTES, 99.

Where the desertion is shown it is presumed to have been wilful and malicious.

Bealor *v.* Hahn, 117 Pa. 169.
Hahn *v.* Bealor, 132 Id. 242.
Ingersoll *v.* Ingersoll, 49 Id. 249.
Van Dyke *v.* Van Dyke, 135 Id. 459.

Emanuel Furth, (*Jacob Singer* with him), for appellees.

"A marriage is a combination of acts by which a man and a woman become husband and wife."

14 Am. & Eng. Ency. of Law, 470.

The law of Pennsylvania has always taken a sensible view of the relation of husband and wife, by not requiring that a marriage ceremony either religious or civil is necessary to create the relationship of husband and wife. The mere agreement of the parties most concerned rises paramount to all considerations of form or ceremony.

Chambers *v.* Dickson, 2 S. & R. 477.
Lehigh Valley Railroad Co. *v.* Hall, 61 Pa. 366.
Thorndell *v.* Morrison, 25 Id. 328.
Hill *v.* Hill's Administrator, 32 Id. 511.
Drinkhouse's Estate, 151 Id. 294.

The question of cohabitation and reputation is at best a mixed one, and the facts usually applicable to the one are circumstances from which the other may often be inferred. This is essentially so in this case. The circle in which the decedent moved was, as may be readily inferred, rather contracted; her walk in life was rather an humble one; society as we know it, knew her not. Beyond the woman with whom she lived, a few relatives and friends, it is fair to presume she was unknown. The appellants prove "she was always a person for herself." The decedent resides during the whole time that we have inquired into her life history, with her aunt; the account of the executor of that aunt was adjudicated on the same day that the present account was adjudicated, and it appeared from her will that she bequeathed a legacy to "Sophia Strauss" and it formed part of the decedent's estate in this case. The appellants knew the decedent as Sophia Strauss, addressed her as such and presented in evidence a deed so executed by the decedent.

If the question of the marriage had been referred to a jury for its decision there could have been but little doubt as to the result.

If this were a conflict to determine the legitimacy of the child Emily Strauss, the presumption of the law would undoubtedly favor the innocence of parents and child.

Senser *v.* Bower, 1 P. & W. 450.

May 30, 1895. McCOLLUM, J. The learned auditing Judge found from the evidence before him, that Nathan Strauss was the husband of Sophia Strauss, the decedent, and his finding was confirmed by a divided Court. It is conceded that if his finding in this particular was justified by the evidence, the adjudication based thereon should be sustained. The brothers and sisters of the decedent, five in number, have appealed from the adjudication on the ground, as they allege, that the learned Orphans' Court erred in deciding that she was the wife of Strauss. They admit that he was the father of her child, but they insist that it was illegitimate, although they must allow that the registration of its birth and the acknowledgments or admissions of its parents furnish some ground at least for an inference opposed to their contention. It would seem to the ordinary mortal that proper regard for the reputation of their sister would have induced them to relinquish their claim to the small sum in dispute rather than to engage in a contest in which their success depended upon showing her departure from the path of virtue and her resort to a false pretence to hide her shame. But while this was a matter proper for their consideration before inaugurating the contest it cannot be allowed to affect in any degree the decision of the question before us on their appeal. It is a question of fact determinable upon the evidence, oral and documentary. There is some conflict in the former; the latter is undisputed and includes the record of the birth of the child, the receipt for the burial expenses, the checks drawn by Nathan Strauss to the order of Sophia Strauss, her signature to the deeds, and the insurance effected and maintained by Nathan Strauss on his life in favor of Sophia Strauss as his wife. In the record and papers referred to

Digitized by Google

there is a clear recognition by the parties of the existence of the marital relation between them. Their acts and admissions thus evidenced are consistent with that relation and cannot be reconciled with any other without impeachment of their chastity and truth. The beneficial society of which Strauss was a member recognized and dealt with the decedent as his wife. All the testimony in the case is to the effect that after the birth of her child she was known to the narrow circle in which she moved as Mrs. Strauss. A brother-in-law of Nathan Strauss testified that about a year before her child was born she was so known to him and others in the neighborhood, and that Strauss told him she was his wife. His children by a former wife called her mother and received from her the consideration and care which her duty as the wife of their father imposed.

If the admissions and representations made by the parties in regard to the relation they sustained to each other were false and intended to deceive their neighbors, it is quite clear that her relatives, including the appellants, were participants in the fraud. They were willing that their sister while she lived should be known to her and their neighbors as the wife of Strauss, in order, as they suggest, to conceal her wrong doing, but now for the obvious purpose of appropriating the small estate she left for distribution under the intestate laws, they repudiate the claim they sanctioned in her lifetime and allege that her relations with Strauss were illicit. We think it is clear that their change of position and the motive which prompted it, were not well calculated to lend strength to and inspire confidence in their testimony. All the written evidence was adverse to their contention and the natural inferences from it supported the marriage. It was for the auditing Judge to consider the oral testimony in connection with the written, and from all the evidence before him to ascertain the facts. The law favors marriage, 14 Am. & Eng. Ency. of Law, p. 520, and cases cited. It is a civil contract, and in civil cases, at least, reputation and cohabitation are sufficient evidence of it: 1 P. & W. 450; 25 Pa. 326; 61 Pa. 361; 1 Grant 253; the admissions of the parties of the fact of their marriage are in the nature of direct proof of it: 85 Pa. 352. In the light of these well settled principles, we think the evidence was sufficient to sustain the finding of the auditing Judge that Strauss was the husband of the decedent, and to authorize the adjudication based thereon.

Decree affirmed and appeal dismissed at the cost of the appellants.

STERRETT, C. J., and MITCHELL, J., dissented.

W. C. S.

July, '95, 145. January 31, 1895.

Steinmetz's Estate.
Duffield's Appeal.

Wills—Separate use—Married women—Trusts.

All that is necessary to establish a separate use by will is an unequivocal manifestation of an intention of the testator to exclude marital influence.

Where a testator provided that "the separate portion of my daughters shall be separately secured to them and their use beyond the dictation of the husband of either of them," a valid separate use was created.

Where the will provided that after certain indebtedness was met "one third of the net amount shall be paid to my said wife" and at the same time provides that his whole estate is left in an active trust "as though I myself acted in the premises" an estate in fee simple in the third does not pass to the widow.

Appeal of Martha S. Duffield, from the decree of the Orphans' Court of Philadelphia, dismissing appellant's exceptions to the adjudication of the account of the executors of the will of Daniel Steinmetz, deceased.

The facts as they appeared at the adjudication were that decedent died January 10, 1891, having made a will which was proven January 20, 1891.

The will provided, *inter alia*:

"*Third.* It is my will that my real estate remain as at present undivided and unapportioned, the rents to be collected, the repairs to be made and the interest on encumbrances paid, and when the principal of any debt due by my estate becomes due it shall be paid as though I myself acted in the premises and my executors are hereby authorized to act and are hereby empowered so to act that my real estate may be kept intact as it now is.

"*Fourth.* It is further my will that after my executors shall have provided for all bills for repairs, interests for moneys borrowed (due or about to fall due), taxes, water rents and any other demands against my real estate property to be paid, then the net residue shall be distributed as follows, viz.:

"One-third of said net amount shall be paid to my said wife Emma G. Steinmetz, and the remainder shall be equally divided between my children, Daniel, Henry K., Philip J., John, Charles G., Burtis, Emma M., Martha G., and Fanny J., share and share alike.

"This arrangement I desire to continue during the life of my wife the said Emma G. Steinmetz; at her decease it is my will that my children shall do as they think best; it is however, my will (should my children agree to a division of my estate after the death of my wife) that the

Digitized by Google

separate portion of my daughters Emma M., Martha G., and Fanny J., shall be separately secured to them and their use beyond the dictation of the husband of either of them."

Emma G. Steinmetz, widow of testator, died October 11, 1893.

The auditing Judge found that under the will of Daniel Steinmetz a separate use was created for his daughter. To this Martha S. Duffield filed exceptions, and these exceptions having been dismissed by the Court, she appealed.

William H. Peace, for appellant, submitted a paper-book but made no oral argument.

Charles F. Ziegler, for executors and trustees.

May 20, 1895. MITCHELL, J. Although the testator's direction that his daughter's portion of his estate should be held on a separate use trust, might seem on the literal wording of it, to depend on a contingency, yet his plain intent to the contrary appears from a view of his whole will together. He directs his real estate to be held "as at present, undivided, and unapportioned" during the life of his widow, and the interest of each child during that time is only in a share of the "net residue" of the income, after payment of taxes, necessary repairs, etc. This arrangement, as the testator calls it, is to continue during the life of his widow, and at her decease his "children shall do as they think best," *i. e.*, as to a continuance of the arrangement, but should they "agree to a division of the estate" then the separate portions of the daughters "shall be separately secured to them and their use beyond the dictation of the husband of either of them." The purpose to create a separate use is thus clear, and where that is so, no particular form of words is necessary. The fact that it is directed on the happening of the contingency of the widow's death and the refusal of the children to continue the joint arrangement, is no more than a direction to put the trust into form when it may become necessary. So long as the estate was held together on the trust to collect and distribute the revenue a formal separate use was not necessary, the daughters got only their shares of net income without it, but when the estate was to be divided so that the daughters' shares should come to them in severalty, freed from the first administrative trust, then the separate use would be required and was directed to be made. The contingency specified by the testator did not go to the creation of the separate use but to the time and occasion for putting it into formal execution.

The claim that the widow took a fee in one-third of the realty cannot be sustained. The whole estate is left in an active trust to keep it together, collect rents, make repairs, pay encumbrances, etc., "as though I myself acted in the premises," and the widow was to get one-third of the residue, that is, of the net income. Not only is this all that is given in terms to the widow but the direction that after her death the joint administration of the whole may be continued by the children, or in case they determine to make partition, the daughters' portions shall be put in separate use trust, shows that it is all the testator intended to give.

Decree affirmed. W. D. N.

July '95, 251. January 31, 1895.

Steinmetz's Estate.

Cobb's Appeal.

Act 11 April, 1848, P. L. 536; Act 3 June, 1887, P. L. 332.

A married woman having an estate in fee subject to a separate use trust, cannot devise it by will unless authorized by the instrument creating the trust.

The Acts of 11th April, 1848, P. L. 536, and 3d June, 1887, P. L. 332, apply to the common law rights of a married woman, not to trusts in equity for separate use.

MacConnell *v.* Lindsay, 131 Pa. 476, followed.

Appeal of William Cobb, from the decree of the Orphans' Court of Philadelphia, dismissing appellant's exceptions to the adjudication of the account of the executors of the will of Daniel Steinmetz, deceased.

The facts are stated in preceding case, see *ante*, page 377.

Emma M. Cobb, one of the daughters, died in August, 1893, leaving a will by which she gave her entire estate to her husband and made him her executor.

William Cobb, husband of Emma M. Cobb, deceased, claimed her share of testator's estate by virtue of her will.

This was not allowed by the auditing Judge, and exceptions were filed thereto.

John G. Johnson, (with him *Percy McGeorge* and *Isaac Elwell*), for appellant.

As the contingency upon which a trust was to arise, of the share of Emma M. Cobb, did not occur prior to her death, her share was never held in trust.

The devise by Emma M. Cobb to her husband, of her interest in the real estate of her father, vested in him her equitable fee simple.

Peacock *v.* Monk, 2 Vesey, Sr., 192.

Digitized by Google

Lancaster *v.* Dolan, 1 Rawle, 247.
Methodist E. Church *v.* Jaques, 3 John. Ch. Rep. 113.

1. The reason why the equitable estate is not merged into the legal, in case of a passive trust for a married woman, is that she can only, by non-merger, be protected against the improvidence of herself and of her husband.

2. The protection of a married woman against the improvidence of herself and of her husband does not require that she shall be denied the power to will.

3. A passive trust for a married woman is terminated by her own death as well as by that of her husband. Her will operates (where she has an equitable fee) upon an estate that, *eo instanti* with her death, merges into the legal one.

4. A power to will is one of the incidents of an equitable fee. The Wills Acts of 1848 and 1887 give full power to a married woman over an equitable fee simple.

Jones's Appeal, 57 Pa. 372.
MacConnell *v.* Lindsay, 131 Id. 485.
Hays *v.* Leonard, 155 Id. 478.
Act 11 April, 1848, P. L. 536.
Act 3 June, 1887, P. L. 332.
2 Perry on Trusts, 257.
Bispham's Equity, 151.

The daughters of Steinmetz, as to two-thirds of his estate, were subject to no life estate of their mother. The husband took an estate by courtesy therein.

Henry J. Hancock, for Henry K. Steinmetz, appellee.

Under the provisions of testator's will it is clear an active trust was created and that only ⅙ of ⅔ of the net income is given to Emma M. Cobb during the life of testator's widow and that there is no gift of the principal whatever during such life estate. This view is especially strengthened by the direction to the executors in the third item to keep the estate intact and manage it as the testator would have done.

The fact that a trust was created for all the children made it no less a trust as to the share *qua* share of one of the *cestuis que trustent*, to wit, Mrs. Cobb.

As long as the estate remained undivided, the will expressly provided the children should only be entitled to their proportion of the net amount of the income after payment of taxes, etc. It is a novel doctrine that the whole is not equal to the sum of the parts.

During the widow's lifetime Mrs. Cobb had only an interest as *cestui que trust* in ⅙ of ⅔ of the net income, and even this gift was not free or unconditional, but the testator sought to attach a spendthrift trust to it.

This was not such an estate as to which there could be a tenant by curtesy. This Court is ever ready to seize upon anything by which the interest of the wife can be secured.

Tyson's Appeal, 10 Pa. 220.
Perry, Executor *v.* Boileau, 10 S. & R. 208.
Lightner's Appeal, 11 WEEKLY NOTES, 181.
Quin's Estate, 144 Pa. 454.
Hitner *v.* Ege, 23 Id. 305.

Neither the Acts of April 11, 1848, or June 3, 1887, have extended the power of married women over their separate use trusts.

Hays *v.* Leonard, 155 Pa. 474.

May 20, 1895. MITCHELL, J. In Steinmetz's Estate, Duffield's Appeal, opinion filed herewith, it was held that testator's intent was to secure the shares of his daughters to their separate use, and that the contingency of the widow's death and the partition by the children, of the common estate, did not go to the creation of the separate use but to the time and occasion for putting it into formal operation. The testator created two trusts by his will, first, for the management and administration of his whole estate, undivided, and the distribution of the net income, during his widow's life and as much longer as the children should agree to continue that arrangement, and secondly, on the severance of the joint management, a separate use trust for his daughters. His intention to exclude the husbands of his daughters covered both situations. Under the first trust the husbands had no control, because the daughters were only entitled to their shares of the net income. In the second situation a formal separate use was established. As the intent to exclude the husbands in both cases is therefore clear, and as that is all that is required, the interest of Mrs. Cobb in her father's estate from the time of his death must be treated as a present interest in net revenue only, and a remainder in fee subject to a separate use trust, and whether her death occurred during the prior life estate of the widow, or after its termination made no difference in the substance but only in the form of the trust, and of her control over the property.

We have, therefore, the question whether in the absence of express authority given by the instrument creating the trust, a married woman can pass such an estate by will. It has been argued with great force that as the remainder is in fee simple, and the restriction of alienation is in derogation of an essential incident of that estate, it should not be carried beyond the extent actually necessary to reach the end equity has in view, the protection of the wife from the influence as well as the power of her husband, and that does not go beyond her life.

The question, however, is no longer open. It is perhaps somewhat notable that a principle

Digitized by Google

of so much practical importance in its results and of such frequent occurrence should be so little discussed in the case which first decided it: Thomas *v.* Folwell, 2 Whart. 11, where the conclusion was stated rather briefly as a necessary corollary of Lancaster *v.* Dolan, 1 R. 231. The latter case, however, one of the landmarks in Pennsylvania law, had been decided only a few years before, and the professional mind was so filled with it, controversially and otherwise, that probably a brief reference to it was considered all that was necessary.

The intensity of professional feeling on the subject is illustrated by Horace Binney, who, writing thirty years after, says, "It has taken more than one Act of Assembly to patch the hole in the law that was made by Lancaster *v.* Dolan, and it is not well patched yet:" Leaders of the Old Bar, p. 59.

Notwithstanding the brevity of the discussion, however, Thomas *v.* Folwell has been followed uniformly from Stahl *v.* Crouse, 1 Pa. St. 111, down to Quin's Estate, 144 Pa. 444, and is not now to be questioned. Whether in view of the present statutory powers of a married woman to make a will, the reasoning of Thomas *v.* Folwell, would now lead us to the same conclusion if that question were new, is not material, as the cases are clear that the Acts of 1848 and 1887 apply to the common law rights of a married woman over her property, not to trusts in equity for separate use: MacConnell *v.* Lindsay, 131 Pa. 476.

Decree affirmed.

W. D. N.

Jan. '95, 230. April 2, 1895.

Fischer's Appeal.

Beneficial society—By-laws—Vested interest—Act 15 April, 1868, P. L. 103—Case stated.

A member of a beneficial association who survives the beneficiary he has nominated and has not availed himself of his right to substitute another, is supposed to have intended that a by-law of the society governing the matter of the right to the fund should operate.

There is a material distinction between beneficial societies and life insurance companies, the philanthropic element in the former being absent in the latter.

Commonwealth *v.* Beneficial Association, 137 Pa. 412; Lithgow *v.* Supreme Tent, 165 Id. 292; Dickinson *v.* A. O. U. W., 159 Id. 258, followed.

Appeal of Charles C. Fischer, administrator of the estate of Louisa Fischer, deceased, from the judgment of the Common Pleas No. 1, of Philadelphia County, entered on a case stated in assumpsit wherein Margaret Fischer, widow of Charles F. Fischer, to the use of J. & P. Baltz Brewing Company was plaintiff, and the American Legion of Honor was defendant. The appellant with others were also plaintiffs.

Margaret Fischer brought action against the American Legion of Honor to recover an amount alleged to be due upon the death of her husband C. F. Fischer, who was a member of the same. The fund was also claimed by C. C. Fischer, administrator of the estate of Louisa Fischer, deceased, a former wife of C. F. Fischer. The Legion of Honor paid the fund into Court and a case was stated between the two claimants.

The facts as agreed upon in the case stated were that Charles F. Fischer, a member of the American Legion of Honor, named his wife, Louisa Fischer, as beneficiary, who afterwards died leaving children by him; he afterwards married and died, leaving, as his widow, the second wife, Margaret, and one child by her, and the children by the first wife. According to a by-law of the order in force when Charles F. Fischer became a member, the benefit fund was to be paid to the member's dependent heirs, if, after the death of the beneficiary named the member did not designate another beneficiary; but this by-law was changed and at the time of Charles F. Fischer's death a by-law was in force which gave the fund to the member's widow, if the beneficiary selected should die before the death of the member and the member should fail to select another beneficiary. Charles F. Fischer, after the death of his first wife, Louisa, did not expressly select another beneficiary, and his widow, Margaret, therefore, claims the benefit fund under the by-law in force at the time of his death. The fund is also claimed by the administrator of the first wife and by the dependent heirs.

The Court entered judgment in favor of Margaret Fischer. Charles C. Fischer, administrator, etc., then took this appeal.

William W. Porter, (*Benjamin Alexander* with him), for appellant.

The insurance for the benefit of a wife creates a vested interest in her.

Act 15 April, 1868, sec. 1, P. L. 103.
Anderson's Estate, 85 Pa. 202.
De Ginther's Appeal, 83 Id. 337.

A corporation possesses no powers but those which are given by its charter, either expressly or impliedly as necessary in the strict furtherance of the objects of its creation. The charter of a corporation provided that it should consist of not more than one hundred active members, and might bestow honorary membership on active members as they saw proper. It was held that the corporation could not create honorary members except from active members, and that

Digitized by Google

a by-law authorizing the creation of contributing members in the same manner as active members was void.

Fire Company *v.* Com'th, 75 Pa. 291.
Legion of Honor *v.* Perry, 140 Mass. 580.

The by-law by which the money is attempted to be diverted is *ultra vires*.

People *v.* Kip, 4 Conn. 282.
Com'th *v.* Gill, 3 Wharton, 228.
The Phila. Savings Institution, 1 Id. 461.
Phillips *v.* Allen, 41 Pa. 481.

Joseph H. Shoemaker, for appellees.

In order to carry out the object of the beneficial societies, the beneficiary never acquires an interest in the benefit fund before the death of the member.

Given *v.* Odd Fellows, 71 Wis. 547.
Society *v.* Lewis, 9 Mo. App. 412.
Society *v.* Burkhart, 7 West. Rep. 527.
Order *v.* Callahan, 146 Mass. 391.

This is so irrespective of any law of the order preventing the vesting of an interest in the beneficiary before the death of the member.

2 Am. & Eng. Ency. of Law, p. 177, citing authorities.

Act of April 15, 1868, P. L. 103, relates to insurance and it has been decided that statutes of this character do not affect beneficial associations.

Dickinson *v.* A. O. U. W., 159 Pa. 258.

May 20, 1895. FELL, J. Charles F. Fischer was a member of the American Legion of Honor, and at the time of his death held a benefit certificate for $1,000, in which Louisa A. Fischer, his former wife, was named as beneficiary. She died in 1889, leaving children, and he remarried, and at his death in 1894 left surviving him a widow, Margaret Fischer, and children of both marriages. No change was made after the death of his first wife in the name of the beneficiary, and at his death the amount due by the defendant was claimed by his widow, the plaintiff, and by the administrator of the estate of his first wife, and by his children as dependent heirs. Upon a case stated judgment was entered by the Court for the plaintiff, and this appeal is by the administrator of Louisa A. Fischer.

The American Legion of Honor is a beneficial association, and one of the purposes of its organization is to establish a fund from which upon the death of a member "a sum shall be paid to the family, orphans or dependents as the member may direct." At the time when Charles F. Fischer became a member the by-laws provided: "Sec. 5. In the event of the death of all the beneficiaries selected by the member before the decease of such member, if no other or further disposition thereof be made in accordance with the provisions of sec. 3 of this law, the benefit shall be paid to the dependent heirs of the deceased member, and if no person shall be entitled to receive such benefit by the laws of the order it shall revert to the benefit fund." The by-laws in force at the time of his death provided that "in the event of the death of all the beneficiaries selected by the member, before the decease of such member, if no other or further disposition thereof be made in accordance with the provisions of these by-laws the benefit shall be paid to the widow. If none, then to the heirs of the deceased member, and if no person or persons shall be entitled to receive such benefit it shall revert to the benefit fund."

If the beneficiary first named had a vested interest in the fund payable at the death of her husband her administrator is entitled to recover, otherwise he has no standing. It seems clear that she had no such interest. There is a material and fundamental distinction between philanthropic or beneficial associations, which issue benefit certificates to their members, and life insurance companies, which was pointed out in Commonwealth *v.* Equitable Beneficial Association, 137 Pa. 412, and has since been recognized in Dickinson *v.* A. O. U. W., 159 Pa. 258 and in Lithgow *v.* Supreme Tent, etc., 165 Pa. 292. It appears from the charter and by-laws that the association defendant was organized for social, moral and intellectual purposes and for the relief of sick and distressed members. Insurance is not its only nor its primary object. It limits the persons and classes of persons who may be named as beneficiaries to "the family, orphans or dependents," and provides that in the event of the failure of all such persons or classes of persons the sum due shall revert to the order. The amount secured by the certificate is subject to deductions for relief benefits paid in case of sickness or disability to the member and for his funeral expenses. Where the beneficiary has died the member may name another. These provisions are in entire harmony with the object of the order as a fraternal and beneficial organization, and they are entirely incompatible with the vesting of an interest in the fund in the beneficiary before the death of the member. Such a construction would in many cases by giving the fund to the legal representatives of the beneficiary divert it entirely from the purpose intended by the member and for which the organization was formed.

It was the right of Charles F. Fischer after the death of his first wife to name a new beneficiary within the limits as to persons and classes prescribed. Upon his failure to do so the law of the association fixed the persons to be benefited. Of this law he presumably had knowledge, and his acquiescence in the selection made by it had all the effect of a new appointment by him.

Digitized by Google

The Act of April 15, 1868, P. L. 103, referred to by the appellant, was intended to secure to the wife and children and dependent relatives of the insured, as against his creditors, an insurance taken out or assigned in good faith for their benefit. We do not see that it affects the question involved in this case.

The judgment of the Court of Common Pleas is affirmed. W. D. N.

July, '94, 79. March 11, 1895.

Lilly v. Person et al.

Evidence—Written instrument—Alteration of contract—Building agreement.

If an alteration in a written instrument is material and in the interest of the party producing the writing, it gives rise to a suspicion which it is incumbent upon him to remove.

Where a building agreement contains a provision for a *per diem* forfeit for failure to comply with the terms expressed in the agreement, and the terms of the agreement are varied, even by mutual concession and under the provisions of the agreement itself, it is a question of fact whether or not, under the circumstances, a completion of the work within the time specified was possible, and if it is found not to have been possible the forfeit will not be enforced.

Appeal of Milton J. Person and Edward E. Riegel, from the judgment of the Common Pleas of Northampton County, entered on a verdict in an action of assumpsit wherein William E. Lilly was plaintiff and appellants were defendants.

The facts of the case are sufficiently set forth in the opinion of the Court.

At the trial, the Court, REEDER, J., charged the jury as follows:—

"If you find that the plaintiff's theory is the correct one, and that his bid for $17,880 was handed in, which was afterwards reduced to $17,550, that the $300 was deducted then for the purpose of ascertaining the contract price, and it was so put in the contract at $17,550, then of course they are not entitled to have it credited now. If it was not a mutual mistake, if the defendants did not so intend it and the contract was entered into for $17,550, they understanding and intending that the $300 should be accredited upon the $17,550, no matter what the plaintiff may have understood about it, they are entitled to have that $300 taken as a credit upon the contract price, as stipulated in the contract, $17,550. That is to say, that if you believe that they, by mutual agreement, deducted the $300 before fixing the $17,550 as the contract price, then they have no right to deduct it now."

And in reference to the addition to the contract after execution in relation to the ten-inch increase of the front of the building, "the two subscribing witnesses who were present at the time this contract was signed also testify that Mr. Lilly's attention was called to it, that it was read either in whole or in part, and he said: 'Yes, yes, I understand.' If that testimony is true, then he agreed to build that extension under this contract for the contract price, and cannot recover for it now. If it is not true, and his attention was never called to it, and he never saw it as part of the contract, then it was not part of the contract, and was not included in the contract price, and he would have the right to recover whatever that extension was reasonably worth."

Also, in commenting on the clause in the agreement as to forfeit for delay in completing the contract:—

"I say to you, as a matter of law, that if the finishing of this contract was delayed, necessarily delayed, by the change in the character of the structure by the defendants, then defendants are not entitled to recover any portion of this *per diem* forfeiture for any time beyond the necessary delay. That is to say, that if the defendants changed this front from the original contract, whatever delay was occasioned the plaintiff in the finishing of the building was the defendants' delay as well as the plaintiff's delay, and the defendants would have no right to recover for this forfeiture."

Verdict for plaintiff and judgment thereon. The defendants took this appeal.

The above were made the subjects of the first, second and third assignments of error.

The admission of plaintiff's evidence to prove that there was nothing said at the time the contract was executed of the increase in the frontage of the building, and the admission of testimony to prove that his bid was based upon the original width of the building, were assigned as errors 7th and 8th.

W. S. Kirkpatrick (*L. R. Meyers* with him), for appellants.

"It is not enough in cases of this kind to show the sense and intention of one of the parties to the contract. It must be shown incontrovertibly that the sense and intention of the other party concurred in it; in other words, it must be proved that *both* understood the contract as it is alleged it ought to have been and would have been but for the mistake. It would be the height of injustice to alter a contract on the ground of mistake when the mistake arises from misconception of one of the parties in consequence of his imperfect explanation of his intentions. If it be clearly shown that the intention of one of the parties is mistaken and misrepresented by the written contract, that cannot avail unless it be further shown the other party agreed to it in the same way and that the intention of both of them was by mistake misrepresented by the written contract."

Digitized by Google

Lyman *v.* United Ins. Co., 17 Johns (N. Y.) 373.
Am. & Eng. Encycl. Law, Vol. 15, p. 629.

The parol testimony of either of the parties to a written contract must be corroborated, before a judge, sitting as a chancellor, should submit it to a jury in a proceeding at law.

North and West Branch Railway Co. *v.* Swank, 105 Pa. 555.
Phillips *v.* Meily, 106 Id. 536.

The rule is that a chancellor invariably refuses to decree on the uncorroborated evidence of a single witness.

Brawdy *v.* Brawdy, 7 Pa. 157.
Murray *v.* N. Y. L. & W. R. R. 103 Id. 37.

To set aside a written instrument on the ground of fraud, the evidence thereof must be clear, precise and indubitable, and of that which occurred at the execution of the instrument.

Cummins *v.* Hurlbutt, 92 Pa. 165.
Sylvius *v.* Kosek, 117 Id. 67.
Thorne *v.* Warfflein, 100 Id. 526.

"Every alteration on the face of a written instrument detracts from its credit and renders it suspicious; and this suspicion the party claiming under it is ordinarily held bound to remove. If this alteration is noted in the attestation clause as having been made before the execution of the instrument, it is sufficiently accounted for, and the instrument is relieved from that suspicion."

1 Greenleaf on Evid., sec. 564.
Greenfield's Estate, 14 Pa. 496.
Penn. R. R. *v.* Shay, 82 Id. 202.

W. E. Doster, (*W. C. Loos* with him), for appellee.

Parol testimony is admissible to establish an oral agreement contemporary with a written one.

Thomas & Sons *v.* Loose, 114 Pa. 35.
Walker *v.* France, 112 Id. 210.
Ferguson *v.* Rafferty, 128 Id. 356.

It was competent for plaintiff to show by parol a new and distinct agreement.

McCauley *v.* Keller, 130 Pa. 69.

Where a party to a contract by his acts or defaults renders performance of the contract impossible, or if not wholly impossible, yet imposes such conditions on its execution as to render performance practically impossible, the other party to the contract may treat the same as rescinded.

Seepel *v.* Insurance Co., 84 Pa. 47.

May 20, 1895. FELL, J. Our labor in reviewing the proceedings of a protracted trial involving many complicated questions of law and fact has been materially lessened by the clear and orderly manner in which the case has been presented by counsel.

The plaintiff contracted in writing with the defendants to construct a building for them for $17,550. One of the specifications provided that he should tear down an old building and use such materials in the construction of the new one as were suitable, "the net value of such materials to be reckoned at the amount stated in the contractor's bid, and the said amount to be deducted from the gross contract price." The plaintiff's bid for the new work and for the material of the old building was in writing, but had been lost or destroyed by the defendants, and there was no written evidence of the amount he had agreed to allow for the old material. The dispute upon this branch of the case was whether the agreed allowance for this material had been deducted from the amount of his bid in ascertaining the contract price or whether it should be deducted from the amount named in the agreement. The plaintiff was allowed to testify under objection that his bid was $17,880, and that he wrote below his bid that he allowed $300 for the old building; that he was then told by the defendants that if he would throw off $30 they would give him the contract; that to this he assented, and that the contract was afterwards written and the price named in it, $17,550, arrived at in this way. The issue of fact raised by this testimony and its denial by the defendants' witness was submitted to the jury to determine what the actual agreement as to price was. We find no error in either the manner in which the issue was raised or the manner in which it was submitted.

The action was to recover on the basis of the price named in the contract. The only written evidence fixed that at $17,550. The plaintiff might have rested upon this agreement. As the bid for the work to be done and the old materials to be purchased had been lost the contract was the only written evidence in the case, and if any deduction was to be made parol evidence must of necessity be resorted to. If the defendants had done this either upon the ground that the contract offered was not the whole of the written agreement or that by mistake the amount of the bid for the old materials had not been deducted from the contract price it would have been competent for the plaintiff to have met the claim by oral evidence in rebuttal. As there was nothing in the agreement to bind him to take less than $17,550 his recovery on that basis could be defeated only by proof of matter outside the agreement. It was competent for him to anticipate such a defence and to explain any matter which suggested a doubt as to his claim.

The second ground of defence relates to the claim made by the plaintiff for additional compensation for constructing a building ten inches wider than the plans and specifications provided for. The agreement was signed at the middle

Digitized by Google

of the last page, and witnessed by two witnesses. The attesting clause reads, "Alterations on pages 1 and 2 were made before signing. Also additional on page 6." On the page following, with nothing intervening to call attention to it is written, "The plans and elevations which form part of this agreement are ten inches less than the width of the building is intended to be. In all cases the details will be followed in preference to ⅛″ and ¼″ scale drawing." The half of the page below the signatures was blank, and there was ample room to have written this addition there. The testimony was conflicting as to whether the addition had been made before the agreement was signed and whether the plaintiff's attention had been called to it. The subscribing witnesses testified that it had been made before signing, and that it was read to the plaintiff, and they were corroborated by one of the defendants. The plaintiff denied all knowledge of it, and of any intention on the part of the defendants to construct a wider building, until he had commenced work and was consulted by them as to the additional cost and agreed to the change, the cost being left for adjustment when the work was completed. He was sustained by the corroborating proof that the purchase of the additional strip of ten inches of ground was not made until seven days after the agreement was signed, and that then the architect's attention was first called to the matter and the plans altered. We are concerned with this conflicting testimony only as it gives rise to and affects the legal question involved. The jury was instructed that if the plaintiff did not know of the addition to the contract at the time of signing and was deceived because of the place in which it was written, he was not bound by it. The contract remained in the possession of the defendants from the date of its execution until it was produced at the trial, and during that time was not seen by the plaintiff.

Any alteration of a written instrument detracts from its credit. If the alteration is material and in the interest of the person producing the writing, it gives rise to a suspicion which it is incumbent upon him to remove. An alteration may ordinarily be sufficiently explained by the fact that it is noted in the attestation as having been made before the execution, as this virtually incorporates it in the text. "But if any ground of suspicion is apparent on the face of the instrument the law presumes nothing, but leaves the question of time when it was done, as well as that of the person by whom and the intention with which the alteration was made, as matters of fact to be ultimately found by the jury upon proof to be adduced by the party offering the instrument in evidence:" Greenleaf on Evidence, Vol. 1, 564; Jordan *v.* Stewart, 23 Pa. 244. The addition in this case was after the signatures. It was not written on the same page with them, although there was ample room, half of the page being blank. It was written at the top of the following page, where it would not ordinarily be observed. The plaintiff is presumed to have read all that preceded his signature, but there is no presumption that he read what followed it on another sheet. The testimony on this branch of the case raised an issue which was properly submitted to the jury.

The contract provided that the builder should forfeit $10 for each day that the building remained unfinished after the time fixed by the agreement for its completion. It also provided that any change in the plans "either in quantity or quality of the work" should be executed by the plaintiff "without holding the contract as violated or void in any other respect." During the progress of the work a change was made in the material for the front of the building from brick and granite to Indiana stone with carved panels and frieze. The difficulty in procuring a prompt delivery of the stone caused a delay in finishing the building, and the defendants claimed to recoup the stipulated forfeit and set-off the loss of rents. By the agreement the defendants reserved the right at any time during the progress of the work to make any alterations in the plans and specifications, and it became the duty of the plaintiff to carry them into effect. The provision that the changed plans should be executed without holding the contract as violated or void in any other respect should be read in connection with this reserved right. The words "in any other respect" exclude the implication of any change in terms except such as would result from the alteration of the plans, but not such changes as would be the necessary consequence thereof. Alterations calling for more work and materials, or work and materials of a different class, might of necessity require more time for the completion of the building. They might be directed so near the end of the work as to make it impossible to complete the building within the time stipulated. In this case the building was in Bethlehem, and the material fixed for the front by the contract could be purchased in an open market and delivered ready for use in one day. The stone required by the alteration could be procured only at the quarries in Indiana, where an order had to await its turn, and after delivery it required weeks of skilled labor to fit it for use in the building. For such delay in the completion of the building as was the necessary consequence of the change of plans by the defendants the plaintiff was not answerable, and for it no forfeiture could be exacted.

The judgment is affirmed. W. D. N.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, JULY 12, 1895.* [No. 22.

Supreme Court.

July, '94, 109. February 12, 1895.

Evans et al. v. Township of Willistown.

Art. III., sec. 3, Constitution—Acts of June 9, 1891, June 19, 1891, and June 10, 1893—Constitutional law—Increase of township indebtedness—Defective title to Act.

The title of the Act of June 10, 1893, viz.: "An Act to regulate the nomination and election of public officers, requiring certain expenses incident thereto to be paid by the several counties and punishing certain offences in regard to such elections," expresses nothing which carries notice in any way of the intention to include the subject of the increase of municipal indebtedness, and so much of that Act as relates to elections other than those for public officers is unconstitutional.

The Act of June 19, 1891, is defective for the same reason; neither of these Acts meets the requirements of sec. 3, Art. III., of the Constitution.

The special election for the increase of the indebtedness of a township or other municipality is governed by the Act of June 9, 1891 (P. L. 252), the clauses in the Acts of June 19, 1891, and June 10, 1893, inconsistent with said Act, being unconstitutional.

Appeal of William Evans *et al.*, freeholders, residents and taxpayers of the Township of Willistown, from the decree of the Common Pleas of Chester County, sustaining a demurrer of the township and supervisors.

This was a bill in equity by taxpayers for an injunction to restrain the defendants from increasing the debt of the Township of Willistown, Chester County, Pennsylvania, by the sum of $40,000 in pursuance of an election which purported to authorize such increase. It was alleged that said election was illegal in that the question being voted on was not printed on the official ballot prescribed by law, but on separate ballots. The defendants demurred. The Court sustained the demurrer and dismissed the bill.

Plaintiffs appealed, assigning for error this action of the Court.

J. Frank E. Hause, for appellants.

The single question is whether a special election for the increase of the indebtedness of a township is covered by the Ballot Act of 1893. The question has been decided in—

Ripple *v.* Lackawanna Co., 146 Pa. 532.

The ballot law of 1893 is entirely inconsistent, on the question here involved, with the Act of June 9, 1891, amending the Act of April 20, 1874. The last section of the ballot law of 1893 expressly repeals all laws and parts of laws inconsistent therewith. Even in the absence of this provision, the two laws are so repugnant that on the point involved they cannot stand together.

All Acts of Assembly are to be construed if possible so as to avoid violating the Constitution.

If the Act of 1893 did not contain the provision that the question voted on should be printed on the official ballot, it would be most clearly unconstitutional. The result would be that at one election, as, for instance, an election to increase debt, one kind of ballot would be used—that indicated in the Act of June 9, 1891 (P. L. 254), while at an election for public officers the form of ballot would be that indicated in the Act of 1893. Here would be a clear lack of uniformity, while the seventh section of Article VIII. of the Constitution of 1874 provides as follows:

"All laws regulating the holding of elections by the citizens . . . shall be uniform."

Patterson *v.* Barlow, 60 Pa. 75.
Wright *v.* Barber, 5 WEEKLY NOTES, 444.

The Act is mandatory in requiring any question submitted to the people to be printed on the official ballot. The language of the Act is that the question "shall be printed upon the ballots."

Cusick's Election, 26 WEEKLY NOTES, 425.

Thomas W. Pierce, for appellees.

The election was held in conformity with the provisions of the Act of June 9, 1891, amendatory of Act of April 20, 1874, the latter being passed to carry out sec. 8, Art. IX. of Constitution.

The Act of June 10, 1893, does not repeal the Act of June 9, 1891, and to constitute a repeal by implication there must be a manifest and total repugnancy.

Sifred *v.* Comth., 104 Pa. 179.
Homer *v.* Comth., 106 Id. 221.

The expression "other question" in the fourteenth section furnishes the only ground for the statement that the Act of 1893 has application to the kind of election held in this case.

It is submitted that that expression does not furnish a substitute for the Act of 1891, under which this election was held, or make the Act of 1893 apply to such elections.

If the Act of 1893 has application to such an election as this, the Act violates the third section of Art. III. of the Constitution, in that the title

Digitized by Google

of the Act does not clearly express the subject of the law.

If this Act was to apply to and repeal the provisions for the class of elections provided for in the Act of 1891, the title does not fairly give notice of such subject and would be calculated to mislead inquiry.

Allegheny Co. Home's App., 77 Pa. 77.

May 30, 1895. MITCHELL, J. The Act of June 9, 1891, P. L. 252, is clearly repealed by the Act of June 10, 1893, P. L. 419, if the latter is valid. The provisions of the two are irreconcilable. The Act of 1891, requires the voter to express his wishes on the proposed increase of municipal debt upon a separate ballot marked on the outside "increase (? of) the debt" and having on the inside, written or printed, "no increase of debt" or "debt may be increased" and these ballots to be deposited in a special and separate box, as was then provided by law for elections in general. The Act of 1893 on the other hand requires the voter on the same question to use the one official ballot prescribed by the Act on which the question is to be "printed in a brief form" below the lists of candidates and followed by the words "yes" and "no." If these two methods apply to the same elections they are obviously irreconcilable. The language of the Act of 1893 in section 14 is, "whenever the approval of a constitutional amendment or other question is submitted to the vote of the people, such question shall be printed upon the ballots," etc., as above quoted. The learned Judge below was of opinion that the words "other question" were so controlled by their association with the words "approval of a constitutional amendment" that they must be confined to those questions which are submitted to the same electoral body, *i. e.* the people of the whole State, and that questions which only go before the electors of a subordinate municipality were therefore not included. We are unable to adopt this view. Passing by the fact that there are no other such questions and the Legislature cannot be presumed to have made express provision for a class of cases that does not exist, this construction requires the insertion in the Act of the words "other such question submitted to the vote of the whole people of the State," or some equivalent phrase. There is no warrant for such addition to the language actually used. The words "other question" mean matter on which the electors are to express their will, other than the election of officers. The clause has reference to the nature of the subject before the people, not to the particular body of electors who are to decide it, and the words "other question" are used in contradistinction to the choice of candidates for office which is the main subject of the Act. They include all questions, whether State or local, which are submitted by referendum, to the direct vote and decision of the electors either of the State at large, or of a particular locality.

But it is objected that notwithstanding the repugnancy of the two statutes on this point, the Act of 1891 is not repealed because the Act of 1893 is unconstitutional in that its title gives no notice or indication of this subject. This objection we are obliged to sustain. The Act of 1893 is entitled "An Act to regulate the nomination and election of public officers, requiring certain expenses incident thereto to be paid by the several counties and punishing certain offences in regard to such elections." This title except for the omission of a few words requiring certain expenses to be paid by the Commonwealth, is an exact duplication of the title of the Act of June 19, 1891, P. L. 349, which is repeated, amended and supplied by the Act of 1893. The title restricts the subject of the Act to elections of "public officers," and expresses nothing which carries notice in any way of an intention to include the subject of the increase of municipal indebtedness. This subject had been expressly and elaborately legislated upon by the Act of June 9, 1891, and those interested therein would hardly suppose that the specific provisions for the mode of ascertaining the people's will on those questions, would be wholly changed by another Act only ten days later. At any rate they, and the members of the Legislature themselves, were entitled by the Constitution to notice in the title of the statute that it proposed to deal with that subject. The Acts of June 19, 1891, and June 10, 1893, are equally defective in not meeting the requirements of sec. 3, Art. III., of the Constitution. The specification in the title of the Act of 1893 that it was an Act for the regulation of the nomination and election of public officers, not only failed to express the intention to regulate the mode of voting on questions of the increase of municipal indebtedness, but tended to the impression that that subject was not included. The title therefore was not only insufficient, but misleading: Union Pass. R. W.'s App., 81* Pa. 91; Phila. *v.* Market Co., 161 Pa. 522. So much, therefore, of the Act as relates to elections other than those for public officers must be declared unconstitutional. As this strikes out that part of section 14 which makes the conflict with the Act of June 9, 1891, it follows that the latter Act is not repealed, and the election was properly held under its provisions.

Though we have not reached it by the same pathway we concur in the conclusion of the learned Court below.

Judgment affirmed. W. M. S., Jr.

Digitized by Google

Jan. '94, 458. January 10, 1895.

The Fidelity Insurance, Trust and Safe Deposit Company, Guardian, etc., v. The Commonwealth Title Insurance and Trust Company.

Foreign attachment — Contract — Stakeholder, rights of—Practice.

Land in the possession of A. as guardian of X. was attached by C. in foreign attachment proceedings as the property of Y. Pending the attachment A. sold the property under an agreement with the purchaser and C. that the purchase money should be deposited with B. to hold until C. should recover judgment and establish that the property was subject to the attachment, and if C. failed to establish this then B. was to pay the money back to A.

In a suit by A. against B. to recover this fund:

Held, 1. A. could not recover until the attachment proceedings terminated; the mere fact that C. allowed thirteen years to elapse without further proceedings in the attachment gave A. no right to sue.

2. Ordinarily A. would have no right to intermeddle with the attachment proceedings, but by the agreement C. recognized A.'s interest in the land, and A. was authorized to intervene. The proper course for A. to pursue is to bring a bill in equity or take a rule to intervene in the attachment proceedings and compel C. to go on or be nonsuited.

Appeal of the Fidelity Insurance, Trust and Safe Deposit Company, from the judgment of Common Pleas No. 3, of Philadelphia, refusing to take off a non-suit.

On the trial the facts appeared as follows:—

On April 4, 1884, James Watt brought an action of foreign attachment against Dennis McCauley, to Court of Common Pleas No. 2, June Term, 1884, No. 24, and attached certain real estate in the county of Philadelphia.

James Watt subsequently died, and letters testamentary upon his estate were granted to the Pennsylvania Company for Insurances on Lives and Granting Annuities, who were substituted as plaintiffs of record in the foreign attachment.

Prior to the issuance of the writ of foreign attachment, Dennis McCauley, the defendant, had granted and conveyed in fee, certain of the attached premises to Mary Ann Pearson by deed dated February 4, 1884.

Mary Ann Pearson died December 26, 1885, leaving her surviving her husband, Robert W. Pearson, and one son, Dennis McCauley Pearson, a minor.

The Fidelity Insurance, Trust and Safe Deposit Company was appointed guardian of the estate of Dennis McCauley Pearson, and Robert W. Pearson conveyed to them his interest in the premises, upon certain trusts, by deed dated August 25, 1888, and duly recorded.

The Fidelity Insurance, Trust and Safe Deposit Company in 1888 sold the premises for $2,000, and in order to obtain a release of the attachment so as to give a clear title to the premises, entered into an agreement with the Pennsylvania Company for Insurances on Lives and Granting Annuities and the purchasers by which the amount of the purchase money, less taxes, was paid into the hands of the Commonwealth Title Insurance and Trust Company as stakeholder.

This agreement, which is in writing, was executed on December 10, 1888. After reciting the facts, it proceeds:—

"And Whereas, The said The Pennsylvania Company for Insurances on Lives and Granting Annuities, executors as aforesaid, have been requested to release the said lot or piece of ground from the lien and operation of the said foreign attachment, and they are willing so to do, provided the Fidelity Insurance, Trust and Safe Deposit Company, guardian and trustee, as aforesaid, deposit with the Commonwealth Title Insurance and Trust Company the said purchase money of $2,000, until the question of the liability of the lot or piece of ground hereinabove described to be taken in execution in satisfaction of any judgment which may be obtained against the said Dennis McCauley in the aforesaid action of foreign attachment shall have been determined:—

"And Whereas, The said sum of $2,000 purchase money as aforesaid has been deposited with the said The Commonwealth Title Insurance and Trust Company;

"*Now this Agreement Witnesseth*, That if the said The Pennsylvania Company for Insurances on Lives and Granting Annuities, executors as aforesaid, should hereafter recover a judgment in the aforesaid action of foreign attachment against the said Dennis McCauley, and if the said The Pennsylvania Company for Insurances on Lives and Granting Annuities, executors as aforesaid, shall establish that notwithstanding the above-recited conveyance from the said Dennis McCauley to the said Mary Ann Pearson, the lot or piece of ground hereinabove described is liable to be taken in execution in satisfaction of any judgment which may be obtained in the aforesaid action of foreign attachment against the said Dennis McCauley, then and in such case the judgment so obtained by the Pennsylvania Company for Insurances on Lives and Granting Annuities, executors as aforesaid, shall be payable out of the $2,000 consideration money aforesaid deposited with the Commonwealth Title Insurance and Trust Company. And it is also understood between the parties hereto that the Fidelity Insurance, Trust and Safe Deposit Company, guardian and trustee as aforesaid, may apply to the Court wherein said action of foreign attachment is pending to quash

Digitized by Google

the aforesaid writ of foreign attachment, on the ground that the lot hereinabove described and attached in said writ was not the property of the said Dennis McCauley at the time of the issuing of the aforesaid writ, and that the said writ was unlawfully and improvidently issued.

"And in case the Fidelity Insurance, Trust and Safe Deposit Company, trustee and guardian as aforesaid, shall succeed in quashing the aforesaid writ, or in case after judgment obtained by the Pennsylvania Company for Insurances on Lives and Granting Annuities, executors as aforesaid, against the said Dennis McCauley, the said The Pennsylvania Company for Insurances on Lives and Granting Annuities, executors as aforesaid, shall fail to establish that notwithstanding the aforesaid deed from Dennis McCauley to Mary Ann Pearson, the lot or piece of ground hereinabove described is liable to be taken in execution in satisfaction of said judgment, then and in either of said cases the said $2,000 consideration money aforesaid, deposited with the Commonwealth Title Insurance and Trust Company, shall be paid back to the Fidelity Insurance, Trust and Safe Deposit Company, trustee and guardian aforesaid, freed and discharged from any liability, to be appropriated and applied in satisfaction of any such judgment, the said writ of foreign attachment notwithstanding."

Thereupon the premises were released from the lien of the attachment.

The Commonwealth Title Insurance and Trust Company on December 22, 1888, gave a certificate of deposit for the net amount paid to it under this agreement, providing that the same was—

"To be held under the provisions of the agreement of trust No. 158, between the Pennsylvania Company and said Fidelity Company, dated December 10, 1888, interest at the rate of two per cent. to be allowed upon said fund, and the company's charge of twenty-five dollars for insurance against the attachment mentioned in said agreement to be deducted."

On November 17, 1891, the Fidelity Company brought the present action in Court of Common Pleas No. 3, against the Commonwealth Title Insurance and Trust Company in which the Pennsylvania Company was not joined, to procure the payment to plaintiff of the amount of the deposit, setting forth that under the agreement of December 10, 1888, the Pennsylvania Company, the substituted plaintiffs in the foreign attachment proceeding, were bound *within a reasonable time* to establish their right to attach the premises, and that having failed to do so, the Commonwealth Title Company was bound to pay the fund deposited with it as stakeholder to the Fidelity Company.

The affidavit of defence set out that the parties necessary to a valid judgment in favor of the Fidelity Company were not before the Court, and that no judgment could be entered against the defendant in this action which would validly dispose of the fund, in the absence of other parties. The affidavit also set forth a further defence upon the merits, which is not material in the present appeal.

The learned trial Judge directed a non-suit, which the Court in banc refused to take off.

Whereupon this appeal was taken, assigning for error this action of the Court.

Charles Hart, (*Robert N. Simpers* with him), for appellant.

The Commonwealth Company became a party to the agreement, by its acceptance of the position of stakeholder.

Grove *v.* Hodge, 55 Pa. 515.

No time being mentioned within which the Pennsylvania Company should proceed with their attachment, the presumption of law is that the parties intended and agreed that it should be done in a reasonable time—and what is a reasonable time is a question of law for the Court.

Parsons on Contracts, 650 (8th ed.)

The Commonwealth Company, if they believe there was any valid excuse for the delay of 13 years, should have asked the Court to make an order requiring the Fidelity Company and the Pennsylvania Company to interplead.

John G. Johnson, (*James Wilson Bayard* with him), for appellee.

March 11, 1895. MITCHELL, J. This suit was prematurely brought. The defendant is a stakeholder, and only liable to plaintiff on certain conditions which have not been performed. These conditions, so far as they authorize payment of the stake to the plaintiff, are that plaintiff shall succeed in getting the Court wherein the attachment by the Pennsylvania Company for Insurances on Lives, etc., against the land is pending, to quash the attachment, or that after judgment obtained by the Pennsylvania Company it shall fail to establish the liability of the land to be attached or taken in execution thereon. Neither of these conditions has been fulfilled. It is argued by appellant that the Pennsylvania Company having allowed thirteen years to elapse without doing anything must be deemed to have failed to establish the liability of the land to the attachment. But this argument overlooks the right of the Pennsylvania Company to a hearing. The attachment suit is still pending and may yet result in favor of the Pennsylvania Company, and notwithstanding the lapse of so long a time the latter cannot be adjudged to have

Digitized by Google

failed until that suit has been heard and determined.

The appellant, however, is substantially correct in its interpretation of the agreement on which the rights of the parties rest. As a stranger to the attachment suit the plaintiff had no standing to intermeddle with it, or to require the Pennsylvania Company to do anything with regard to it. But by the agreement of December, 1888, the Pennsylvania Company recognized plaintiff's interest in the land and in the litigation, and having agreed to the substitution of the plaintiff's money for the land, has subjected itself to certain duties to the plaintiff, one of which is to go on and bring the attachment to an end. It was not in the contemplation of the parties that the Pennsylvania Company should do nothing, and simply keep the plaintiff's money tied up in the deposit, with no benefit to either. The agreement authorizes the plaintiff to intervene in the attachment and move for its dissolution, and on the other hand puts on the Pennsylvania Company the duty of prosecuting its attachment to a successful termination by the establishment of the liability of the land.

Appellant's only mistake was in proceeding in the first instance against the stakeholder, and not against the Pennsylvania Company under the agreement. This it might do by bill in equity, or by a rule in the attachment suit to intervene and compel the plaintiff therein to go on or be non-suited. So far as the case now appears, the equity powers of the Court in which the attachment is pending are sufficient to afford relief by rule, and the plaintiff has standing to invoke them by virtue of its rights under the agreement. After that suit is determined in its favor and the conditions of the agreement thereby fulfilled, the plaintiff will be in position to demand the surrender of the fund by the present defendant.

Judgment affirmed. W. M. S., Jr.

Jan. '94, 123. March 4, 1895.

Grohmann v. Kirschman.

Trespass—Malicious prosecution—Barratry—Evidence—Probable cause—Act 21st March, 1772, 1 Sm. L. 365.

In the trial of an action of malicious prosecution or false arrest, a verdict of guilty is strong *prima facie* evidence of probable cause, but it may be rebutted by proof that it was obtained by corrupt or undue means; the effect to be given to a verdict of acquittal depends upon the circumstances under which it was rendered.

It is competent for the plaintiff to prove his acquittal, and the proper means to do this is by the record of the Court of trial.

It is error to admit testimony as to the remarks of the Judge in directing an acquittal in the Court of Quarter Sessions.

Appeal of Edward C. Kirschman, from the judgment of the Common Pleas of Berks County, entered on a verdict in an action of trespass wherein Friederich Wilhelm Erdman Grohmann, by his next friend Jacob A. Wolff was plaintiff, and appellant defendant.

On the trial of the cause the facts appeared as follows: The plaintiff had instigated prosecutions against two persons for maintaining disorderly houses and selling liquor unlawfully, which prosecutions had been dismissed.

The defendant was an alderman of the City of Reading, and upon the discharge of the aforesaid two persons caused information to be made of the plaintiff's action and a warrant of arrest was delivered to a constable charging plaintiff with barratry, which was executed and plaintiff was committed by defendant, who at the hearing declined to accept bail.

At the trial of the case in the Quarter Sessions, after the evidence was given the Court directed a verdict of acquittal and a judgment for costs against the prosecution.

The plaintiff, under objection and exception, proved that the notice under the Act of 21st March, 1772, which provides that in such an action as this thirty days' notice must be served upon the defendant of intention to bring suit, and also that:

"No such plaintiff shall recover any verdict against such justice, in any case where the action shall be grounded on an act of the defendant, as justice of the peace, unless it is proved upon the trial of such action that such notice was given as aforesaid; but in default thereof such justice shall recover a verdict and costs as aforesaid,"

had actually been made within the requisite time, although there was no proof of service of record.

The Court also admitted as evidence the testimony of one of the audience in the Quarter Sessions at the trial of the case which was the basis of this action, as to the remarks of the Judge when he directed the jury to acquit the plaintiff.

Defendant objected to this. Objection was overruled. (Second assignment of error.)

The Court, Endlich, J., charged the jury as follows:—

"The plaintiff claims that the defendant, occupying the position of alderman in the City of Reading, abused the powers conferred upon him by the laws of this State, by causing the plaintiff to be arrested upon a charge which the defendant knew to be baseless, or at least, had no reasonable grounds for believing to be true, and

Digitized by Google

after the defendant's arrest, by refusing him an opportunity to obtain bail and confining him in the Berks County prison.

"If the jury are satisfied, from a fair preponderance of the evidence, that both, or either, of these allegations are true, then the plaintiff is entitled to recover. In other words, if the jury believe, from a fair preponderance of the evidence, that the defendant, Kirschman, instituted this prosecution knowing it to be baseless, or having no reasonable ground for believing it to be true, or if the jury believe, from a fair preponderance of the evidence, that the defendant, Kirschman, when the plaintiff was arrested and brought before him, refused, or threw obstacles in the way of his obtaining bail, and committed him to the prison without the opportunity of obtaining bail, in either of these cases, and in both of these cases, the verdict of the jury will have to be in favor of the plaintiff." (Third assignment of error.)

And further that "If you believe, from the evidence, that he instigated this prosecution, or refused bail, because of a personal ill-will, or because of any sinister motive towards this plaintiff, then you may find for the latter not only such damages as will compensate him for the injuries he has sustained, but such damages as will punish the defendant for an act so grossly in violation of his duties." (Fourth assignment of error.)

Verdict for plaintiff in $341.91 and judgment thereon. The defendant appealed and assigned as error the admission of the testimony and the instruction to the jury above indicated.

C. H. Ruhl, (*Ermentrout* with him), for appellant.

"The Act of March 21, 1772, was made to prescribe a certain requisite in such cases as this; it requires a notice where the act was done in execution of his office; it does not discriminate between mistake, malice or fraud. It provides a certain rule. If we leave this, the Court or the jury must make the rule; and this would result in anything but a certain or uniform rule."

Wise *et al.* *v.* Wills, 2 Rawle, 210.

"Where indeed the act done is entirely foreign to the magistrate's jurisdiction, nothing can give it official color; but where he has a general jurisdiction over the subject matter, and intended to act as a magistrate, he will be entitled to all the benefit which the Act of Assembly secures to him in any case."

Jones *v.* Hughes, 5 S. & R. 301.
Com'th *v.* Frailey, 69 Pa. 260.

In computing the time from the date of such service to the date upon which suit is brought, the rule of the common law as to computation of time applies. This rule includes the first, and excludes the last day.

Cromelien *v.* Brink, 29 Pa. 524.
Thomas *v.* Afflick, 16 Id. 14.

The record of the Court of Quarter Sessions was the only and sufficient proof of the trial and its result. The testimony of what the trial Judge said is inadmissible.

False imprisonment is a trespass, and lies where one is apprehended upon a criminal proceeding, which is based upon a charge not criminal, for which the person apprehended is not amenable to the law. Such process is void, and he who institutes, he who issues, as well as he who subsequently acts under such process are trespassers *ab initio*; hence the action before the procedure Act of 1887, was trespass, and not case.

Kramer *v.* Lott, 50 Pa. 496.
Cooley on Torts, 419.

Want of probable cause must be alleged in the *narr.*

Emerson *v.* Cochrane, 111 Pa. 619.

H. P. Keiser, (*W. B. Bechtel* with him), for appellee.

May 20, 1895. FELL, J. Upon the trial of an action for false imprisonment testimony was admitted for the plaintiff to show what had been said by the trial Judge in the Quarter Sessions in submitting the case to the jury. The offer was to prove want of probable cause, and that the prosecution was groundless. The testimony was to the effect that the Judge directed a verdict of acquittal and instructed the jury to hold the prosecutor liable for costs.

It was competent for the plaintiff to prove that the prosecution was ended, and that he had been acquitted of the charge. This was properly shown by the record of the trial, and the plaintiff had the advantage of all the legal consequences of his acquittal.

A verdict of guilty is evidence of probable cause. A verdict of acquittal is evidence, though it may be slight, of the want of probable cause. Courts have differed as to the conclusive effect of conviction. The true principle seems to be that in the trial of an action of malicious prosecution or false arrest, a verdict of guilty is strong *prima facie* evidence of probable cause, but it may be rebutted by proof that it was obtained by corrupt or undue means: Munns *v.* Dupont, 1 Am. Leading Cases, 217. The effect to be given to a verdict of acquittal has been made to depend upon the circumstances under which it was rendered. Deliberation by the jury has been held to be evidence of probable cause: Greenleaf on Evidence, Vol. 2, sec. 457. A verdict

Digitized by Google

of acquittal rendered promptly and without hesitation has been decided to have additional weight as evidence of the want of probable cause. In our cases proof of a verdict of acquittal has been allowed for the purpose of showing that the prosecution was ended, and ended in favor of the plaintiff, thus establishing the right of action and the basis for recovery in damages. The result of any inquiry behind the fact of the verdict would seem to rest upon very unsatisfactory and unsafe ground. The hesitation of the jury to acquit might be evidence that there were indications of guilt, but it would be of no value unless it clearly appeared that the hesitation was upon the evidence. The prompt action of the jury upon the evidence throws no light upon the real question in issue, whether the prosecutor had reasonable cause on existing facts then known to him. The inquiry as to probable cause goes back to the commencement of the prosecution, and it relates to the facts then known and as they then appeared. It is not confined to the truth of matters which led to the prosecution, but extends to their appearance as indicating the guilt or innocence of the accused. The jury in the criminal Court deals with the question of actual guilt as it appears at the trial, not with the indications of guilt as they appeared at the time of the arrest.

The plaintiff in this case went a step further, and under objection offered testimony of what the Judge said at the trial in the Quarter Sessions. The remarks of the trial Judge were directed to the question of actual guilt as it appeared after a full investigation and after hearing the testimony of both sides. They were passed upon a state of facts different from those which led to the arrest, and related to the grounds for conviction or acquittal. We are of opinion that this testimony should have been excluded.

The second assignment of error is sustained. The remaining assignments are sufficiently answered in the able opinion of the learned Judge of the Common Pleas.

The judgment is reversed with a venire de novo.

W. D. N.

Jan. '94, 242. May 1, 1894.

Fillman v. Ryon.

Trespass—Pleading — Amendments — Conspiracy—"Probable cause"—False imprisonment.

A declaration in trespass may be amended six years after the right of action accrues, if no new cause of action is introduced by the amendment.

When the gist of an action is extortion of money and the statement charges the extortion as brought about by a conspiracy, an amendment striking out the charge of conspiracy does not change the cause of action.

A plaintiff may recover against one of two or more defendants where conspiracy is alleged if the wrongful act could have been committed by that one.

To constitute duress by imprisonment the latter must be unlawful, and it is unlawful, even where a person is arrested under a legal warrant, executed by a proper officer, if one of the objects of the arrest was to extort money or enforce the settlement of a civil claim.

The surrender of any property by the prisoner by reason of his arrest under such circumstances is void.

Prough *v.* Entriken, 11 Pa. 85; Schofield *v.* Ferrers, 47 Id. 194; Schmidt *v.* Weidman, 63 Id. 173; Mayer *v.* Walter, 64 Id. 285; Laverty *v.* Vanarsdale, 65 Id. 507; Work's Appeal, 59 Id. 445, and Collins *v.* Cronin, 117 Id. 35, followed.

Appeal of John S. Ryon, from the judgment of the Common Pleas of Tioga County, entered on the report of a referee, in an action of trespass, wherein appellant, together with Lewis W. Fenton and Charles C. Ward, was defendant, and Andrew J. Fillman, plaintiff.

The statement of claim in this case was filed August 27, 1888, and alleged that on April 3, 1886, plaintiff was taken into custody by the defendant Fenton, a constable at Elkland, on a warrant issued by the defendant Ward, a justice of the peace, charging plaintiff with embezzlement, and that when plaintiff was arrested the three defendants induced him to pay the defendant Ryon a sum of money and to agree to pay him a further sum. On December 17, 1892, by leave of Court an amended statement was filed omitting an allegation of conspiracy between the defendants. Defendants pleaded "not guilty," and the statute of limitations. Under the Act of Assembly February 23, 1870, P. L. 219, the case was referred to S. F. Channell, Esq., who found the facts as follows:—

"For about four years prior to April 3, 1886, the plaintiff, A. J. Fillman, was in the employ of John S. Ryon, one of the defendants, in conducting for him a store and market at Elkland, Pa.

"At about that date the plaintiff and said Ryon settled, and they agreed there was due plaintiff from said Ryon for such service, the sum of $373.55, and said Ryon paid plaintiff that day to apply thereon $100, and on the 21st day of the same month paid him another $100 to apply thereon, and also gave him his due bill for the balance of about $173.

"On April 23d of the same month, the said Ryon, defendant, made an information before C. C. Ward, Esq., then a justice of the peace at Elkland, Pa., and one of the defendants in this case, in which he charged the plaintiff, un-

Digitized by Google

der the 107th section of the Act of March, 1860, with having, while in his employ, as above stated, feloniously taken from him money, upon which information he procured the said C. C. Ward to issue a criminal warrant for the arrest of the plaintiff, and by him it was delivered to L. W. Fenton, then a constable at Elkland, and now one of the defendants in this case, for execution.

"Upon this warrant the said Fenton arrested the plaintiff and took him to the office of the said justice, which was also the office of the said Ryon, at about ten thirty o'clock in the forenoon. There they found the said justice and the defendant Ryon and two or three other persons.

"Soon after the plaintiff was brought in, the justice inquired of him if he desired an attorney, and said to him that if he desired one he was entitled to time to get one. The plaintiff failed to signify a desire for an attorney, and the justice read the information to him, explaining that it was a somewhat serious charge, and inquired if he was guilty, to which he responded that he was not.

"Soon thereafter the justice left the office, and as soon as he left, or a little before, the outside door of the office was locked, but by whose suggestion it is not certain, and a little before the justice left, the said Fenton suggested to the plaintiff that he knew whether he was guilty or not, and that if he was he ought to settle the matter, but he advised him not to pay anything if he was not guilty. From that time the said Fenton, Fillman and Ryon entered into a general discussion of the matter, which, however, largely related to how much the plaintiff should pay to the said Ryon. Ryon at first demanded of plaintiff $500, then offered to take $400, and finally accepted $200 in money and the due bill which he had given plaintiff for $170.50, he being assured that that was all the plaintiff could raise.

"Mr. Ryon stated once or twice while the conversation was being had that he could not settle the criminal prosecution, that the law would not allow him to do so, and also, soon after the plaintiff was brought in, made some statement in the nature of a threat and about his ability to send him to the penitentiary. After this had been done, and the plaintiff had signed a receipt to said Ryon in full of all demands, he was allowed his liberty at about twelve o'clock. As the parties separated it was suggested by some one of them that what had there occurred should be kept quiet.

"At one o'clock the justice returned to his office and found the defendant, Ryon, there, and he then directed the justice to enter upon his docket record of the case that 'the prosecutor not appearing the defendant is discharged,' which was accordingly done."

The referee found that there was probable cause for the arrest.

He also found "that the prosecution was commenced by the defendant Ryon for the purpose of extorting money from the plaintiff, and that the money and due-bill was paid and returned to said defendant by plaintiff under the compulsion of said prosecution, as managed by defendant, and to be relieved therefrom; that there was such an abuse of legal process by the defendant as to constitute duress, and that the money and due-bill which was obtained by said Ryon from plaintiff was obtained by duress of his person."

From these facts the referee found the following conclusions of law:—

"First. As to the question reserved on the admission of evidence offered for the purpose of showing probable and actual cause, the referee now rules that under the facts of this case such evidence was immaterial.

"Second. As to the question reserved as to the admission of the defendant to testify as to his belief in the guilt of the plaintiff as to the matters charged against him, the referee now holds that such evidence was incompetent. . . .

"Third. The referee finds that this action is properly brought in trespass. . . .

"Fourth. The referee does not find that the amended narr. in this case works such a change in the cause of action as to let in the bar of the statute of limitation. The change is mainly in the statement of the mode by which the injury was effected.

"Fifth. The referee finds from the facts that the plaintiff is entitled to recover from the defendant John S. Ryon the sum of three hundred and seventy dollars and fifty cents and interest thereon since April 23, 1886, and he finds no cause of action as to the other defendants, C. C. Ward and L. W. Fenton."

Exceptions were taken which were dismissed by the Court and judgment entered in accordance with the report.

Ryon took this appeal and assigned as error, *inter alia*, the finding that the amended statement did not change the cause of action (2d, 6th and 9th assignments of error); that the referee refused to find that probable cause for arrest having been shown the plaintiff could not recover (1st and 3d assignments).

James Ryon, (*R. K. Young* and *George W. Merrick* with him), for appellant.

The discharge of the prisoner on hearing raises only a presumption that the prosecution was without probable cause.

Smith *v.* Ege, 52 Pa. 419.
Bernar *v.* Dunlap, 94 Id. 329.
Madison *v.* R. R. Co., 147 Id. 509.

Digitized by Google

Plaintiff must aver and prove malice to recover.

Emerson *v.* Cochran, 111 Pa. 619.
Norcross *v.* Otis, 152 Id. 481.

An amendment which makes a substantial change in the cause or ground of action, especially if it will deprive the opposite party of a defence under the statute of limitations, is error.

Royse *v.* May, 93 Pa. 454.
Furst *v.* Association, 128 Id. 183.
Fairchild *v.* Dunbar Co., Id. 485.
Winder *v.* Northampton Bank, 2 Barr, 446.
Reitzel *v.* Franklin, 5 W. & S. 33.
Newall *v.* Jenkins, 26 Pa. 159.

The cause of action arose by the finding of fact, April 23, 1886, and the declaration was amended December 17, 1892, more than six years thereafter. In amending the record we understand the practice to be that if the amendment raises the question of limitations, it is allowed as of course without exception, and the question is raised after the evidence is in on prayers for instructions or conclusions of law as to its effect.

Kaul *v.* Lawrence, 73 Pa. 410.
Leeds *v.* Lockwood, 84 Id. 70.
Tyrell *v.* Lamb, 96 Id. 464.
Seipel *v.* Extension Co., 126 Id. 425.

Jerome B. Niles (*John T. Gear, Aaron R.* and *Alfred J. Niles* with him), for appellee.

Any amendment to a statement of claim in trespass or assumpsit will be permitted that does not change the cause of action.

Caldwell *v.* Remington, 2 Wharton, 131.
Smith *v.* Bellows, 77 Pa. 441.
Wilhelm's Appeal, 79 Id. 120.
Proper *v.* Luce, 3 P. & W. 65.
Clymer *v.* Thomas, 7 S. & R. 178.
Coxe *v.* Tilghman, 1 Wharton, 290.

Money or property improperly received or unjustly detained may be recovered by assumpsit or trespass.

Smith *v.* Bellows, 77 Pa. 441.
Chase *v.* Dwinal, 30 Am. Dec. 352.
Foshay *v.* Ferguson, 5 Hill (N. Y.), 154.

Though a person is arrested under a legal warrant and by a proper officer, yet if one of the objects of the arrest is thereby to extort money or enforce the settlement of a civil claim, such arrest is a false imprisonment by all who have directly or indirectly procured the same or participated therein for any such purpose; and a release or conveyance of property obtained by such means is void. And the discharge of the person arrested without being taken before the magistrate for examination, and the failure to return the warrant, are circumstances competent to be considered as bearing upon the question whether the release or conveyance was obtained by duress.

Hacket *v.* King, 6 Allen (Mass.), 58.

There is a distinction between a malicious use and a malicious abuse of legal process. An abuse is where the party employs it for some unlawful object, not the purpose which it is intended by the law to effect,—in other words a perversion of it.

Mayer *v.* Walter, 64 Pa. 285.

"It is true, as was held in Prough *v.* Entriken, 1 Jones, 81, where a criminal charge is proved to have been instituted for the sole purpose of extorting money from another the law will imply malice as well as the want of probable cause."

Gilliford *v.* Windel, 108 Pa. 146.

"If one commences a criminal prosecution merely for the purpose of compelling his debtor to pay a just debt, it is *prima facie* evidence both of want of probable cause and malice and shifts the onus on the defendant."

Schmidt *v.* Weidman, 63 Pa. 173.

May 30, 1895. McCollum, J. The defendant and two other persons were sued as co-conspirators in an executed scheme to extort money from the plaintiff by means of his arrest and detention on the charge of embezzlement. This sufficiently appears from the declaration filed in the case. More than six years after the cause of action arose, the declaration was amended so as to remove therefrom the element of conspiracy, and the case was so proceeded in that it resulted in a judgment against the present defendant for the money alleged to have been extorted from the plaintiff, and in a judgment in favor of his co-defendants. It is claimed that the amendment changed the cause of action, and deprived the defendants of substantial rights. If the conspiracy was the cause of action, and the amendment substituted for it a new and distinct cause barred by the statute of limitations, there would be obvious merit in the defendant's contention. But the essence of the complaint in the declaration was the extortion, and the amendment was not necessary to authorize or sustain the judgment appealed from. This being so, the defendants were not in any manner prejudiced by the amendment. It did not introduce a new cause of action nor contribute to the result complained of. The case as presented by the pleadings before the amendment was allowed was clearly within the principle of Laverty *v.* Vanarsdale, 65 Pa. 507, in which it was held that where an action is brought against more than one for a wrong done, in order to recover against all a combination or joint act of all must be proved, but if it turns out on the trial that one only was concerned, the plaintiff may recover as if such one had been sued alone, and in such

Digitized by Google

case the conspiracy is nothing as to sustaining the action, the foundation being the actual damage done to the plaintiff. To the same effect is Collins *v.* Cronin, 117 Pa. 35, in which it was held that in an action against two or more in case in the nature of a conspiracy, if the tort be actionable whether committed by two or more, recovery may be had against but one, but if the tort be actionable only when committed under an unlawful conspiracy of two or more, recovery may not be had unless the unlawful conspiracy be established. In the case before us, as in Laverty *v.* Vanarsdale, the tortious act complained of was "capable of being performed by one defendant alone." For these reasons, the defendants' eleventh point was inapplicable, and the answer thereto, although technically erroneous, furnishes no ground for reversing the judgment.

There was probable cause for the arrest of the plaintiff for the crime with which he was charged in the information, and the warrant for it was regular upon its face. The arrest, therefore, considered by itself, afforded no ground for an action for malicious prosecution. This much was conceded by the learned referee, who nevertheless found that the arrest was made for the purpose of extortion, and that the money obtained by it was paid under duress. As these findings appear to be warranted by the evidence, the case must be disposed of upon them. To constitute duress by imprisonment the latter must be unlawful, or there must be an abuse of or an oppression under lawful process or legal detention: 6 Am. and Eng. Ency. of Law, p. 62 and cases there cited. If there is an arrest for a just cause, but for an unlawful purpose, the party arrested, if he is thereby induced to enter into a contract, may avoid it as one procured by duress: Baker *v.* Morton, 12 Wallace (U. S.) 150. "Though a person is arrested under a legal warrant, and by a proper officer, yet if one of the objects of the arrest is thereby to extort money or enforce the settlement of a civil claim, such arrest is false imprisonment by all who have directly or indirectly procured the same or participated therein for any such purpose; and a release or conveyance of property obtained by means of such arrest is void." Hackett *v.* King, 6 Allen, 58. The principles enunciated in the citations made are in accord with the decisions of this Court: Prough *v.* Entriken, 11 Pa. 85; Schofield *v.* Ferrers, 47 Id. 194; Schmidt *v.* Weideman, 63 Id. 173; Mayer *v.* Walter, 64 Id. 285; and Work's Appeal, 59 Id. 445. The law does not countenance the employment of criminal process for the collection of debts and the enforcement of civil liabilities. If there is probable cause for a criminal prosecution, and it is instituted and maintained for a lawful purpose, the acquittal of the accused does not give him an action against the prosecutor. But if there is just cause for the prosecution, and it is resorted to for an unlawful purpose, the prosecutor will not be permitted to acquire anything by it. These well settled principles are applicable to the facts found by the learned referee in the case at bar. The plaintiff was arrested on the charge of embezzlement, and for the purpose of extorting money from him. The prosecution was abandoned when the purpose of it was accomplished. He parted with his property while under duress by imprisonment and threats, and his right to recover it from the wrong-doer cannot, under the circumstances shown, be successfully questioned. We think, too, that as the act of which he complains was obviously unlawful and tortious, he may recover the property obtained by it in this form of action.

The specifications of error are overruled.

Judgment affirmed.

W. D. N.

July, '94, 99. January 25, 1895.

Reeves v. McComeskey.

Landlord and tenant — Repairs — Tenantable condition — Surrender of lease during term.

In the absence of a provision in a lease that the lessor shall repair, it is no defence to an action for rent that the demised premises are not in a tenantable condition.

Where a lessee claims to be released from liability to pay rent by reason of a surrender of the demised premises during the term, he must prove clearly an acceptance by the lessor.

An offer by lessee "to prove that he was told previously to his removal that they would take the property and that he might leave it" was too vague to prove acceptance.

Appeal of Thomas McComeskey, from the judgment of the Common Pleas No. 3, of Philadelphia County, in favor of Mary Reeves in an action of assumpsit for rent due.

The facts are sufficiently stated in the opinion of the Supreme Court, *infra*.

On the trial counsel for defendant made the following offers:—

Mr. Gorman: I offer to prove that the premises were in such a state of dilapidation that it was dangerous for the defendant and his family to live there, and the physician, after the death of his two children and the sickness of his wife, advised him that the premises were in such a condition as to be dangerous and prejudicial to health.

(Offer overruled. Exception for defendant.)

Mr. Gorman: I also offer to prove that the

Digitized by Google

plaintiff did make repairs to the tin roof while the defendant was in possession.

(Offer objected to. Objection sustained.)

(Exception for defendant.)

Mr. Gorman: I also offer to prove by this witness that the ordinary repairs incident to a house of this character would not put this property in a condition for tenant's occupancy.

(Objected to. Objection sustained.)

(Exception for defendant.)

Q. Did you see this property after you had delivered the key to Mr. McCloskey?

A. Yes, sir; I did.

Q. State whether there was a bill on it.

(Objected to.)

Mr. Gorman: I desire to follow it up by showing that there was a bill "for sale" put on it.

(Offer objected to. Objection sustained.)

Q. You saw this property after you had delivered the key, and you found a bill "for sale or to rent" on the property?

(Objected to. Objection sustained. Exception for defendant.)

By Mr. Gorman:

Q. What was the name of the party who went to the owner or agent to rent this property after you left it?

(Objected to. Objection sustained.)

Mr. Gorman: I propose to show by this witness that a party applied to rent the property and made an offer for it for the balance of the term, and that they refused to rent it.

(Objected to. Objection sustained. Exception for defendant.)

Mr. Gorman: I also offer to prove that the property was offered for sale during the term for which the suit was brought, with possession.

(Objected to. Objection sustained.)

Mr. Gorman: I now offer to prove by this witness that he was told previous to his removal that they would take the property and that he might leave it.

(Objected to. Objection sustained. Exception for defendant.)

Q. State again what took place between you and the agent when you delivered the key to him.

(Objected to. Objection sustained.)

Mr. Gorman: I offer to prove that when the witness delivered the key to the agent the agent accepted the key from the witness, and thereafter put a bill on the house "for sale," and thereafter offered it to a purchaser, with immediate possession.

(Objected to. Objection sustained. Exception for defendant.)

The Court, FINLETTER, P. J., directed a verdict for plaintiff. Verdict and judgment accordingly. Defendant appealed, assigning for error this direction of the Court and the overruling of his offers of evidence.

William Gorman, for appellant.

A tenant from year to year is not obliged to make substantial or lasting repairs.

Torriano *v.* Young, 6 C. & P. 8.
Leach *v.* Thomas, 7 Id. 326.
Scheerer *v.* Dickson, 3 Brewster, 276.
Brolaskey *v.* Loth, 5 Phila. 81.

If there was an acceptance of the surrender, then liability for rent ceases.

Gunnis *v.* Kater, 29 Leg. Int. 230.

A surrender and acceptance may be by operation of law, as where landlord advertises the premises to be let or sold.

Reeve *v.* Bird, 1 Cr. M. & R. 31.

If the facts offered had been proven they would have shown a case of surrender and acceptance.

Auer *v.* Penn, 99 Pa. 370.
De Morat *v.* Falkenhagen, 148 Id. 393.
Pratt *v.* Richards Jewelry Co., 69 Id. 53.

Charles Knittel, for appellee.

Defendant tried to escape payment of the rent on three grounds:

First. That the premises were so dilapidated that he could not live there; but failing in this, as defendant himself agreed to keep the property in good order and repair, he resorts to a *second* excuse, and says "that he was told that plaintiff would take the property and that he might leave it," without stating that plaintiff or her agent told him so, and finding that even if he had been told so by plaintiff or her agent that this was not sufficient, he makes a *third* and last desperate attempt to escape and says: "I delivered the key to the agent, and he accepted the key, and put a bill on the house 'for sale,' with immediate possession;" but unfortunately for the defendant, he had already testified to facts which showed the contrary to be the case, and that the key was taken under protest, and that he would be held liable for the rent up to the end of the current year.

May 30, 1895. McCOLLUM, J. The lessee's first objection to the payment of the rent sued for is that the demised premises were not tenantable. It appears that he occupied them nine years and seven months, under a lease which bound him to keep them in good repair, and which he was at liberty to terminate at the end of any current year of the term on giving to the lessor thirty days' previous notice of his intention to do so. If the untenantable condition of which he complains was caused by reasonable wear and tear he must have had notice of it in time to enable him to determine the lease in ac-

Digitized by Google

cordance with its provisions and thus avoid a dispute concerning a few months' rent. He does not claim that there was any extraordinary cause for the alleged dilapidation of the premises, but he says that to render them habitable substantial repairs, which it was not his duty to make, were required. Instead of adopting the method provided by the lease for determining it, he paid the rent for the first seven months of the tenth year of his tenancy and abandoned the premises. Assuming they were not tenantable when he abandoned them, and that he left them because they were not, do these facts constitute a defence to the claim for rent for the balance of the year? The lessor did not warrant or represent them to be tenantable, or undertake if they were, to keep them so, and there is no implied covenant of this nature founded upon or arising from the relation of landlord and tenant. In the absence of a provision in a lease that the lessor shall repair it is no defence to an action for the rent that the demised premises are not in a tenantable condition: Wheeler *et al. v.* Crawford, 86 Pa. 327, and Moore *v.* Weber, 71 Id. 429; see also Jackson and Gross on Landlord and Tenant, secs. 288, 963 and 1045, and cases cited in the notes. It follows that the lessee's first objection to the claim in this case is not well taken.

The second objection to the claim is founded upon the lessee's abandonment or surrender of the premises. He left the key with the lessor's agent, and his own account of the conversation between them shows that there was then no acceptance of the surrender and that it was the purpose of the lessor to hold him for the rent. His subsequent offers of evidence were properly overruled by the Court. The matters to which they referred were not sufficient, if proven, to establish an acceptance or to afford a legitimate basis for an inference of it. His offer "to prove that he was told previously to his removal that they would take the property and that he might leave it" was altogether too vague. It significantly omitted to mention who told him. If it was the lessor or her agent he could easily, and undoubtedly would, have said so in his offer.

DeMorat *v.* Falkenhagen, 148 Pa. 393, is not applicable to this case. It related to the sufficiency of an affidavit of defence, and held that an affidavit which distinctly averred a surrender and acceptance was good; Auer *v.* Penn. 99 Pa. 370, is in accord with the conclusions we have reached and so is Breuckmann *v.* Twibill, 89 Pa. 58.

The specifications of error are overruled and the judgment is affirmed. W. M. S., Jr.

July, '94, 21. January 30, 1895.

Hormann's Appeal.

Equity—Specific performance—Partnership—Inventory—Orphans' Court.

Where partners have in writing agreed on a valuation of the partnership property and that upon the death of one the other should have the option to purchase from the decedent's estate his interest at the sum agreed upon, that sum will be regarded as intended to have been mutually fixed and the executors of the will of the deceased partner will be required to convey to the surviving partner the property upon receiving the consideration for the same.

Appeal of Ferdinand Hormann, from the decree of the Orphans' Court of Philadelphia County, dismissing the exceptions filed to the report of a master dismissing the petition of appellant, to which A. J. Wiedner, Amelia E. H. Rohrbacker and petitioner, as executors of the will of Frederick Rohrbacker, deceased, were respondents, together with Amelia M. Steenson and Ellen R. Kennedy, daughters of the decedent.

The petition set forth that petitioner was the business partner of the decedent in the manufacture of glassware in the City of Philadelphia; that on October 12, 1880, the petitioner and decedent executed an agreement of co-partnership, providing, *inter alia*, that in the event of the decease of either partner the survivor should have the option of purchasing the business of the firm, said option to be exercised within fifteen days; and further containing the following clause:

"And it is hereby further mutually agreed that all property not enumerated or specified in the aforesaid statement, such as lands, buildings (subject to the encumbrances now thereon, being three several yearly ground rents, amounting in the aggregate to the sum of $300.12 per annum), stationary fixtures, boilers, engine, machinery of all kinds and descriptions, decorating machines and all things belonging thereto, patterns, plates, wagons, horses, carriages and all tools and implements belonging to the manufacture of glass or the different departments in which we are engaged, shall be valued at the sum of $25,000, and if any or all of the said yearly ground rents shall be extinguished or any other premises shall be purchased in the name of the firm after the execution of this agreement, then said sum of $25,000 shall be increased in amount to the sum expended either in the extinguishment of any or all of the said yearly ground rents or in the purchase of any other premises. And if any portion of the premises in the name of the firm shall be sold or encumbered after the execution of this agreement, then

Digitized by Google

said sum of $25,000 shall be reduced in amount the sum realized from the sale or encumbrance thereof."

That decedent died April 3, 1892, having first made his last will dated in December, 1880, wherein he appointed petitioner and respondents Rohrbacker and Wiedner, executors, which will has been duly proved and letters testamentary thereon issued to all three of the aforesaid.

That petitioner desiring to exercise his option under the above recited agreement requested his co-executors to execute the necessary deeds therefor, which they refused to do, and the prayer was for an order directing them, the said Rohrbacker and Wiedner, to execute and deliver the necessary deed to petitioner upon his paying them the amount specified in the above recited agreement.

The answer of Amelia E. H. Rohrbacker for the respondents admitted the facts set forth in the petition but alleged that the books of account of Rohrbacker & Hormann contained additional items of amounts used in the improvement and for the betterment of the property of the said firm as per an annexed schedule, marked "Exhibit A;" that she was advised and believed that in the settlement of the said partnership the amounts so set forth in Exhibit A should be added to the said sum of $25,000; that by such addition the property account amounted to the sum of $48,579.09, instead of $32,452.09; that upon a tender of proper papers securing the one-half of the said sum of $48,579.09, to wit, the sum of $24,289.54, she was willing and ready to execute the same.

The inventory (Exhibit A) amounted to $54,882.98.

At the hearing before the master, Joseph Mellors, Esq., to whom the petition and answer were referred, the conveyancer who drew the agreement was called to prove what was understood by the parties by the word "purchase." His testimony was held by the master to be inadmissible.

The petitioner was called in his own behalf and his testimony was held to be inadmissible. The master recommended that the petition be dismissed. The petitioner excepted, *inter alia*, to the exclusion of said testimony and the dismissing of the petition. The Court dismissed the exceptions and the petitioner took this appeal, assigning as error the action of the Court in dismissing exceptions.

Joseph L. Tull and *John G. Johnson*, for appellant.

The circumstances of the parties at the time the agreement was executed and their subsequent action shows the construction placed upon it by the master and Court below to be incorrect.

The evidence of the conveyancer who drew the agreement was competent.

Alridge *v.* Eshleman, 46 Pa. 420.
Dubois *v.* Bigler, 95 Id. 203.
Church *v.* Clime, 116 Id. 146.
Koch *v.* Dunkel, 90 Id. 264.
Everhart *v.* Dolph, 133 Id. 640.
Warfel *v.* Knott, 128 Id. 528.

To the same effect are the following:—

Barnhart *v.* Riddle, 29 Pa. 92.
Gould *v.* Lee, 55 Id. 99.
Jackson *v.* Litch, 62 Id. 451.
App. Real Est. Title Co., 125 Id. 549.

The object of the agreement of October, 1880, was not obtained in the interpretation put upon it by the Court below.

The grammatical and ordinary sense of the words should be the interpretation of all written instruments.

Grey *v.* Pearson, 6 H. of L. Cases, star page 104.
Abbott *v.* Middleton, 7 Id. star page 114.
Frazier *v.* Monroe, 72 Pa. 169.
Hancock's Appeal, 112 Id. 541.

J. Henry Williams, for appellees.

Specific performance is not a matter of right, but of sound discretion and will not be decreed:

(*a*) Of a contract which is inequitable or unjust.

Oil Creek R. R. *v.* Atlantic R. R. 57 Pa. 65.

(*b*) Where the terms of the contract are so ambiguous that one party may put a different construction upon it from the other.

(*c*) "Unless its terms are clear and capable of ascertainment from the instrument itself."

Hammer *v.* McEldowney, 46 Pa. 334.

The finding of facts by a master approved by the Court below will not be reversed by the Supreme Court except for clear error.

Kisor's Appeal, 62 Pa. 428.

The two parties to this agreement had a valuable business, and were desirous of continuing it, hence the agreement that upon the terms stated therein the survivor might purchase the interest of the other.

May 20, 1895. FELL, J. The proceeding in the Orphans' Court was to require the specific performance of an agreement entered into by the decedent and the appellant. In 1869, Frederick Rohrbacker and Ferdinand Hormann entered into a partnership for the purpose of manufacturing glassware. On October 22, 1880, they made an agreement which provided that in the event of the death of either, the survivor should have the option of purchasing the business. Rohrbacker died in April, 1892, leaving a will made in December, 1880, in which his executors were directed to carry out and fulfill the

Digitized by Google

agreement made with his partner. The option was properly exercised, and upon the refusal of the executors to convey, a petition for a decree for specific performance was presented. This petition was referred to a master, and, after hearing on exceptions to his report, was dismissed.

The contention relates to the construction to be given to that part of the agreement by which the valuation of the real estate and plant is to be determined. The agreement provides: first, that bills receivable shall be taken by the survivor at their face value, materials in stock at cost, good accounts at a discount of five, and manufactured articles at a discount of ten per cent. It then proceeds: "And it is hereby further agreed that all property not enumerated or specified in the aforesaid statement, such as lands, buildings, (subject to the encumbrances now thereon, being three several yearly ground rents amounting in the aggregate to the sum of $300.-12 per annum) stationary fixtures, boiler, engine, machinery of all kinds and descriptions, decorating machines and all things belonging thereto, patterns, plates, wagons, horses, carriages and all tools and implements belonging to the manufacturing of glass in the different departments in which we are engaged, shall be valued at the sum of $25,000, and if any or all of the said yearly ground rents shall be extinguished or any other premises shall be purchased in the name of the firm after the execution of this agreement, the said sum of $25,000 shall be increased in amount to the sum expended either in the extinguishment of any or all of the said yearly ground rents or in the purchase of any other premises, and if any portion of the premises in the name of the firm shall be sold or encumbered after the execution of this agreement, then said sum of $25,000 to be reduced in amount the sum realized from the sale or encumbrance thereof. And the executor or administrator shall by good and sufficient deed grant and convey unto the party so surviving all the property not enumerated or specified in said statement, and the surviving party shall make and execute and deliver unto the executor or administratrix of the one so dying for the benefit of his estate a bond and mortgage to the sum of one-half of the aforesaid sum of $25,000, or the one-half of the sum so increased or diminished as above set forth."

The dispute relates to this part of the agreement. During the period of eleven years and a-half between the making of the agreement and the death of one of the partners ground rents had been extinguished, more land purchased, additions and improvements added to old buildings, and new buildings erected. The petitioner concedes that the valuation of $25,000 should be increased by $5,452.09 paid for the extinguishment of ground rents and also by $2,000 expended in the purchase of additional real estate. The executors claim that to these amounts should be added about $16,000 used by the firm after 1880 in the erection of new buildings and in making additions and improvements to the plant.

The first part of the agreement provides for the valuation in detail of what was personal property pure and simple, the notes, accounts, manufactured articles and raw material, the actual value of which was easy of ascertainment. The second part of the agreement provides for the valuation in bulk of all the remaining property of the firm. This was property used in carrying on the business. It consisted of real estate, and fixtures, machinery, tools, and implements, patterns, plates, horses and wagons. The value of the different items of personal property which went to make up the whole would vary from time to time, as the old became worn out and were replaced by new, and the value of the whole would vary with the fluctuations of business. Additions to fixtures, machinery and tools would become worn and useless, and at their best their value to the business was their value in place and for the uses for which they were designed. This was the case, differing in degree only, with the additions to the buildings. Of the things of material value used in the business and named there was but one which had anything like a stable value for other purposes. That was the real estate. It had a value irrespective of its use in the business, and a value that would be permanently increased by addition to it or by the extinguishment of ground rents, and lessened by the encumbrance or sale of any portion of it. This change in value was provided for in the agreement, and it seems to have been the only change contemplated by the parties.

Omitting the parts of the agreement which do not aid in ascertaining its meaning, and preserving the phraseology, it would read: "It is agreed that all property—such as lands, buildings, (subject to the encumbrances now thereon being three several yearly ground rents)—stationary fixtures of all kinds—patterns, plates, wagons, horses, carriages and all tools—shall be valued at the sum of twenty-five thousand dollars, and if any one or all of the said yearly ground rents shall be extinguished or any other premises shall be purchased in the name of the firm—then said sum of twenty-five thousand dollars shall be increased in amount to the sum expended either in the extinguishment of any or all of the said yearly ground rents or in the purchase of any other premises. And if any portion of the premises in the name of the firm shall be sold or encumbered—then said sum of

Digitized by Google

twenty-five thousand dollars shall be reduced in amount the sum realized from the sale or encumbrance thereof." The increase provided for is that which would result from the extinguishment of ground rents and the purchase of other premises; the decrease that which would be caused by the encumbrance or sale of part of the premises. An intention that the cost of new buildings should be added cannot be gathered from the words used unless by the "purchase of other premises" was meant the cost of erecting new buildings. This was the construction adopted. The word premises was used to denote the thing which might be purchased, or sold or encumbered. Its natural and ordinary use in this connection would seem to be to denote an estate in lands purchased, sold or encumbered. It might well be supposed that the firm would buy materials and construct buildings, but not that it would purchase, sell or encumber them as buildings merely; and any acquisition or disposition of them as real estate was expressly provided for. The words, the context and the subject matter all indicate that they were speaking of the real estate only, and no provision was made for a change in its value except as they here stipulated. A considerable part of the sum of $16,000 which it is claimed should be added was expended in alterations of old buildings, the largest item being "cost of new and improved furnace and alterations and improvements to the factory, $5,629.32."

Prior to 1880 an inventory of the assets and liabilities had been made annually. The value of $25,000 fixed by the agreement of October that year was not based upon the appraised value of the things enumerated. In 1879 they had been appraised at over $54,000. It was a value fixed irrespectively of the actual value, which would change from year to year, and which they considered it just that the survivor should pay and the estate of his deceased partner receive. Neither could know to whom the option to purchase would fall; and if during the running of the agreement, because of large additions or reductions, the price might become inequitable either party had the remedy in his own hands, as without his assent they could not be made. The agreement was in force over eleven years before the death of one of the parties. During this time the annual net profits varied from $20,255.25 in 1882 to $4,424.50 in 1889. In 1880, the year of the agreement, they were over $15,000. During all these years the saleable value of the plant was affected by the conditions of the business.

A careful examination of the testimony has led us to the belief that the learned Judge before whom the account was audited was misled by the auditor's report in finding as evidence of the construction which the parties themselves placed upon the agreement that after October 20, 1880, a real estate account was opened, the first item of which was the agreed value of $25,000, and that to this were added various items of expense, to the end that it would show the correct value of the plant, at the death of either of the partners. Such an account appears as an exhibit attached to the answer to the petition, but it does not appear on the books of the firm. It was made up from entries culled from the books. The cash expenditures for improvements and new buildings were carried to the ledger and posted under different heads. The entry of $25,000 appears neither in the books nor in the inventories subsequently made. Annual inventories were made after 1880 as before, and the price fixed by the agreement did not enter into them. In the inventory made January 1, 1881, the real estate was carried at $26,225. All of this together with the personal property appraised at about $14,000, making an aggregate of over $40,000, had by the agreement of the previous October and for the purpose of that agreement been valued at $25,000. Subsequent inventories followed the same form, and from time to time the original lots were carried at an increased valuation. As to these it must be conceded that there could be no addition for increased value. These inventories furnish no ground for an inference of an intention that the valuation fixed by the agreement was to be departed from. The account referred to represented the opinion of the witness who made it, but not the views of the partners. It is therefore of no value as indicating their understanding of the agreement.

We are left then to the construction of the agreement as it is written. Considering the condition of the property at the time, the mutual interest of the parties and the end they had in view, their desire to make certain the price at which the survivor could take and their knowledge that the cost would not be a criterion of the value, we think that they meant to say that the valuation of $25,000 was to remain, subject only to the conditions which they imposed, the fixed value for the purpose of the agreement. What is of much more and of primary importance in interpretation, we find that this is what they did say.

We see no want of equity in the agreement, nor any hardship to result from the performance which should lead a chancellor to deny the prayer for specific performance. There was no inequality of terms; it applied to both alike, and the advantage to be gained by the survivor was not more certain than that which would result to the estate of the deceased. The parties with full knowledge of the condition of the firm prop-

Digitized by Google

erty, acquiesced in the agreement for over eleven years, and when in 1892 its enforcement was asked the net profits of the business were but one-third as large as they had been in 1880 when the agreement was made.

The order of March 24, 1894, dismissing the petition of Ferdinand Hormann is reversed and set aside, and the record is remitted in order that a decree may be entered in the Orphans' Court in accordance with this opinion.

W. D. N.

Orphans' Court.

Jan. '95, 77.

Parker's Estate.

Practice—Averments in Petition—Specific performance—Agreement to take effect at death.

In a petition for specific performance the petitioner should set forth the terms of the agreement fully and must aver that he has done all that is required of him under it.

An agreement to sell is not necessarily testamentary because it is not to be performed until the death of the vendor, and even if testamentary it may be enforced as a contract if founded upon sufficient consideration; and this is so even though the contract is unilateral and without reciprocal engagement on the part of the vendee.

Petition for specific performance.

Thomas Parker was during his life and at the time of his decease seized in fee of premises No. 1412 and 1414 South Broad street, in the City of Philadelphia.

On the 13th day of March, 1886, he executed and acknowledged an agreement with Joseph E. Laurence, the lessee of said premises, for the conveyance thereof to the said Joseph E. Laurence after the death of said Thomas Parker and his son Charles Parker, for the sum of $7,000, which writing was duly recorded.

Charles A. Lagen and *John V. McGeoghegan*, for petitioner.

Bradbury Bedell and *Edward C. Quin*, contra.

March 30, 1895. PENROSE, J. The agreement for sale, as we infer, was indorsed on a lease of the property to which it refers and seems to be contingent upon the punctual performance by the vendee of his covenants as lessee, and dependent also upon the contingency of the deaths during the term of the decedent and his son. The petition does not aver performance and contains no copy of the lease or statement of its date, terms, or provisions, nor does it give the date of the son's death. In these respects we think it should be amended, especially as the failure so to aver has been set up as a ground of defence.

That an agreement to sell is not necessarily testamentary because it is not to be performed until the death of the vendor (Meck's Appeal, 1 Outerb. 313; Book *v.* Book, 8 Outerb. 240; Cable *v.* Cable, 31 Crumr. 451); that even if testamentary it may be enforced as a contract if founded upon sufficient consideration (Loffus *v.* Maw, 3 Giffard, 592; McClure *v.* McClure, 1 Barr, 374; Brinker *v.* Brinker, 7 Barr, 53; Cawley's Appeal, 21 Crumr. 628); that specific performance may be compelled of a contract to convey, though unilateral and without reciprocal engagement on the part of the vendee (Kerr *v.* Day, 2 Harris, 112; Smith's Appeal, 19 Smith, 474; Napier *v.* Darlington, 20 Smith, 64); that the purchaser, who has not signed the contract, becomes bound when he declares his intention to take and files his bill or petition for performance (Grove *v.* Hodges, 5 Smith, 504; Shollenberger *v.* Brinton, 2 Smith, 40, 98); and that questions as to the title or form of deed may be determined at or before the time of the decree (Tiernan *v.* Roland, 3 Harris, 437–8; Act of Feb. 24, 1834, sec. 18, P. L. 70), are well settled principles, the application of which to the present case we shall consider when it comes before us on the amended petition; deferring until then, also, the consideration of the question how far, in the absence of evidence of fraud or original inadequacy of price, the right to specific performance is affected by the rise in value of the property in the interval between the date of the contract and the time stipulated for performance (Coles *v.* Trecothick, 9 Vesey, 234).

Of course the respondents will have the right to answer the amended petition.

Leave to amend granted. G. H. S.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, JULY 19, 1895.* [No. 23.

Supreme Court.

July, '94, 149. April 15, 1895.

Brady v. The Prudential Insurance Co.

Contract—Life insurance—Limitation.

Where a life insurance policy contains a clause stipulating that unless action be commenced within six months next after the decease of the insured it shall be considered as conclusive evidence against the validity of the claim, and also another condition that "if the insured shall die three or more years after the date thereof and after all due premiums shall have been received by the company the policy shall be incontestable," it is error to charge that the latter invalidates the former. The latter clause prevents the company from contesting the policy, but the right of the company to contest its liability on the ground of delay in commencing the action is not affected.

Appeal of the Prudential Insurance Company, from the judgment of the Common Pleas of Luzerne County, entered on a verdict in an action of assumpsit wherein John Brady, administrator of Wm. Muckle, deceased, was plaintiff, and appellant, defendant.

This was an action on a policy of life insurance. On the trial, before LYNCH, J., the facts appeared as follows:—

Margaret Brady obtained from the defendant company two policies of insurance on the life of William Muckle, dated respectively, 21st day of April, A. D. 1884, and 17th day of May, A. D. 1886. The first policy was for the sum of $500, and the second for the sum of $138. William Muckle, the insured, died on the 4th day of May, A. D. 1888, more than three years after the first policy issued, and two years after the issuing of the second policy. Immediately upon the death of the insured, Margaret Brady filed proofs of death, as required by the conditions of the policy, claiming that she was entitled to the amount of the policies as beneficiary, she being a cousin of the insured. The defendant refused to pay to her the amount of the policies, and she instituted a suit to No. 157, June term, 1889, and the same, after issue joined, was referred to a referee, who filed his report, finding in favor of the defendant. Exceptions were filed which were dismissed by the Court.

John Brady, Margaret's husband, then took out letters of administration on the estate of William Muckle, the insured, and instituted the present suit on August 1, 1890, more than two years after the decease of the insured. The policies contained, *inter alia*, the following conditions: "Unless such suit or action shall be commenced within six months next after the decease of the person insured under this policy; and it is expressly agreed that should any such suit or action be commenced after the expiration of said six months, the lapse of time shall be deemed as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding," and "if the insured shall die three or more years after date thereof, and after all due premiums shall have been received by the company this policy shall be incontestable."

The Court instructed the jury that there could not be any recovery on the policy for $138, for the reason that the suit was not instituted within six months after the death of the insured and the policy not having issued three years prior to death of insured, but that the plaintiff could recover on the policy for $500, because having been issued more than three years before the death of the insured, it was incontestable, and it made no difference that the suit was not instituted, saying, *inter alia*: "The Court instructs you that the ninth clause of this policy, providing that suit must be commenced within six months after death, is qualified and controlled, so far as this case is concerned, by the twelfth clause, and that the ninth clause has reference to suit upon a policy that had not been issued three years before the death of the insured. When the death did not occur until more than three years after the date of the policy, the ninth clause does not apply, and it is not essential that suit be commenced within six months after the death of the assured." (Sixth assignment of error.)

Verdict and judgment for plaintiff. The defendant took this appeal, assigning as error, *inter alia*, the above quoted instruction.

E. F. McGovern, for appellant.

The stipulation as to time within which action must be brought goes to the *right* as well as to the *remedy*. The clause contemplates a loss about which a contest may arise between the assured and the company, and in respect to which the right to recover may be denied. The object was not to foreclose it and prevent a resort to the proper tribunal, but to compel a speedy resort and a termination of the controversy while the facts were fresh in the recollection of the parties and witnesses and proper proof accessible.

Cray *v.* Hartford Fire Ins. Co., 1 Blatch. (U. S.) 280.
Steen *v.* Niagara Fire Co., 42 Am. Rep. 297.

Digitized by Google

There can be no exception to the limitation unless it is contained in the limitation itself. The limitation clause in the policy stands as a statute of limitations between the parties, and of their own making.

Wilson *v.* Insurance Co., 27 Vt. 99.
Hocking *v.* Howard Ins. Co., 130 Pa. 170.

Such a stipulation in a policy of insurance as to the time is binding upon the parties.

2 Chitty on Cont., 1214.
North W. Ins. Co. *v.* Oil and Candle Co., 31 Pa. 448.
Farmer's Ins. Co. *v.* Barr, 94 Id. 345.
Waynesboro Ins. Co. *v.* Conover, 98 Id. 384.
Universal Ins. Co. *v.* Weiss, 106 Id. 20.
Riddlesbarger *v.* Ins. Co., 7 Wall, 386.

The ninth condition is in no way qualified or controlled by the twelfth. No reference is made in the twelfth condition to the ninth. In other words, the twelfth condition relates solely to defences that may arise outside of and independent of any of the conditions precedent agreed upon in the contract before a recovery can be had.

Starck, Admr. *v.* Union C. L. Ins. Co., 134 Pa. 45.

D. L. O'Neill, (*W. H. Hines* with him), for appellee.

It is a cardinal rule of interpretation that effect should, if possible, be given to each and every part of a contract, so that it may stand as a whole and carry out the intention of the parties.

Ins. Co. *v.* Cropper, 32 Pa. 356.
Ins. Co. *v.* Edmond, 17 Gratt. (Va.) 138.
Cowles *v.* Cont. Life Ins. Co., 1 New Eng. R. 247.
May on Ins., sec. 174.
Ins. Co. *v.* Brock, 57 Pa. 74.
Addison on Contracts, 746.
2 Blackstone's Com., 380.

The ninth condition of the policy being against the statute of limitations of this State, against justice and common right and being the language of the insurer it must be construed strictly against the insurer and in favor of the insured.

Phila. Tool Co. *v.* Assurance Co., 132 Pa. 236.
Grandin *v.* Ins. Co. 107 Id. 38.
Ins. Co. *v.* Mund, to use of Biddle, 102 Id. 94.
Imperial Ins. Co. *v.* Dunham, 117 Id. 460.
Ins. Co. *v.* Hoffman, 125 Id. 626.
Merrick *v.* Ins. Co., 54 Id. 277.
Ins. Co. *v.* Berger *et al.*, 42 Id. 292.
Ins. Co. *v.* Brock, 57 Id. 74.
Ins. Co. *v.* Cropper, 32 Id. 351.
Bole *v.* Ins. Co., 159 Id. 56.
Dougherty *v.* Ins. Co., 154 Id. 385.
Roe *v.* Ins. Co., 149 Id. 94.
Krug *v.* Ins. Co., 147 Id. 272.
Pickett *v.* Ins. Co., 144 Id. 79.
Doud *v.* Ins. Co., 141 Id. 47.
Humphreys *v.* Benefit Association, 139 Id. 264.
Mears *v.* Ins. Co., 92 Id. 15.

In Western Ins. Co. *v.* Cropper, 32 Pa. 351, it was held that, "If an exception in a policy be capable of two interpretations equally reasonable that must be adopted which is most favorable to the assured, for the language is that of the insurers." This principle is recognized and approved in—

Commonwealth Ins. Co. *v.* Berger *et al.*, 42 Pa. 292.
Insurance Co. *v.* O'Maley, 82 Id. 401.
Teutonia Ins. Co. *v.* Mund, to use of Biddle, 102 Id. 89.
Hoffman *v.* Ætna Ins. Co., 32 N. Y. 405.
Phila. Tool Co. *v.* Assurance Co., 132 Pa. 236.

May 30, 1895. WILLIAMS, J. The sixth assignment of error directs attention to the controlling question in this case. In the policy of insurance sued on, the ninth clause contains the following provisions: "No suit or action at law or in equity shall be maintainable unless such suit or action shall be commenced within six months next after the decease of the person insured; and it is expressly agreed that should any such suit or action be commenced after the expiration of six months the lapse of time shall be deemed conclusive evidence against the validity of such claim." The action was not brought within the time so limited. This fact was relied upon by the defendant as an answer to the action. The learned Judge of the Court below held that the provision was a valid one, and was binding upon the plaintiff unless he was relieved from its operation, under the circumstances of this case, by a waiver or by some other stipulation contained in the agreement.

The twelfth clause in the same policy contained this stipulation, "If the insured shall die three or more years after the date hereof and after all due premiums shall have been received by the company the policy shall be incontestable." This stipulation the learned Judge held relieved the plaintiff from the bar of the limitation imposed by the ninth clause and opened the way to a recovery. If the insured had died before the end of three years after the date of his policy then the limitation of the right to sue after six months would have been, in the view of the learned Judge, a good defence; but having survived three years and the policy having become incontestable the right to defend upon the agreed limitation was gone. The correctness of this exposition of the twelfth clause in the policy is the question presented on this appeal.

In considering this question it is important to remember that the application for insurance and the acceptance of it by the company, which is evidenced by the policy, constitute when taken together the contract. If the representations as to age, state of health, or general physical condition, on which the policy was issued, turn out

Digitized by Google

to be untrue or the insured violates the conditions on which his right to insurance depends, the right of his representative to recover may be contested for that reason and the company may deny its liability under a policy so obtained. The twelfth clause puts a limit upon the time when such objections may be made. If the insured lives for three years and pays all moneys due from him in the meantime then the statements made in the application are taken to be true. They are no longer contestable. The policy is to be held to be a good and valid contract binding upon the company according to its terms. In case of death happening after three years, the policy, if suit be brought upon it, is not to be defeated by inquiry into representations on which it was based, but the company must be held to performance. What then is the undertaking of the company? It is to pay if suit be brought within the time stipulated and proper proofs of death are produced. But suppose the proofs of death are not sufficient? The right of the company to contest its liability on that ground is not affected by the twelfth clause. So if the action is not brought within the time fixed, the company may contest, not the policy but the plaintiff's right to recover upon it for that reason. In this case, therefore, the plaintiff started with an incontestable policy. The defendant said by way of reply to this action, "Yes, you have a valid policy, but you have not brought your action within the time you agreed to." This was *prima facie* a defence, and the burden was thereby cast upon the plaintiff to show some reason why he was not bound by his own covenant. Unless he did this to the satisfaction of the Court and jury he could not recover. The provision in the ninth clause which was relied upon to show that the policy was incontestable did not amount to a confession of judgment. It did not deny to the company the right to defend against an action brought upon the policy, except in so far as the defence might rest on a denial of the validity of the policy itself. All other lines of defence remained open to it.

The learned Judge gave altogether too broad a scope to the stipulation in the twelfth clause. Under his exposition it not only closed the doors against inquiry into the statements and representations in the application, but it closed the doors against all other defences.

It made not the policy only but the right to recover incontestable. This was error, and for this reason the judgment is now reversed and a venire facias de novo awarded.

W. D. N.

Oct. '94, 209. October 31, 1894.

Dietz v. Metropolitan Life Insurance Company.

Insurance — Fraud or misrepresentation — Question of health when policy issued—Misleading charge.

The condition of the health of the insured when the policy was issued was essential and entirely a question of fact to be decided upon the evidence and involving the credibility of witnesses, and it would have been manifest error to refuse to submit that question to the jury.

Appeal of the Metropolitan Life Insurance Company, defendants, from the judgment of the Common Pleas No. 2, of Allegheny County, in an action wherein John Dietz and Justina, his wife, were plaintiffs.

This was an action upon a policy of insurance issued by the Metropolitan Life Insurance Co. of New York on the 16th day of February, 1891, upon the life of one Frederick Dietch (spelled Dietz in the declaration), wherein the said company agreed to pay to the proper person upon receipt of proofs satisfactory to the company of the death of the insured the sum of $258, subject to certain conditions, one of which was: "No obligation is assumed by the company prior to the date hereof, nor unless upon said date the assured is alive and in sound health." The insured died on the 6th day of May, 1893, and proofs were duly filed with the company. The defence set up was that he was not in sound health at date of the policy. The other facts sufficiently appear in the opinion of the Court, *infra*. The defendant presented two points:—

(1). Under all the evidence the verdict should be for the defendant; and (2), if the jury believe from the evidence that the insured was afflicted with chronic epilepsy at the time of the issuing of the policy, then he was not in sound health and the verdict should be for the defendant. The Court, WHITE, J., refused the first point, affirmed the second point and submitted the case to the jury practically upon the question of the health of the insured, and the jury found in favor of the plaintiffs.

The assignments of error were as follows:—

First. The Court erred in refusing the plaintiff's first point, which point and answer were as follows:—

"Under all the evidence the verdict should be for the defendant." *Answer*. Refused.

Second. In the general charge the Court said, *inter alia*:—

"What I mean is this—a man may have sick headache temporarily and still be considered in sound health, although abstractly considered it is not sound health; so a man might have an

Digitized by Google

attack of rheumatism, a temporary attack of rheumatism; now abstractly he would not be considered to be in sound health, and yet I apprehend that in the meaning of this policy he would be in sound health if it was just a temporary attack of rheumatism. . . . These little infirmities or rather, these little attacks of temporary disease, headache, or a little attack of rheumatism, or some little attack of that kind—I do not apprehend are what is meant in this policy to be 'sound health,' because they have no probable bearing upon the man's life. . . .

"In answering that eleventh question that I have referred to: 'Was the deceased afflicted with any infirmity, deformity or chronic disease? If so, please specify.' He simply gives the word 'Epilepsy.' Now that question appears to refer back to the whole life; it does not limit the time to the time of death, but it seems to go back and cover the whole life, and if the party had been subject to epileptic fits in childhood, and had recovered from them, I apprehend the doctor ought to answer as the answer is here. I do not know what they mean by deformity or chronic disease, but still the question, I apprehend, is as to the condition of the party at the time of the death."

Verdict for plaintiff and judgment thereon. The defendant took this appeal, and assigned as error, *inter alia*, the refusal of the points and the portions of the charge above quoted.

W. K. Jennings, for appellant.

L. K. Porter, (*S. G. Porter* with him), for appellee.

May 30, 1895. McCollum, J. There was no evidence of fraud or misrepresentation in obtaining the insurance, and the sole question for the jury was whether the insured was in sound health when the policy was issued. It appears to have been conceded that the immediate cause of his death was typhoid pneumonia, but the defendant company claimed that he was affected with chronic epilepsy, and introduced some evidence to support its claim. Upon this evidence it requested the Court to say that its claim was substantiated and to direct the jury to find in its favor. The Court declined to comply with the request and referred the question to the jury with the instruction that if they believed from the evidence that the insured was afflicted with chronic epilepsy at the time of the issuing of the policy, then he was not in sound health and the verdict should be for the defendant. The refusal of the request is the subject of the first specification of error. The condition of the health of the insured when the policy was issued was essentially and entirely a question of fact to be decided upon the evidence and involving the credibility of witnesses. The most of the evidence affecting this question related to the period of his childhood, and was to the effect that he occasionally had fits, "or weak spells." His father, who was called by and on behalf of the defendant, testified that he had not seen his son have "a weak spell" for twelve years preceding the issuing of the policy, although during all that time the latter dwelt and worked with the former. He testified further that his son was strong and active, and the most of the time referred to was employed as a hodman. The sister of the insured, who was also called by the defendant company, testified substantially as her father did in regard to her brother's health and ability to labor. Their testimony was uncontradicted and tended to show that he was in sound health when the policy was issued. The certificate of the physician who attended him in his last sickness afforded but little if any support to the claim that he was afflicted with chronic epilepsy. It was, on this point, plainly reconcilable with the testimony of the father and sister, and with the other evidence in the case. Our conclusion, resulting from an examination of all the testimony, is that the question whether the insured was in sound health when the policy was issued was for the jury, and that it would have been manifest error to refuse to submit it to them.

The second and third specifications are based on excerpts from the charge, which the defendant characterizes as misleading. We have given to this complaint all the consideration it deserves and are convinced that it is without just foundation. The charge appears to be adapted to the issue and the evidence affecting it, and there is no prejudice, partiality or tendency to mislead discernible in it. It was the duty of the learned trial Judge to construe the contract and to define the scope and meaning of the provision in it on which the defendant sought to avoid the insurance. It is not claimed that there was any error in his construction of the contract, but the learned counsel for the defendant appears to think that his explanation of the meaning of the words "sound health" as used in the policy was more elaborate and illustrative than was necessary and tended to belittle the defence.

We do not think so; nor do we see any merit in the criticism of the portion of the charge which is complained of in the third specification. The jury were plainly and repeatedly informed that the material question for their determination was whether the insured was in sound health when the policy was issued. There was no room in the instruction on this point for misapprehension of the issue. The specifications are overruled.

Judgment affirmed. W. C. S.

Digitized by Google

Jan. '95, 17. April 23, 1895.

Caldwell v. East Broad Top R. R. & Coal Co.

Equity—Adequate remedy at law—Trespass—Covenants in deed to govern—Oral agreement—Negligence.

Where at the time of a conveyance by plaintiff to a railroad company there is a condition in the deed that the latter shall maintain a station and siding, but the deed is silent as to the character of the station to be maintained, the question of how far a station of a given character is a compliance with the contract, is to be determined by the needs of the company and of those who use it.

The plaintiff has a full and adequate remedy at law for a trespass which consists in the negligent exercise by the defendant, of an undoubted right, and hence cannot in such case maintain a bill for an injunction.

Appeal of I. C. Caldwell, plaintiff, from the decree of the Common Pleas of Huntingdon County, dismissing his bill against the East Broad Top Railroad and Coal Company.

The facts of the case are sufficiently stated in the opinion of the Supreme Court, *infra*.

The errors assigned by the appellant were (1) that the Court in its decree said "We deem it a sufficient disposition of those exceptions, which complain of the finding of the master as to the alleged contemporaneous oral agreement, to say that such finding is as binding upon us as would be the verdict of a jury;" (2), approving and confirming absolutely the report of the master; (3), in dismissing plaintiff's bill and refusing the relief and injunction prayed for.

W. McK. Williamson, for appellant.

John D. Dorris, (*William Dorris* with him), for appellee.

June 3, 1895. Fell, J. The plaintiff in 1884 by deed granted to the defendant a right of way over his land for a railroad. The only condition in the deed is that the defendant shall erect at or near a place designated a freight and passenger station with sidings necessary for the convenient shipment of freight to and from the station. More than six years after the completion of the road the bill in this case was filed to compel by injunction the location of a siding in such a manner that the plaintiff can connect with it a track to his saw mill, and to require the operation and maintenance of the defendant's road in such a manner as to restore a water power on the plaintiff's property, and to establish a station to be named "Caldwell." All of the rights claimed by the plaintiff, except that of having a station and siding, rest upon an alleged oral agreement made at or before the delivery of the deed.

It is alleged in the answer that the defendant has complied with the conditions of the deed as far as it was permitted to do so by the plaintiff; that a station has been built within a few feet of the place fixed by the deed, and a siding constructed; and that any failure in an exact compliance with the deed has been due to the plaintiff's refusal to give land for the purpose, as he had agreed, at a point where it was practicable to establish a station. The answer further distinctly denies that there was any agreement between the parties except that shown by the deed, and sets out that prior to the filing of the bill in this case the plaintiff instituted an action of ejectment to recover the land conveyed, and also an action to recover damages for the injuries complained of in the bill. Both of these actions are still pending.

The finding of the learned master, approved by the Court, that the alleged oral agreement was not established by the testimony, seems to be fully justified. The claim for equitable relief then rests upon the alleged breach of the condition of the deed in relation to the erection and maintenance of a station, and upon the injury to the water power. The station erected is a board shed, and no agent has been placed there. In structure and management it does not differ from most of the stations on the road. As the agreement is silent upon the subject, the character of the station to be maintained is to be determined by the needs of the company and of those who use it. The testimony does not show that the defendant has not fairly and substantially complied with the conditions of the deed in this regard. The injury to the water power has been caused by the washing of the embankment of the road-bed, which extends to the edge of an old channel in which the water flows only when there is a freshet. At such times dirt and loose stones from the embankment are carried by the water to the tail-race and deposited there to such an extent as to fill it up. The master finds as a fact that the injury is caused in part by the plaintiff allowing tree-tops and rubbish to be thrown into the old channel, and that the power can be fully protected by the removal of the obstacles by the plaintiff and by the rip-rapping of the banks at the foot of the embankment by the defendant. As the injury complained of is caused in part by the plaintiff's negligence he has no standing to ask that the defendant be enjoined, and under the findings the bill might have been dismissed on the merits.

As stated in the opinion of the learned Judge of the Common Pleas, any trespass of which the defendant is guilty consists in the negligent exercise of an undoubted right, and for this the

Digitized by Google

plaintiff has a full and adequate remedy at law, to which in the first instance he resorted, and to which he should now be left.

The decree is affirmed at the cost of the appellant.

W. C. S.

Common Pleas.

C. P. No. 4. June '94, 1024.

Meigs et al. v. Milligan.

Equity—Building restriction—Change of character of neighborhood — Merger—Easement —Deed—Construction.

Where an easement is merged by reason of the title to both servient and dominant tenements vesting in the same owner, he may, in conveying the same, revive it as against the servient tenement.

A restriction was as follows: that A., his heirs and assigns, shall and will not erect, or cause to be erected, any building or other obstruction, "excepting bath houses and privy, and walls or fences, not exceeding eight feet in height from the level of the ground on the said above described and granted lot," etc.:

Held, the restriction to eight feet in height applied as well to bath houses and privy as to walls and fences.

Wherever several words and phrases are followed by a general qualifying expression, which is as much applicable to the first as the last, the qualifying expression is not limited to the last, but applies to all the words.

A. filed a bill to enforce a building restriction; at the time of the creation of the restriction the neighborhood in which the premises were situated was used exclusively for residential purposes; at the time of the filing of the bill several houses therein had been converted into stores:

Held, that as A. had been guilty of no laches, equity would enforce the restriction. Orne *v.* Fridenberg, 143 Pa. 487, distinguished and explained.

Hearing on bill, answer and agreed facts.

Harry I. Meigs and others, owners of premises 1208 Walnut street, filed a bill against William Milligan, the owner of the adjoining premises, praying that the latter be enjoined from erecting or maintaining any structure at a point further south than fifty-nine feet from the original line of Walnut street at any greater height than eight feet from the level of the ground. An answer was filed and the parties then filed an agreement of facts as follows:—

"It is hereby agreed that the following statement of facts shall be filed of record in this case, to have the same force and effect as if duly proven and found according to equity practice:

"1. The plaintiffs are the owners in fee simple of premises No. 1208 Walnut street, as set forth in paragraph 1 of their bill.

"2. The defendant, William Milligan, is the owner by deed dated July 10, 1894, of the house and lot (No. 1210 Walnut street) lying immediately to the west of the house and lot owned by plaintiffs.

"3. In the year 1828 Samuel Mifflin was the owner of the lots which are now Nos. 1210 and 1212 Walnut street, and his wife, Elizabeth Mifflin, was the equitable owner of the lot which is now No. 1208 Walnut street. In that year the said Samuel Mifflin and wife conveyed to James Cooper the lots which are now Nos. 1210 and 1212 Walnut street, by deed duly recorded, which recited the premises conveyed as being bounded on the east by ground of Samuel Mifflin, and contained the following conditions: 'To have and to hold the aforementioned and described premises unto the said James Cooper, his heirs and assigns, under the condition that no building or part of a building other than steps, cellar doors, eaves, cornices, etc. (as specified in a certain indenture recorded in Deed-book M. R., No. 13, page 491, etc), shall be erected on said lot within three feet of the line of the said Walnut street, and under the condition also that no building or part of a building, or other obstruction (except a bath house and privy and walls or fences not exceeding eight feet in height from the level of the ground), shall be built or erected on the easternmost twenty-one feet of the said hereby granted lot, further south than fifty-nine feet from the original line of the said Walnut street.'

"Said easternmost twenty-one feet composed the lot which is now No. 1210 Walnut street and is owned by defendant under the said deed of Samuel Mifflin and wife, by virtue of several mesne conveyances, all of which recite the above set forth condition and convey the premises under and subject thereto. The plaintiffs are not the heirs of Samuel Mifflin.

"4. On May 30, 1850, Charles Augustus Davis, trustee (under a deed of Charles Bird and Rebecca his wife, dated May 15, 1824), of premises now No. 1208 Walnut street, for the sole and separate use of Elizabeth Mifflin, wife of Samuel Mifflin, and Elizabeth Mifflin, widow and relict of Samuel Mifflin, conveyed the said premises No. 1208 Walnut street to Charles D. Meigs; and on March 29, 1854, Cecilia Carpentier conveyed the premises now No. 1210 Walnut street to the said Charles D. Meigs by deed duly recorded, which recited the condition above set forth in paragraph 3. On July 1, 1854, Charles D. Meigs, being then the owner of Nos. 1208 and 1210 Walnut street, conveyed No. 1210 Walnut street to John Forsyth Meigs in fee by deed duly recorded, which recited the condition above set forth in paragraph 3 and contained the following covenant: 'And the said

Digitized by Google

John Forsyth Meigs doth hereby for himself, his heirs and assigns, covenant, promise, and agree to and with the said Charles D. Meigs, his heirs and assigns, owners of the messuage and lot of ground adjoining the above described and granted lot on the east, that he, the said John Forsyth Meigs, his heirs and assigns, shall not and will not, at any time or times hereafter, erect or put up or cause or suffer to be erected or put up any buildings or part of a building or other obstruction except a bath house and privy and walls or fences, not exceeding eight feet in height from the level of the ground, on the said above described and granted lot of ground further south than fifty-nine feet from the original line of the said Walnut street.'

"On August 5, 1865, Charles D. Meigs conveyed No. 1208 Walnut street to John Forsyth Meigs by deed duly recorded, under and through which the plaintiffs own that lot.

"And on the same date (August 5, 1865), John Forsyth Meigs conveyed No. 1210 Walnut street to Charles D. Meigs by deed duly recorded, under and through which the defendant owns that lot. This deed and all the subsequent conveyances under which the defendant derives title recite at length the conditions in the deed of 1828 (quoted above in paragraph 3), and also the covenant of John Forsyth Meigs (immediately above set forth), and all contain a recital, immediately after the clause of *habendum et tenendum*, that they are made 'under and subject to the above-mentioned conditions as the same are above particularly mentioned.'

"5. In the year 1828 bath houses or bath rooms were by no means general in houses in Philadelphia; some of those that existed were built in a structure on the ground floor behind the body of the house. In 1854 bath houses in Philadelphia were generally built in and from the second story of dwellings and projected from the rear part thereof.

"6. At no time prior to defendant's purchase had any structure been erected upon lot No. 1210 Walnut street more than eight feet in height from the level of the ground south of fifty-nine feet from the original line of Walnut street. The only structures of any kind south of the said fifty-nine feet line were walls or fences not exceeding eight feet in height from the ground and a privy in the rear, also not exceeding eight feet in height from the ground, save for a few inches at the top of the pitch of the roof thereof, where it is eight feet two inches, but of this plaintiffs had no actual knowledge, though a measurement thereof would have disclosed the fact. It has existed some years. Early in August of this year defendant began to build a structure jutting out from the rear wall of his house, No. 1210 Walnut street, at about the level of the second story and extending upwards. The whole of this structure is more than eight feet above the level of the ground and more than fifty-nine feet south of the original line of Walnut street. Said structure is eight feet seven inches deep by six feet one and three-quarter inches wide and nine feet three and one-half inches high. It was built for a bath house, and is now fitted for no other purpose. It is built exclusively over defendant's lot, and not over any part of the soil belonging to the plaintiffs. At the time of defendant's purchase, and for a long time prior thereto, there was a bath room and water closet in the second story of 1210 Walnut street, north of the line fifty-nine feet south of the original line of Walnut street.

"7. On the north side of Walnut street between Twelfth and Thirteenth street there are sixteen houses, one of which is a store (northeast corner Thirteenth and Walnut streets). All the others are dwelling houses. On the south side of Walnut street between Twelfth and Thirteenth streets there are sixteen houses, seven of which are stores with bulk windows in front, three others occupied partially for business purposes, one a boarding house, and five dwelling houses. All the buildings on both sides of Walnut street up to 1854 were dwelling houses.

"8. Notice of objection and warning to desist were given on behalf of the plaintiffs on August 6, 1894, immediately upon discovery of the intention to erect this structure, when it was but little more than begun, and an injunction applied for as soon as reasonably could be by filing of the bill.

"9. This agreement is to be a substitute for all allegations of fact in the bill and answer, and it is agreed that the said allegations of fact shall not be evidence for any purpose.

"10. Each party to have the right to appeal."

John Samuel, (*William M. Meigs* with him), for plaintiffs.

The words "not exceeding eight feet in height from the level of the ground" apply to all the structures mentioned in the exception, viz: "bath houses," "privies," and "walls or fences."

1. The rule of construction governing such a phrase is "that wherever several words or phrases are followed by a general qualifying expression, which is as much applicable to the first as to the last, the qualifying expression is not limited to the last, but applies to all the words." In all of the cases in which this has been held, this legal construction has not coincided with the grammatical construction, but in this case the legal and grammatical construction are identical; for all of the words to which the general following qualifying expression applies are connected by the copulative "and," thereby gram-

Digitized by Google

matically connecting the qualifying phrase "not exceeding eight feet in height" with each one of the preceding words, "bath house," "privy," "walls or fences."

This canon of construction is illustrated and enforced in the following cases:—

Gyger's Estate, 65 Pa. 311.
Eby's Appeal, 70 Id. 311.
Great Western R. R. *v.* S. & C. R. W. Co., L. R. 9 App. Cas. 808.
Coxson *v.* Doland, 2 Daly, 66.

2. The words must receive a reasonable construction and not one that would defeat the object of those using them. That the object of the deeds of 1828 and 1854 was to create an easement for light and air on No. 1210 and in favor of Nos. 1208 and 1212 cannot be doubted. See Muzzarelli *v.* Hulshizer, 163 Pa. 643.

To limit the application of the words "not exceeding eight feet in height" to walls or fences would enable the owners of 1210 to cover their ground with so called privies or bath houses (because the adjoining owners would have no means of knowing the uses to which any buildings would be put) erected of a size and height sufficient to exclude light and air from the adjoiners. Why apply the words "not exceeding eight feet in height" to "walls or fences," which between houses in the city are rarely or never above that height and not apply them to baths and privies which are generally over that height, if an easement for light and air was intended?

Any inference that the words have any reference to the method of building bath houses or privies in 1854 is rebutted and overthrown when it is observed that they are an exact copy of the words used in the deeds of 1828.

Even if it were customary in 1854 to erect overhanging bath rooms from second stories, a condition creating an easement for light and air would more naturally endeavor to prevent such an erection than allow for their construction, and therefore the fact that in 1854 overhanging second story bath rooms were general, makes not in favor of but against the construction of defendant.

If there is anything in the argument sought to be founded on the alleged changed character of the neighborhood, that is, that what formerly was a locality of residences has now become a business street—if there was anything in the argument, the facts forbid its application. There is no comparison between this locality and 9th and Chestnut streets on which Orne *v.* Fridenburg, 143 Pa. 487, on which defendant relies, arose. At 9th and Chestnut streets no dwelling house meets the eye. Walnut street, between 12th and 13th, the northern side is all occupied by dwellings, on the southern side there are but seven out of the sixteen buildings that have been altered into the appearances of stores, though three more had partially been used for business.

But Orne *v.* Fridenburg really decided this only: "A chancellor does not and ought not to interfere by way of mandatory injunction *even though the injury be clearly established where there has been long continued delay in asserting the right, and a remedy exists at law.*" The matters complained of had existed in that case for over twenty-one years without objection.

In this case defendant only acquired the premises in July, 1894, notice to desist from building the objectionable structure was given on August 6, 1894, immediately on the discovery of the intention to erect it, and the bill was filed on the same day.

Under the cases of—

Clark *v.* Martin, 49 Pa. 289,
St. Andrew's Church App. 67 Id. 512,
Muzzarelli *v.* Hulshizer, 163 Id. 643,

the injunction prayed for in the bill must be granted.

Alexander Simpson, Jr., (*Robert T. Corson* with him), for defendant.

The plaintiffs have no standing to enforce the condition under the deed of 1828. (1), they are not heirs of Samuel Mifflin; (2), they are not interested in the premises conveyed; (3), they do not claim title or interest through Samuel Mifflin.

While the common law rule that none but heirs of the grantor can enforce the right for condition broken has been here so far relaxed as to allow an assignee to do so when the right has been expressly reserved to assign, (McKissick *v.* Pickle, 16 Pa. 140), yet there must be an express reservation to accomplish this, and such reservation is not to be inferred but must clearly appear.

1 Shars. & Budd Lead. Cas. 141 *et seq.*

In doubtful cases a reservation must be construed most strongly against the grantor.

Butler *v.* Gardner, 8 Johns. 394.
Duryea *v.* New York, 62 N. Y. 592.
Gibson *v.* Tyson, 5 Watts, 34.
Dunham *v.* Kirkpatrick, 101 Pa. 43.
Warbrick *v.* Way, 2 WEEKLY NOTES, 117.

As to the covenant in the deed of 1854, the best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it.

Schuylkill Nav. Co. *v.* Moore, 2 Whart. 477.
Dunham *v.* Kirkpatrick, *supra*.

This would allow a "bath house" and "privy" as they were admittedly built in 1854, viz: with the overhanging bath for the second story. The contention of the plaintiff that the bath house and privy, as well as the wall and fence must not

Digitized by Google

exceed eight feet, is not sustainable by the covenant when considered grammatically, but, waiving this, the clause is capable of two constructions, and hence that which is against the grantor must prevail.

J. F. Meigs, who made the covenant in 1854, afterward became possessed of the lot in whose favor it was made, and C. D. Meigs, the covenantor, became the owner of the servient tenement, there was therefore a merger of the easement.

When the covenant was made the neighborhood was a residential one, it has now ceased to be such, and equity will not under the changed conditions interfere, but will leave the plaintiffs to their action at law.

Orne *v.* Fridenburg, 143 Pa. 487.

June 10, 1895. ARNOLD, J. We have no doubtthat the property owned by the defendant, is subject to the building restriction sought to be enforced by the plaintiffs' bill. The restriction was created in 1828, and while there may be said to have been a merger of the restriction between March 29 and July 1, 1854, by reason of the title to both properties, Nos. 1208 and 1210 Walnut street, being vested in Charles D. Meigs, yet it was revived in express words in the deed of No. 1210 Walnut street from Charles D. Meigs to John Forsyth Meigs of July 1, 1854, in which the said John Forsyth Meigs, for himself, his heirs and assigns, covenanted, promised and agreed with the said Charles D. Meigs, his heirs and assigns, owners of the messuage and lot of ground adjoining on the east, that is, No. 1208, "that the said John Forsyth Meigs, his heirs and assigns, shall not and will not erect or put up, or cause to be erected or put up, any buildings, or part of a building or other obstruction, excepting bath houses and privy and walls or fences, not exceeding eight feet in height from the level of the ground, on the said above described and granted lot of ground, further south than fifty-nine feet from the original line of Walnut street."

On August 5, 1865, Charles D. Meigs and John Forsyth Meigs made an exchange of properties (although not by a technical deed of exchange), No. 1208 becoming thereby vested in John Forsyth Meigs and No. 1210 in Charles D. Meigs. The deed to Charles D. Meigs for No. 1210 Walnut street and the subsequent conveyances of the property, recite at length the restriction created in 1854, and in the *habendum* declares that it is made "under and subject to the above mentioned conditions as the same are above particularly mentioned." The plaintiffs are the present owners of No. 1208 Walnut street and the defendant is the owner of 1210 Walnut street. By the agreed statement of facts it appears that early in August of the year 1894 the defendant began to build a structure jutting out from the wall of his house, No. 1210 Walnut street, at about the level of the second story and extending upwards. The whole of this structure is more than eight feet above the level of the ground and more than fifty-nine feet south of the original line of Walnut street. Said structure is eight feet seven inches deep by six feet one inch and three-quarters wide and nine feet three inches and a half high. It was built for a bath-house and is fitted for no other purpose. It is built exclusively over defendant's lot and is not over any part of the soil belonging to the plaintiffs. Notice of objection and warning to desist were given by the plaintiffs on August 6, 1894, immediately upon discovery of the intention to erect this structure, when it was but little more than begun, a bill for an injunction was filed the same day, and an *ex parte* injunction was granted on August 9, 1894. A hearing was had on August 17, 1894, at which the injunction was continued until the further order of the Court; but, as at that time the entire outer part of the bath-house had been erected and it was roofed in, the preliminary injunction was unavailable to prevent the erection so far as it had gone. An answer was then filed and an agreement of facts entered into, which are substantially as averred in the bill and answer. Among these facts, in addition to those stated above, is an agreement that in 1854 bath houses were built in and over the second story of buildings and projected from the rear thereof. It is also agreed that in the lot occupied by the plaintiffs' and defendant's houses, there are sixteen houses, of which seven are stores, three are occupied partly as stores and partly as residences, one as a boarding house and five are dwelling houses. We do not consider, however, that either of these facts overcomes the restriction.

The defendant contends that the restriction against building more than eight feet high applies to fences only, that being the word next to the words limiting the height to eight feet, and that the restriction does not apply to the other buildings enumerated in the restrictive clause, to wit, bath-houses, privies and walls; or failing to prevail in this narrow application of the restriction, he contends that the matter is in such doubt that it should be resolved against the grantor, according to the canon of construction, that a deed is to be construed most strongly against the grantor.

We do not, however, conceive that there is any doubt on the subject. The true rule as contended for by the plaintiffs, "that wherever several words and phrases are followed by a general qualifying expression, which is as much applicable to the first as to the last, the qualifying ex-

Digitized by Google

pression is not limited to the last, but applies to all the words." Instances of the application of this rule may be found in Eby's Appeal, 70 Pa. 311; Fisher *v.* Connard, 100 Pa. 63; Great Western Railroad Company *v.* Swinden and Cheltenham Railway Company, 9 App. Cases, 808.

The claim of the defendant that there has been such a change in the neighborhood as to justify him in considering the building restriction as at an end, is not tenable. More than half the houses are still occupied as residences, although some of them are in part used for business. In the case of Orne *v.* Fridenberg, 143 Pa. 487, in which this principle was applied, it appeared that the whole neighborhood had been abandoned for residences and given up to business, and the forbidden erection had been up for over twenty-one years. The change of the neighborhood and the laches of the plaintiff, together, combined to deprive him of his right to an injunction, although he might have sued for damages.

As the defendant has violated the restriction and persisted in building the above structure after he was warned that proceedings would be taken against him, we will enter a decree requiring him to take it down and abate it, as was done in Clark *v.* Martin, 49 Pa. 289; Reimer's Appeal, 100 Pa. 182, and Muzzarelli *v.* Hulshizer, 163 Pa. 643.

Let a decree be drawn up in pursuance of the prayer of the bill.

Decree accordingly. H. B.

C. P. No. 2. Dec. 1893, 240.

Wood v. The Pennsylvania Railroad Company.

Negligence—Proximate and remote cause—Railroad company—Duty to ticket purchaser before he has boarded a train and who is on the station platform.

The measure of the duty of a railroad company toward a person who is on the platform of a station and who is either a passenger or is about to become one, having purchased a ticket, is, that the company must take all the care for his safety that foresight can suggest.

The responsibility for negligence does not extend to all the consequences that may by possibility result from that negligence, but to those consequences only, that under the circumstances, might and ought to have been foreseen.

Motion to take off non-suit.

The facts of this case are very fully stated in the opinion.

February 16, 1895. PENNYPACKER, J. On October 26, 1893, the plaintiff, having bought a return ticket, went as a passenger upon the railroad of the defendant company from Frankford to Holmesburg. After spending the day there, attending to some matters of business, he concluded to come back upon a way-train, due at Holmesburg at five minutes after six in the evening. While waiting for this train the plaintiff stood on the platform of the station, which was on the north side of the tracks, at the eastern end of the platform, with his back against the wall at the corner. To the eastward of the station a street crosses the railroad at grade. How far this crossing is from the station does not appear from the evidence. It was not so far away, however, but that persons on the platform could see objects at the crossing. For at least one hundred and fifty yards to the eastward of the crossing the railroad is straight, and then curves to the right. About six o'clock an express train, coming from the eastward upon the north track, passed the station, and the plaintiff, while standing in the position described, was struck upon the leg by what proved to be the dead body of a woman, and was injured. The headlight of the approaching locomotive disclosed to one of the witnesses, who stood on the platform, two women in front of the train at the street crossing, going from the south to the north side of the tracks. One succeeded in getting across in safety, and the other was struck just about as she reached the north rail. How the woman came to be upon the track there is nothing in the evidence to show. There was evidence that no bell was rung or whistle blown upon the train which struck the woman before it came to the crossing, and some evidence that it was running at the rate of from fifty to sixty miles an hour. Upon this state of facts the trial Judge entered a non-suit.

The question which is raised in this case must be considered from the standpoint of the duty of a railroad company toward one who is on the platform of a station, and is either a passenger or is about to become a passenger, after having purchased a ticket. No doubt the measure of that duty is that the company must take all the care for his safety that foresight can suggest. But it has long been a well-settled doctrine that responsibility for negligence does not extend to all the consequences that may by possibility result from that negligence. There must be an end to that responsibility somewhere. It is said by Mr. Justice GREEN, in Passenger Ry. Co. *v.* Trich, 117 Pa. 399: "To impose such a standard of care as requires, in the ordinary affairs of life, precaution on the part of individuals against all the possibilities which may occur, is establishing a degree of responsibility

Digitized by Google

quite beyond any legal limitations which have yet been declared." The line at which responsibility is to cease was fixed in the case of Hoag *v.* The Lake Shore, etc., R. R. Co., 4 Norris, 293, an authority which has been cited with approval in many later cases and never disputed. The facts there were, that a locomotive, drawing a train of oil cars, by negligence, came in contact with a landslide; the cars were broken, the oil was set on fire, ran into an adjacent creek, which was at the time swollen, was carried down the stream and burned the plaintiff's property. A verdict was directed for the defendant, and the judgment was affirmed in the Supreme Court, which held: "We think this difficulty may be avoided by adhering to the principle substantially recognized in the Railroad Co. *v.* Kerr, and the Railroad Co. *v.* Hope; that, in determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence, such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrong-doer as likely to flow from his act. It would be unreasonable to hold that the engineer of the train could have anticipated the burning of the plaintiff's property as a consequence likely to flow from his negligence in not looking out and seeing the landslide. The obstruction itself was unexpected. The probable consequences of the collision, such as the engineer would have a right to expect, would be the throwing of the engine and a portion of the train off the track. Was he to anticipate the bursting of the oil tanks, the oil taking fire, the burning oil running into and being carried down the stream, and the sudden rising of the waters of the stream, by means of which, in part at least, the burning oil set fire to the plaintiff's building? This would be a severe rule to apply." Now, what is the result of the application of the rule there established to the facts of the present case? The engineer could anticipate that if he ran too rapidly or failed to blow the whistle or ring the bell that he might strike a woman on the crossing, and that she would be injured; but could he anticipate that her body would be carried over the distance, indefinite under the testimony, between the crossing and the platform, and there be thrown against a man in such a way as to harm him? There is a possibility of such a result, because it has actually occurred, but it is the most remote kind of a possibility. In fact, the slowing of the train and the blowing of the whistle would ordinarily be a matter of entire indifference to a man standing on the platform of the station. It would have relation to him so seldom that it could be said with comparative truth, that it does not affect him at all. But it is urged that it was the duty of the defendant to blow the whistle, and the failure to perform this duty was negligence in a general sense, and that, as a result, the woman was without warning and got upon the track, and, being there, she was struck and thrown against the plaintiff. The fatal defect of this reasoning is that it assumes, what is essential in every case to prove, that the negligence of which complaint is made was the cause of the accident. It may be conceded that if it appeared that the accident was due to the concurrent negligence of both the defendant and the woman, each would be responsible; but still it would have to be shown that the negligence of the defendant was an efficient moving cause. How do we know that the failure to blow the whistle had any effect in bringing this woman upon the track? So far as appears, she may have both seen and heard the train coming and concluded to take the risk with deliberation, and if so, the blowing of the whistle would have been without effect. The mule case, Fisher *v.* Pennsylvania R. R. Co., 126 Pa. 294, where it was held that it was not the duty of the defendant company to blow a whistle, in order to warn a mule, is authority for the proposition, that it is not enough to show general negligence in the failure to blow a whistle at a crossing, but that the plaintiff must go further and show that the accident was the result of the negligence. Chief Justice GIBSON said, in Railroad Co. *v.* Skinner, 7 Harris, 302: "Granting, what one of the witnesses testified, that the cow might have been seen at the distance of fifty rods by the wayside, and granting that the train might have been stopped within it, yet the engineer was not bound to stop it. He had no reason to apprehend that she would leap into the jaws of death, or that it was necessary to anticipate her." If the engineer could not anticipate that a cow would so run into danger, much less could he, looking at the situation from the position of his duty to a man on a platform some distance ahead of him, anticipate that a sensible being would put herself before an approaching train. Suppose the obstruction on the track had been a log, put there by some one in an effort to overthrow the train; that case would come directly within the authority of Fredericks *v.* The Railroad, 157 Pa. 116, where it was held that railroads are not bound to take precautions against the criminal acts of strangers. Suppose this woman thrust herself before the train as a *felo de se;* her body is then exactly in the same relation to the train as a log; that is, it is an obstruction put before the train in an effort to commit a crime. The probability is that she was not a suicide, but the evidence in the case fails to account in any way for her presence

Digitized by Google

there, and it is incumbent upon plaintiff, before he can recover, to show that the negligence of the defendant produced the accident.

Let us compare the facts in this case with those in the case of Passenger Ry. Co. *v.* Trich, *supra*. There the plaintiff was thrown from a railway car into the street in consequence of the negligence of the driver of the car. While lying there she was injured by being run over by a runaway team. Though one falling into a crowded street would be quite likely to fall in front of a passing wagon, it was held there such a result was only possible and not probable, and that the team constituted an intervening cause for which the car company was not responsible. Can it be said that the presence of the woman in this case was any less an intervening cause, or any more likely to be foreseen than the presence of the team? It is true that women do frequently go over railroads at crossings, and it is also true, that wagons in great numbers traverse the streets.

Our attention is called to the case of Alabama R. R. *v.* Chapman, 31 Am. and Eng. R. R. Cas. 394, which is somewhat similar in its facts, and where a recovery was permitted. It is perhaps enough to say that the law of negligence has developed into a system in Pennsylvania, and that, therefore, authorities from other States, however respectable and well reasoned, cannot be always followed. That case was decided upon the ground that the force given by the blow of the train to the cow had not terminated, and this fact appeared from the testimony. In the present case we do not know how the woman's body got over the intervening space between the crossing and the platform. It may have been carried, and the projecting body may have come in contact with the platform, or it may have been thrown by the first impact, but either theory is only conjectural.

In the case of Township of West Mahanoy *v.* Watson, 112 Pa. 574, where a team of horses were frightened at a heap of ashes negligently left on the highway, ran off, and were subsequently found dead upon a railroad track five or six miles away, having been killed by a moving locomotive, the Court refused to infer that they had run there under the impulse of the fright. In the absence of proof of a continuous flight, the Court held that it could not be presumed. For these reasons the motion to take off the non-suit is refused; but it ought to be added, that the conclusion here reached is not the unanimous opinion of the Court. F. B. N.

Orphans' Court.

January, '94, 240.

Erwin's Estate.

Practice in the Orphans' Court—Will—Issue d. v. n.

Where an attack is made upon the whole will, which is alleged to have been procured through undue influence, separate issues of *devisavit vel non* as to each bequest will not be awarded.

Exceptions to precept and issue.

The issue awarded in this case was to determine the validity of the whole will. Some of the legatees filed exceptions to this form, asking that separate issues be granted as to each clause of the will.

John G. Johnson, for exceptant.

M. Hampton Todd, for contestant.

March 30, 1895. HANNA, P. J. The ingenuity of counsel has introduced a novelty in practice which, if adopted in this proceeding, we fear would only end in great embarrassment. The matter now before us is not one in which it would be proper to award a separate issue as to the bequests in the alleged will of testatrix. It has proceeded, from the beginning, upon the assumption that the entire will is invalid, and was procured through undue influence, alleged to have been exerted by the improper procurement of the testamentary paper. It is not conceded that any of the bequests are valid. If that were so, then the issue might be confined to those attacked; but here the assault is made upon the entire testamentary paper, and that is the question to be determined.

We see no reason to depart from the usual practice in such cases, viz., to award the general issues which are presented, and therefore must dismiss the exceptions.

Exceptions dismissed and issues awarded.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, JULY 26, 1895.* [No. 24.

Supreme Court.

July, '94, 63. February 5, 1895.

The Pennsylvania Schuylkill Valley R. R. Co. v. The Spring City Gas Light Company.

Eminent domain—"Just compensation" for exercise of—Definition of—Matter to be considered by the jury in determining the value of the land taken—Evidence—Expert testimony.

Where land is taken in the exercise of the right of eminent domain, "just compensation" therefor is such a sum as shall equal the difference between the fair market value of the property entered, before the entry and after it. If the entire lot is taken, its value at the time of taking determines the amount of the damages. If part only is taken, the jury should ascertain the value of what remains, and the difference between this and the value of the whole before the entry was made fixes the measure of damages.

The jury must not be allowed, in determining the value of the land taken, to conjecture what use the owner might have made of it in the future had it not been taken. Such values are speculative and should not be considered by the jury.

A railroad company having taken by the right of eminent domain, certain unoccupied land of a gas company, in an action for damages, the gas company claimed that the land taken was part of its gas plant, and claimed twenty-five thousand dollars damages on the ground that its plant had been impaired. On cross-examination the treasurer of the gas company testified that the entire capital stock of the company was but $25,000. On motion of the plaintiff this evidence was stricken out:

Held, that on the plaintiff's theory the question at issue was the difference in value of the plant before and after entry, and the evidence was relevant, and should not have been stricken out.

Expert testimony is only admissible, when the matters in which the expert is experienced are relevant to the issue.

A witness professing to be an expert as to the value and use of the appliances necessary to the production of gas, is not a competent witness, where a taking of land by right of eminent domain has not interfered with the machinery and structures of the gas works.

Appeal of the Pennsylvania Schuylkill Valley Railroad Company, defendant, from the judgment of the Common Pleas of Montgomery County, in an action brought by the Spring City Gas Light Company, to recover damages for land appropriated and injured by the defendant in the exercise of the right of eminent domain.

Upon the trial, before WEAND, J., the following facts appeared: The Spring City Gas Light Company, the plaintiff in the case, is a corporation located in Royersford, Montgomery County, and owned a plot of ground upon the Schuylkill River. The Borough of Spring City is on the other side of the river, in Chester County. The two boroughs were connected by a bridge across the Schuylkill and had together about a population of 4,000. The plaintiff had manufactured gas in this plant for a number of years, and had its pipes in some of the streets of both boroughs. The defendant company located a branch running from its railroad from the Chester County side across the river Schuylkill to Royersford and occupying First avenue below Main street where opened, and above Main street on the laid out, but unopened part of First avenue it extended in front of the plaintiff's plant. No part of this branch railroad occupied any portion of the plaintiff's ground in use, and the operation of the plaintiff's works was in no way interfered with in the manufacture or distribution of the gas to the boroughs. After the branch had been built the gas works were exactly in the same condition and operation, as they were in before. The land taken by the appropriation of the branch including the street was 267-1000 of an acre. The plaintiff company laid its damages at $25,000.

It appeared that while the gas company had been in operation a good many years, no dividend on the stock had been made. In cross-examination the treasurer of the gas company testified that the capital stock of the company was $25,000. On motion of the plaintiff, this testimony was stricken out. (Third assignment of error.) John Slingluff, one of the witnesses of the plaintiff, and called as an expert, testified, *inter alia*, as follows:

"I am pretty well acquainted with the gas plants, and have paid considerable attention to them. I was on the property at the time the gas works were first started. I don't know how many years ago that was. Quite a good many years. I have known it there, and I have seen it in passing often. I have been on the property two or three times, probably three or four times. I think only once actually on before the railroad came there. I was not acquainted with its market value. I wouldn't buy it except for the purpose of a gas works. I don't know anything about the value of other properties up there. I think I am able from my knowledge in that line of property and my acquaintance with this property with the plant on it before

Digitized by Google

the railroad to tell the fair market value. I think it is very probable it might be used for other purposes. I do not know the value of properties at Royersford. I should think it would be good for other purposes. I do not think I am able to express an opinion as to its market value for other purposes. My judgment as to its value is alone for the purpose of gas works. 'If I was going to purchase I think I would get all the information I could. That would have a great deal of weight with me, if there was anything in it from the past records.' I am not acquainted with the market value of real estate generally in this locality, or of the improvements."

The defendant moved to strike out all of his testimony. Motion overruled. (Fourth assignment of error.) The plaintiff submitted, *inter alia*, the following point:

1st. "In ascertaining the market value of the property in question, if the jury find that its highest and most available use at the time of the taking was that of a gas plant they have a right to consider the future growth of the Borough of Spring City and Royersford, the increased demand for gas so far as those considerations affect its market value, and if the jury further find that by reason of the location of the railroad through the property its availability has been curtailed, lessened or partly destroyed, they have the right to consider these questions so far as they affected the market value of the property as a whole immediately after the taking." *Answer.* I affirm this to be the law. (First assignment of error.) Verdict for plaintiffs for $10,000 and judgment thereon. Whereupon the defendant took this appeal, assigning for error the objection and admission of testimony as above, and the answer to plaintiff's point.

Charles H. Stinson, (with him *C. Henry Stinson* and *William F. Solly*), for appellant.

N. H. Larzelere, (with him *E. L. Hallman* and *William Rennyson*), for appellee.

March 18, 1895. WILLIAMS, J. The general principles relating to the exercise of eminent domain, and compensation to be made to those against whom it is directed, are very familiar though they seem at times to be forgotten. The power to take is a prerogative of the government. It is to be exercised only in the interest of the public. It may be granted to municipal and other corporations to promote such municipal improvements, and such business enterprises as are calculated to advance the general welfare. Private interests must give way when the public good requires it, and the power by which this is compelled is that of eminent domain. Its exercise may sometimes involve inconvenience or positive hardship to the private citizen; but it is the State or its grantee that enters, and for a purpose that the government has deemed of sufficient general importance to make such entry justifiable. But the State or its grantee must make "just compensation" for the property taken or destroyed.

What is a just compensation in any given case may be said to be a mixed question of law and fact. The law provides a general formula. The jury applies this formula to the facts in each particular case. The just compensation is such a sum as shall equal the difference between the fair market value of the property entered before the entry and after it. What that sum is must be determined by the jury from evidence relating to that subject. If an entire lot is taken its value at the time of taking determines the amount of the damages. If part only is taken the jury should ascertain the value of what remains and the difference between this and the value of the whole before the entry was made fixes the measure of damages. That difference is a "just compensation" to the individual for what has been taken from him for the use or benefit of the public. This rule is easy of statement, and it is within the easy comprehension of laymen who serve as jurors. It has been laid down in a multitude of cases and is settled as well as repeated decisions can settle any legal principle.

The first assignment of error complains that this rule was disregarded by the Court below in the affirmance of the plaintiff's first point. This point asked an instruction to the jury that "in ascertaining the market value of the property in question if the jury find that its highest available use at the time of the taking was that of a gas plant, they have a right to consider the future growth of the borough of Spring City and Royersford, the increased demand for gas, as far as these considerations affect its market value; and if the jury further find that by reason of the location of the railroad through the property its availability has been curtailed, lessened or partly destroyed, they have the right to consider these questions as far as they affect the market value of the property as a whole immediately after the taking."

The affirmance of this point without qualification opened the door to conjecture upon subjects incapable of present ascertainment, and was calculated to confuse rather than aid the jury. It permitted them to conjecture the "future growth" of Spring City and Royersford without limit as to the distance to which their conjectures might extend. It then permitted them to conjecture an increased demand for gas to light the cities they had imagined to exist in "the future;" a demand so greatly increased that the company could not supply it with its

Digitized by Google

present facilities, and such additional ones as the remainder of the land would enable it to provide; and that the company might then suffer loss on account of its inability to meet such increased demand. They were invited to make use of these results of their conjectures to fix the market value of the land taken. No more speculative and imaginary considerations affecting the value of the land taken could have been thrown into the jury box.

The damages should have been ascertained by fixing the fair market value of the plaintiff's land before the taking and its value immediately after the taking. The difference would have represented the actual loss, and therefore the "just compensation" necessary to make the plaintiff whole.

The third assignment of error must also be sustained. The plaintiff sought to treat this unoccupied land as part of its gas plant and assess the damages sustained upon the theory that the value of its plant had been impaired. No part of its actual plant was taken, injured or destroyed. Its operations were not interfered with in the slightest degree, yet it was claimed, and testimony was given tending to show, that the gas plant had suffered in damages to the extent of twenty-five thousand dollars. What had actually taken place was the appropriation by the defendant of a quarter of an acre of ground which the gas company had never occupied except by including it within its general enclosure. If this piece of ground was to be treated as a part of the gas plant and its value fixed upon that basis, it is too clear to admit of argument that the value of the plant as a whole before the entry was made upon it was not only a proper but a necessary subject of investigation. What was the plant worth before the entry and what was it worth immediately after, were the questions the jury had, upon that theory, to determine; and the difference between these values would represent the loss sustained.

The amount of the capital stock was some evidence upon the subject of actual value, and it was competent therefore to place this before the jury. The same thing is true of its net earnings. If its entire capital stock had been but twenty-five or thirty thousand dollars and it had paid but little or nothing in the way of profits to the holders, the absurdity of the demand for $25,000 in damages to a plant that had not been interfered with except by the reduction of the area of its unused land, and that was worth as a whole no more than was thus claimed, would have been apparent. If the land taken was to be valued as land merely, then the capital stock, the volume of the business and its character as to profits were immaterial; but if the land was to be treated as part of a gas plant, and damages were to be assessed on that basis, then the value of the plant was a pertinent and indeed a necessary inquiry.

The fourth assignment of error requires some notice. It complains that the motion of counsel for defendant to strike out the whole of the testimony of John Slingluff was refused. Some portions of it ought to have been struck out, but some portions of it were admissible, and we can not say it was error to refuse the motion as made.

The assignment suggests the question, however, as to the extent to which expert testimony is competent in a case like this. One who is familiar with the value of land in the vicinity of the land taken might be offered as an expert upon that subject; but a knowledge of values in Philadelphia or Norristown would not qualify a witness to speak, as an expert, of values in Royersford. So a man might be familiar with the value and use of the appliances necessary to the production of gas, so as to be qualified to speak as an expert of the value and effectiveness of the machinery and fixtures used in any given gas works, but unless these are injured or their operation interfered with by the entry complained of, it is not easy to see what place there is for such an expert in the witness box. In this case the machinery and structures of the gas works were untouched. Its productiveness was not diminished in the slightest degree. There is still room within the enclosure to increase the capacity of the works, if an increase should become necessary; but up to the time of the entry by the defendant, and up even to the time of the trial in the Court below, no such increase had been found necessary. The plaintiff had been deprived of one-quarter of an acre of unoccupied land and of nothing more. Mr. Slingluff did not pretend to know the value of the land. He said: "I am not acquainted with the market value of real estate generally in the locality or the improvements. . . . I can't say that I know the value of any properties including improvements in Royersford." His expert knowledge related to machinery for producing gas and the process of manufacture, neither of which were involved in this controversy.

But it is contended that inasmuch as the land taken was within the exterior lines of the tract owned by the plaintiff, and upon which its gas works were situated, it was therefore part of the gas plant. This is a *non sequitur*. The fact stated does not support the conclusion. Whatever is necessary or convenient to the production, storage, and distribution of gas is part of the gas plant. On the other hand that which is not used or needed for use in the actual business of the company is not a part of the plant though owned by the gas company.

Digitized by Google

What may happen in the next generation, if the neighboring villages should become cities, is a possibility that does not concern the jury. They might as well conjecture whether gas would not cease to be used altogether as an illuminant, and its production be abandoned. The question is one of actual value, the market value at the time of the appropriation. What was the property of the company worth before it was entered by the defendant? What was its worth immediately upon such entry? The difference represents the loss, if any, that has been sustained. The judgment is reversed and a venire facias de novo awarded. S. H. T.

Jan. '95, 264. April 9, 1895.

Philler et al. v. Patterson.

Banks and banking—Clearing House—Clearing House committee—Certificates issued by—Bona fide holder of note.

The Clearing House association is merely an agreement among all the national banks to make their daily settlement at a fixed time and place each day; it is not a business organization or corporation, a partnership nor an artificial person of any sort.

The Clearing House is the room or place where the daily settlements are made.

The Clearing House committee consists of several persons selected by the banks which compose the association, in whose hands the banks agreed to deposit a sum of money or its equivalent in securities at a fixed ratio to their capital stock, to be used for the payment of balances against them. For these sums receipts or certificates are issued by the committee in convenient sums for purposes of settlement, and the cash or securities are held by the committee pledged for the payment of the certificates. In a suit by the committee against the maker of a note deposited by one of the banks for such purpose:

Held, 1. That the committee having issued certificate for the note, was a *bona fide* holder of the same, and not affected by equities between the maker and the bank.

2. That the plan of issuing such certificates involved no element of speculation, and no business undertaking on behalf of the associated banks, and hence in no way violates any of the statutes of the United States relating to national banks.

Appeal of John J. Patterson, from the judgment of the Common Pleas No. 1, of Philadelphia County, in an action of assumpsit by George Philler et al., Clearing House Committee, on a note executed by said Patterson.

At the trial, before BIDDLE, J., plaintiffs offered the note of defendant dated February 11, 1891, for $5,000, to order of J. F. Bailey and by the latter endorsed, and rested.

Counsel for defendant offered in evidence blank loan certificate of the Clearing House Committee of the Philadelphia banks, and stated that he proposed to follow it up by proof showing that certificates in this form were issued to the Spring Garden National Bank to the aggregate of $400,000 in December, 1890; that as collateral security for the delivery of the certificates above referred to the Spring Garden National Bank, among other collaterals, deposited with the Clearing House Association a promissory note made by John J. Patterson to the order of J. F. Bailey, endorsed by J. F. Bailey, and dated September 13, 1890, wherein the maker promised to pay to the order of the endorser on the thirty-first day of January, 1891, $5000; that after the maturity of this note, to wit, on the seventeenth day of February, 1891, the Spring Garden National Bank brought the note in suit to the Clearing House Association, and deposited it as substituted collateral for the note of like amount due on the thirty-first day of January, 1891. Objected to; first, because the paper which is offered in evidence is not the paper which is described in the offer of proof, as the paper offered in evidence is a certificate of the Clearing House Committee and not by the banks, as recited in the offer; and, secondly, because the evidence is immaterial and irrelevant unless it is coupled with an offer to prove a defence to the payment of the note itself. Objection sustained. Exception to defendant. (Second assignment of error.)

Counsel for defendant further offered to prove by defendant that prior to December 3, 1887, defendant and J. F. Bailey borrowed from Nelson F. Evans and Francis W. Kennedy $17,500, and as collateral security for the repayment thereof had deposited with them $27,500 of the second mortgage bonds of the Bloomington and Normal Horse Railway Company; that on December 3, 1887, defendant, with Bailey, sold out their equity in said bonds for $5000 to said Evans and the said Kennedy, assuming to pay the loan of $17,500 hereinbefore mentioned, and, as part of this transaction, Kennedy and Evans represented that it would be necessary for deponent to make and Bailey to endorse a note for $5000, so as to carry the loan of that amount until it would be convenient for Kennedy and Evans to pay it off, which they said would be done within the next six months; that this, however, was not done, and on the maturity of the first note Francis W. Kennedy informed witness that he had been unable to pay off the loan, but requested defendant to make and Bailey to endorse a new note for a like amount, which was to be used to enable Kennedy and Evans to carry said loan, and thus the note continued to mature and be renewed on similar statements made by Kennedy down until the making of the note in suit, which occurred on February 11, 1891, on or about which date said Kennedy stated to defendant that he had been unable to pay off said loan of $5000, and requested de-

Digitized by Google

fendant to make and Bailey to endorse the note in suit, to be applied by him in carrying the said loan of $5000; and, relying on the truthfulness of those statements, defendant made and Bailey endorsed the note in suit and delivered the same to the said Francis W. Kennedy for the purposes aforesaid; that such statement was untrue, and was fraudulently made by said Kennedy to witness to deceive and defraud him, and to enable the said Kennedy to obtain said promissory note and use the same for his own general purposes, and not for the purposes stated when the note was made and endorsed and delivered to him, and that at the time of the making and delivery of the note in suit to said Kennedy he was the president of the Spring Garden National Bank and its chief executive officer.

Objected to, because the defendant has already proved that the plaintiffs are *bona fide* holders for value, having given a full and valuable consideration for the notes, and that the facts, if proved, would be no defence to the action. Objection sustained. Exception to defendant. (First assignment of error.)

Plaintiff requested the Court to charge the jury as follows: "Under the evidence in this case your verdict should be for the plaintiff." *Answer*. Affirmed. (Fourth assignment of error.)

Defendant requested the Court to charge the jury as follows:—

"*First*. That under the statute of the United States known as the National Bank Act the plaintiff cannot maintain this action." *Answer*. Refused. (Fifth assignment of error.)

"*Second*. The undisputed evidence in this cause shows that the Clearing House Association of the Banks of Philadelphia is composed of banks incorporated under the provisions of the statute of the United States known as the National Bank Act and its supplements, and that under the provisions of that statute there is no authority to maintain the pending action. *Answer*. Refused. (Sixth assignment of error.)

"*Third*. The undisputed evidence in this case shows that the Clearing House Association of the Banks of Philadelphia is composed of national banks incorporated under the provisions of the statutes of the United States in reference to national banks, and that the pending suit is brought by the plaintiffs in their capacity as the Clearing House Committee of said association and for the use and benefit of said association; that there is no authority under the provisions of the aforesaid statute of the United States or otherwise to maintain the present action either in the name of the Clearing House Association of the Banks of Philadelphia or in the names of the respective plaintiffs, being the Clearing House Committee of the Clearing House Association of the Banks of Philadelphia. *Answer*. Refused. (Seventh assignment of error.)

"*Fourth*. That under the evidence in this case and the statutes governing national banks the plaintiffs cannot maintain the pending action against the defendant." *Answer*. Refused. (Eighth assignment of error.)

"*Fifth*. That under all the evidence in this cause the verdict must be for the defendant." *Answer*. Refused. (Ninth assignment of error.)

The Court charged the jury as follows:—

"Gentlemen of the jury: The only question in this case is a question of law, which is a matter that I have to decide. As far as you are concerned the note is there which it is admittted has never been paid. Under those circumstances, of course, your verdict will be for the plaintiff. I affirm the plaintiffs' point and refuse the points of the respective defendants." (Third assignment of error.)

Verdict and judgment for plaintiff for $5,997.

Defendant appealed, assigning for error the rulings above noted.

M. Hampton Todd, for appellant.

The Spring Garden National Bank was not a *bona fide* holder for value, and had the suit been in its name there could have been no recovery.

Lerch Hardware Co. *v.* Bank, 109 Pa. 240.

Notice to the president of the bank was notice to the bank.

Millward-Cliff Cracker Co's. Est., 161 Pa. 167.

The Clearing House Committee of the Clearing House Association of the Banks of Philadelphia stands in no better position in regard to the notes which it received from the Spring Garden Bank than the Spring Garden National Bank did itself.

Millward-Cliff Cracker Co's. Est., 161 Pa. 167.

A clearing house simply for the purpose of settling daily balances between banks composing the association is a great public convenience and perfectly lawful, but we submit that there is no authority under the provisions of the National Bank Act for the national banks forming the Clearing House Association of Philadelphia to enter into the agreement of September 24, 1873, as amended October 18, 1873, and repromulgated November 18, 1890; nor was there any authority in said Clearing House Association, either directly or acting through its governing committee, the plaintiffs in this action, to issue the $400,000 of loan certificates in this case to the Spring Garden National Bank, or to receive and hold collateral securities, and especially the note in suit, from the Spring Garden National Bank to secure the repayment by the said bank

Digitized by Google

of the amount of said certificates to the holders thereof with interest; nor have the said associated banks, either directly in their own name, or indirectly through the instrumentality of their governing committee for the use of said associated banks, a right to maintain an action on the note in suit against the defendant; nor can such Clearing House Association, or its committee, become a *bona fide* holder for value thereof. In short, it has no authority in law to purchase the note in suit or to maintain an action upon it. We submit that the issuance of these loan certificates, and the receipt of collaterals to secure their payment with interest, are without authority of law and absolutely void.

There is nothing contained in the National Bank Act that authorizes the formation of an association of banks for such purposes. Indeed the authority to organize a national bank is by express terms limited to "natural" persons.

We further contend, first, that notice to the Spring Garden National Bank that the note in suit was obtained from the defendant by fraud, is likewise notice to the Clearing House Association, because notice to one member of an association within the scope of its purposes is notice to all the members of that association, and this is especially shown by the fact that the constitution of the Clearing House Association expressly provides that the associate banks at the meetings of the Clearing House Association shall be represented by the president or other executive officer. The president in this case was Francis W. Kennedy.

The certificate of loan was an unauthorized bill of credit, and hence the association cannot maintain an action on the same nor upon the collaterals deposited as security for them.

Central Transportation Company *v.* Pullman's Car Company, 139 U. S. 24.

A. T. Freedley, for appellee.

All the points raised here are found in the case of—

Philler *v.* Jewett, 166 Pa. 456.

The maker of a promissory note cannot escape payment by alleging that the Act whereby a subsequent holder acquired it for value was *ultra vires*.

National Bank *v.* Matthews, 98 U. S. 628.
National Bank *v.* Whitney, 103 Id. 102.
Swope *v.* Leffingwell, 105 Id. 3.
Reynolds *v.* Bank, 112 Id. 413.

Whether the contract was *ultra vires* or not, the Spring Garden Bank could not raise the question and keep the fruits it received from the plaintiff, and the appellant is in no better position.

Casey *v.* Credit Mobilier, 2 Woods, 86.

Wright *v.* The Pipe Line Co., 101 Pa. 204.
Township of Pine Grove *v.* Talcott, 19 Wallace, 678.
Sedgwick on Statutory and Constitutional Law, 90.

"The general doctrine is that where a contract or undertaking which has been entered into by a corporation is simply in excess of its charter powers, and the same has been fully executed, the defence of *ultra vires* cannot be successfully pleaded in a suit to enforce negotiable securities or other obligations which have issued out of the original transaction."

Kingman County *v.* Cornell University, 12 U. S. Circuit Court of Appeals, 559.

The loan certificates are not an issuance of currency.

Report of Comptroller of Currency, 1891, p. 12.

The point that the committee are not entitled to sue, as not being the absolute owners of the note, is without foundation. They held the note, and they have the legal title thereto. In an action on a negotiable instrument any holder is entitled to sue. The last question which the maker of a promissory note has to concern himself with is the name of the plaintiff, as such maker is not prejudiced, no matter in what name suit is brought. For if there be any other claimant to the money the defendant can protect himself by paying the amount into Court, and if any defence exists as against the supposed owner of the note, the defendant sets up the supposed ownership and makes his defence.

Logan *v.* Cassell, 88 Pa. 290.
Pearce *v.* Austin, 4 Wharton, 489.
Holmes *v.* Paul, 6 Am. Law Reg. 482.
Brown *v* Clark, 14 Pa. 469.
Ward *v.* Tyler, 52 Id. 393.
Ballentine *v.* McGeagh, 4 Brewster, 95.

May 29, 1895. WILLIAMS, J. Two lines of defence were taken in this case in the Court below. The first of these denied the capacity of the plaintiff to sue, and was brought to the attention of the learned Judge by a prayer for instructions to the jury "that under the evidence in this case and the statutes governing national banks the plaintiff can not maintain the pending action against the defendant."

The second alleged that the note sued on was made for the accommodation of F. W. Kennedy, president of the Spring Garden National Bank, and that the plaintiffs were chargeable with notice of the want of consideration as between the maker and F. W. Kennedy.

The first of these lines of defence makes it important for us to consider and determine the character and objects of the Clearing House Association, the distinction to be taken between it and the Clearing House, and the functions and powers of the Clearing House Committee.

Digitized by Google

An examination of the constitution or articles of association adopted by the banks forming "The Clearing House Association of the Banks of Philadelphia," shows the character and objects of the organization very clearly. In substance these articles amount to an agreement with each other by thirty-eight national banks in the City of Philadelphia to facilitate and simplify the settlement of daily balances between them for their mutual advantage. This agreement substitutes a settlement made at a fixed place and time each day by representatives of all the members of the association, in the place of a separate settlement by each bank with every other made over the counter. No other object is contemplated or provided for. The association does not provide for any united action for any business purpose. It does not contemplate the employment of capital or credit in any enterprise. It proposes and provides for co-operation to expedite and simplify the transaction by each member of the association of its own proper business in one particular, viz., the settlement of daily balances with the other national banks doing business in the city. Incidentally, co-operation in this particular would tend to bring the banks belonging to the association into closer relations, enable them to become more familiar with the volume of business and the actual condition of each other, and open the way to make them mutually helpful in times of financial stringency; but these results are incidental only.

The Clearing House Association is nothing more nor less than an agreement among thirty-eight national banks to make their daily settlements at a fixed time and place each day. To carry this agreement into operation it became necessary to determine the place and hour at which the settlements should be made. A suitable room was secured, fitted up with desks and other necessary appliances at the expense of the associated banks, and a manager chosen to preside over it and direct the action of the clerks and runners when in session. This room is the clearing place or, in the language of the constitution of the association, the clearing house. It is the place where the representatives of the several banks meet, and where all balances are struck and settled daily between the banks composing the association.

At the close of each meeting the amount due to and from each bank is definitely ascertained. The debtor banks then pay over to the manager the gross balances due from them to settle their accounts with all the members of the association; and he makes distribution of the sums so received among the creditor banks entitled to receive them.

The clearing house is therefore not a business organization, a corporation, a partnership or an artificial person of any sort, but a place in which the thirty-eight members of the association settle with each other daily.

We come now to consider the committee and the position in the general scheme occupied by it. Among the economies in time and labor contemplated by the banks was a settlement of daily balances without the necessity for handling and counting the cash in every case. To provide for this the banks agreed that they would deposit in the hands of certain persons, to be selected by them and to be called the Clearing House Committee, a sum of money, or its equivalent in good securities, at a fixed ratio upon their capital stock, to be used for payment of balances against them. For these sums the committee was to issue receipts or certificates in convenient sums, and these receipts or certificates were to be used in lieu of the cash they represented, which remained in the hands of the committee pledged for the payment, when payment became necessary, of the certificates. The committee held the funds and securities deposited with them in trust for the special purpose of securing the payment as far as they would reach of the balances due from the bank making the deposit.

On the twenty-fourth day of September, 1873, the associated banks entered into another agreement with each other by which "for the purpose of enabling the banks, members of the Philadelphia Clearing House Association, to afford proper assistance to the mercantile and manufacturing community and also to facilitate the inter-bank settlements resulting from the daily exchanges," they authorized the committee to receive from any member of the association additional deposits of bills receivable and other securities and issue certificates therefor "in such amount, and to such percentage thereof as may in their judgment be advisable." The additional certificates, if issued, they agreed to accept in payment of daily balances at the clearing house on the condition that the securities deposited therefor should be held by the committee "in trust as a special deposit pledged for the redemption of the certificates issued thereupon." The committee were made, both by the original articles of association and by the additional contract of 1873, trustees or agents for all the members of the association with authority to accept deposits in money or securities and to issue their own receipts therefor, the money or securities remaining in their hands in pledge for the redemption of the receipts or certificates so issued by them. When a bank to which certificates had been issued under the original plan or the contract of 1873 failed to redeem them when their redemption became necessary, it was the duty of the committee to collect the securities in their hands

Digitized by Google

and apply the proceeds to the payment of the holders of the certificates. The deposits were made, and the certificates issued, under an unconditional pledge of the securities to the committee for the payment of the certificates, and their title could only be divested by the payment of the sums for which the securities were pledged.

The entire plan on which the settlements are made is therefore a device adopted by the banks to facilitate their legitimate business as banks, and involves no element of speculation, and no business undertaking by or on behalf of the associated banks. We are unable, therefore, to see in what respect these banks have violated the statutes of the United States relating to national banks or have transcended the limits which these statutes have drawn about the business of banking. They have diverted none of their funds, embarked in no new undertaking, entered into no business alliance, but devised and adopted what seems to be an improved method for doing a portion of their own necessary work. This same method or one identical in general outline has been adopted by the banks in every great city in the United States and by many in other lands; and, as far as I am aware, it has nowhere been held that the method is illegal. On the contrary it has recommended itself by its economy of time and labor to the several banks, and, by its incidental results in promoting mutual helpfulness and confidence, has come to be regarded with favor by the general public.

The first line of defence was therefore properly held to be untenable by the Court below and the assignment of error to that ruling can not be sustained. The second line fails with the first. If it was not a violation of law for the banks to arrange for their own daily settlements in the manner provided by the clearing house agreement, then the committee became holders for value of the securities deposited with, and receipted for by them, and as such are not affected by equities existing between the original parties to the promissory notes or other negotiable securities for which they have issued certificates. But if they could be regarded as fixed with notice of the character of the note it is not easy to see how the fact that the note now sued on was made for the accommodation of F. W. Kennedy can avail the defendant. The committee are certainly holders for value and hold the note in pledge for the payment of its face in cash. Let us suppose they knew when they took it that it had been made and delivered to Kennedy for his accommodation. The very object of making an accommodation note is that the person for whose accommodation it was made may use it in the way that will best accommodate him. When it has been so used by the holder the accommodation maker or endorser is bound by the action of his friend and becomes liable to pay the amount of the note according to its terms: Moore *v.* Baird, 30 Pa. 138; and he can not defend against the endorsee on the ground that the note was without consideration, for to permit this would defeat the purpose for which he loaned his credit: Cozens *v.* Middleton, 118 Pa. 622. As against a holder for value an accommodation maker can defend only on the ground of actual payment. The fact that it was without consideration and made for the accommodation of him who negotiated it, is immaterial: Miller *v.* Pollock, 99 Pa. 206. Accommodation endorsers often show the character of their endorsement by a direction made upon the face of the note to credit the proceeds to the drawer, but the fact that the bank discounting had notice that the endorser was lending his credit to the maker has never been thought to affect the bank, or to relieve the endorser.

The evidence offered at the trial to show that the note was without consideration and given for the accommodation of F. W. Kennedy, by whom it was used in exactly the manner that must have been contemplated when it was given, was properly rejected. It might have been competent if the action had been brought by Kennedy, but as against a holder for value it was inadmissible. This question was ruled in the very recent case of Philler *et al.* *v.* Jewett, decided at the present term. The judgment is now affirmed.

W. M. S., Jr.

July, '94, 141. January 22, 1895.

H. D. Dougherty & Co. v. Bash.

Statute of frauds—Parol agreement—Notes—Extinguishment of original debt.

A verbal promise to pay the debt of another without any consideration moving to the promissor, and where the original debtors continue to be liable, is within the statute of frauds and cannot be enforced.

The receipt by a creditor of debtor's note for a debt does not extinguish the debt unless it be specially agreed that the note is taken as payment.

Appeal of H. D. Dougherty & Co., from the judgment of the Common Pleas No. 2, of Philadelphia County, refusing to take off a nonsuit.

The facts are stated in the opinion of the Supreme Court, *infra*.

The Court, PENNYPACKER, J., at the conclusion of the plaintiffs' case, entered a non-suit, which the Court in banc refused to take off.

Digitized by Google

Plaintiffs appealed, assigning for error this action of the Court.

Alexander Simpson, Jr., for appellants.

The liability of Bash was primary and had no relation to Weinman's liability on the note.

De Colyar on Guarantees, *54.
Hearing *v.* Dittman, 8 Phila. 307.
Reed on the Statute of Frauds, § 113.
Malone *v.* Keener, 44 Pa. 107.
Townsend *v.* Long, 77 Id. 143.

The agreement provided that Bash would receive the discount or interest in advance, and this was a good consideration for his agreement.

Grayson's App., 108 Pa. 581.
Siebeneck *v.* Anchor Savings Bank, 111 Id. 187.

If the sale of the goods was on the credit of defendant, it matters not to whom they were delivered.

Reed on Statute of Frauds, secs. 86 to 89.
Merriman *v.* McManus, 102 Pa. 102.

A motion for non-suit is equivalent to a demurrer to the evidence, and all reasonable inferences of facts therefrom must be taken as true.

Corbalis *v.* Township, 132 Pa. 9.

As the contract was an oral one, its construction was for the jury.

McFarland *v.* Newman, 9 Watts, 59.
Brubaker *v.* Okeson, 36 Pa. 519.
Maynes *v.* Atwater, 88 Id. 496.
Stoddart *v.* Price, 143 Id. 547.

If any doubt exists as to the meaning of the contract it is to be construed against defendant.

Bole *v.* Insurance Co., 159 Pa. 53.

A. B. Shearer, (*Emanuel Furth* with him), for appellee.

The immediate object of the agreement was to pay the debt of a third party for which the latter continued liable, and not being in writing there can be no recovery.

Nugent *v.* Wolfe, 111 Pa. 471.
Carville *v.* Crane, 5 Hill (N. Y.) 485.
Chepline *v.* Atkinson, 55 Am. Rep. 534.
Browne on Statute of Frauds, sec. 174.

Where there is no evidence to authorize any inference the case need not go to a jury.

Maynes *v.* Atwater, 88 Pa. 496.

April 15, 1895. GREEN, J. We think it very clear that in whatever way the plaintiffs' claim may be regarded, it is founded upon a verbal assumption to pay a debt of other parties, without any beneficial consideration moving to the promissor, in which he had no personal interest, and as to which the original promissors continued to be liable. According to the plaintiffs' statement of their cause of action, and according to their testimony on the trial, they were to continue to sell goods to the original debtors, they were to get from them all the cash they could, and for the balance due upon each month's settlement the debtors were to give their own promissory notes, which the plaintiffs were to bring to the defendant, and the "defendant would discount said notes for plaintiffs without recourse." The transaction then would be, purchases of goods in the future by Weinman & Co. from Dougherty & Co., settlements every month and the obtainment from Weinman & Co. of all the money they could on account, and the taking of notes of Weinman & Co. for the balances due, payable at a future day, to their own order, and endorsed by themselves, and these notes were to be brought by Dougherty & Co. to Bash, the defendant, who was to discount them for Dougherty & Co. without recourse to Dougherty & Co.

It is perfectly manifest that the only owner ship of the notes which could ever accrue to Bash would be by virtue of his discounting them, that is lending the money on them. If Wein man & Co. paid the notes at maturity Bash would have no further interest in them, and no interest at any time except as a lender of money. The principal obligation involved under the agreement was the obligation of Weinman & Co. as makers of promissory notes, and that obligation was to continue until the maturity of the notes. It would not be in the least degree extinguished, or changed, or diminished, on account of the defendant having advanced the money for such a note. Both the original statement of cause of action and the amended statement describe the defendant's undertaking as an agreement to "discount said notes for plaintiff without recourse."

The plaintiff, Dougherty, being on the witness stand, was asked: "Q. What did you do with the note in connection with the note that Mr. Bash had? A. We sent word to Mr. Bash that we had secured Weinman & Co.'s. note as directed by him, and we were ready to have him discount it. He sent us word—he sent us a postal card, I think—that he would call." Speaking of his interview with Bash on October 9, 1891, in reference to the first note, he said, "I called to see Mr. Bash in relation to the note that I had taken in settlement of his account with Weinman & Co. on that day for the purpose of having him discount it. I had some conversation regarding Weinman & Co., and I proposed to him that he take this note and discount it without recourse to us."

In speaking of that note he said Bash "guaranteed the payment of the note." The plaintiffs' bookkeeper, Miss Campbell, spoke in the same language in describing the same conversa-

Digitized by Google

tion. In most of the conversations with Bash, as stated by Dougherty, he said that Bash said he should bring the notes to him, Bash, and he would take them. It matters but little what the precise words used were: it is very evident that so far as Bash's undertaking was concerned, he was to furnish the money for the notes to the plaintiffs, and to hold the notes without recourse to the plaintiffs. The important feature of the transaction was that Bash did not promise to pay for the goods which the plaintiffs sold to Weinman & Co., but only to furnish the money for such notes of Weinman & Co. as were brought to him by the plaintiffs. This simplifies the matter very much and eliminates many of the decided cases from consideration.

We have also been unable to discover any evidence on the record showing that the original indebtedness of Weinman & Co. to Dougherty & Co. for the goods sold was extinguished or surrendered. The mere taking of the debtor's note by a creditor for a debt contracted for goods sold, does not extinguish the debt unless it was specially agreed that the note should be taken as payment of the debt: Kemmerer's Appeal, 102 Pa. 558. This is well illustrated in the law of mechanic's liens, where it is held that the acceptance of the debtor's note for the materials furnished does not extinguish the lien, which may be enforced notwithstanding the note: Jones *v.* Shawhan, 4 W. & S. 257.

Without any such evidence in this case therefore, it is evident that Dougherty & Co., after taking the note of Weinman & Co., still retained their right to collect the debt for the goods sold and delivered to Weinman & Co.

It appears, therefore, that the original debt against Weinman & Co. survived after the giving of the note, and its extinction was no part of the agreement between the plaintiffs and the defendant, or between the plaintiffs and Weinman & Co.

It seems to us clear, in view of all the facts and the whole circumstances of the transaction, that the defendant's promise to take the notes of Weinman & Co., and pay or advance the money for them, was only a promise to pay the debt of a third person, and, not being in writing, was void under the statute of frauds and perjuries. In Maule *v.* Bucknell, 50 Pa. 39, which was one of the earliest and best considered cases arising under our statute of 1855, Mr. Justice STRONG, in a very exhaustive and able opinion, reviewed the cases thoroughly, and stated the following deductions from them, "It is undoubtedly true that a promise to answer for the debt or default of another is not within the statute, unless it be collateral to a continued liability of the original debtor. If it be a substitute, an arrangement by which the debt of the other is extinguished, as where the creditor gives up his claim on his original debtor, and accepts the new promise in lieu thereof, it need not be in writing. And as the cases referred to show, it may be unaffected by the statute, though the original debt remains, if the promissor has received a fund pledged, set apart, or held, for the payment of the debt. But except in such cases, and others perhaps, of a kindred nature, in which the contract shows as intention of the parties that the new promissor shall become the principal debtor, and the old debtor become but secondarily liable, the rule it is believed, may be safely stated, that while the old debt remains, the new must be regarded as not an original undertaking, and that it is therefore within the statute. At least this may be stated as a principle generally accurate. In Williams' Saunders', 211*c*, note, it is said, 'The question whether each particular case comes within the clause of the statute or not, depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.' The doctrine of this note is supported by very many cases, and it is in harmony with the words of the statute. It is incumbent then, upon him who would enforce a mere verbal promise of one to answer for the debt or default of another, if the original debt remains, to show that his case is one of those that are recognized as exceptional. And it will be found after examination, that in nearly all the decisions in which it has been held that such a promise is not within the statute, there was some liability of the promissor, or his property independent of his express promise, or that he had become the actual debtor, so as that between him and the original debtor the superior liability was his." All of the foregoing was repeated and affirmed in Nugent *v.* Wolfe, 111 Pa. 471, and it has never been qualified or limited in any of our subsequent cases.

If we try the present case by the standard set out in the foregoing citation, it seems to be conclusive. As we have seen, the original debt of Weinman & Co., was not to be extinguished by the arrangement as testified to by Dougherty. Nor was there to be any liability of Bash except that which was contained in his promise. No fund or property was to be placed in his hands as against his liability nor did his promise relate to any personal interest or property of his own. The affirmative testimony of the plaintiffs exhibits the absence of the exceptional circumstances which might take the case out of the statute. The debt to be paid was the debt of Weinman & Co., who were third persons as to Bash. That it was to be done by advancing money on, or

Digitized by Google

paying, their notes, does not alter the fact that it was their debt that was to be paid. Nor do the facts warrant any inference that the transaction was to be a mere purchase of securities. The whole arrangement was to be for future purchases of goods by Weinman & Co., from Dougherty & Co., to be paid for as far as possible by Weinman & Co., each month, and the giving of Weinman & Co.'s notes for the unpaid balance. These notes the defendant was to discount, or advance money upon them, or to pay, as between the defendant and Dougherty & Co. In real truth it was a mere discount, because the obligation of Weinman & Co., to pay the notes at maturity continued, and if they paid them when due, they thereby extinguished what was still their own debt, and the defendant would be reimbursed for his advance.

The case of Mallet *v.* Bateman, L. R. 1 C. P. 163, comes nearer to this in its facts than any other we have met with, in fact it is entirely similar in its leading features. The plaintiff sold iron buckles or fasteners for bridge floors to Calvert & Co., at the instance of the defendant, who was an iron broker, and Calvert & Co. were to pay cash for the goods at each delivery. Calvert & Co. became slow in their payments, and the plaintiff being dissatisfied called upon the defendant who said if the plaintiff would get the acceptance of Calvert & Co. for the goods then delivered at thirty days he would cash the draft for a discount of three per cent. without recourse to the plaintiff. This was done and the defendant gave the plaintiff a written guaranty against liability on the acceptance. The plaintiff then refused to deliver more buckles to Calvert & Co. unless he was secured for the payment of future invoices, and the defendant, who was interested in having the bridge completed, promised him verbally that he would take the acceptances of Calvert & Co. for future invoices to the extent of the contract with Calvert & Co., off his hands on the same terms and in the way he had taken the one already mentioned. On the faith of this promise plaintiff went on and delivered the goods to Calvert & Co., and obtained their acceptance for the price. Calvert & Co. failed and the defendant refused to take their acceptance off the hands of the plaintiff. It was held by all the Judges that the statute applied to the agreement and that the plaintiff could not recover. The Court held that it was substantially an agreement, that if the buyers of the goods did not pay for them at the end of a month's credit, the defendant would indemnify plaintiff against their default. POLLOCK, C. B., delivering the opinion, said: "The real question here is whether the contract declared upon is not substantially a contract that, if Calvert & Co., the buyers of the goods, do not pay for them at the expiration of the month's credit, the defendant will indemnify the plaintiff against their default. In consideration of a discount of three per cent. the defendant undertakes to hold the bill without recourse to the plaintiff. That is, in substance, an engagement by which the buyers of the goods are not to be exonerated, but the defendant is to indemnify the seller against their default. That is clearly a contract within the statute of frauds." This case was an appeal from the Common Pleas to the exchequer chamber and both Courts concurred in the ruling.

The learned counsel for the plaintiffs claims that this decision is in conflict with our own cases of Arnold *v.* Stedman, 45 Pa. 186; Taylor *v.* Preston, 79 Pa. 436, and Townsend *v.* Long, 77 Pa. 143, but an examination of those cases fails to disclose any hostility to Mallet *v.* Bateman, but shows that they were all cases which were taken out of the operation of the statute by the exceptional circumstances previously indicated.

Arnold *v.* Stedman was decided upon the express ground that Arnold's verbal promise was to pay a debt which was a mechanics' lien upon his own property, and in which he was interested to have the proceedings on the lien suspended. In Taylor *v.* Preston the promise was by the assignee of a vendee under articles to pay unpaid purchase money named in the articles, and we held that the promissor was bound to pay it because it was his own debt. So also in Townsend *v.* Long, the promissor bought out an entire partnership stock and agreed to pay as part consideration of the purchase all the debts of the firm, one of which was due to a former partner who had sold his interest to the other members for $700 and this debt was also specially named in the transfer. We held the promissor liable on this promise because it was his own debt which he had agreed to pay in consideration of the property sold to him. We made the same ruling in Wynn *v.* Wood, 97 Pa. 216.

We have not been referred to any case, nor have we met with any, in which a transaction like the present has been held to be clear of the statute. We are of opinion that the promise of the defendant Bash, was in reality a promise to pay the debt of another without any acquisition of property as a consideration therefor, and without the presence of any of the exceptional circumstances which prevent the application of the statute. Being only a verbal promise it is void under the statute.

W. M. S., Jr.

Digitized by Google

Jan. '95, 100. March 27, 1895.

Hicks v. The National Bank of the Northern Liberties.

Administrators — Set-off — Affidavit of defence.

In an action by the administrator of a solvent estate the defendant may set-off against the claim of the plaintiff a debt due by the decedent when suit was brought.

But in the case of an insolvent estate, the debts of the decedent maturing after his death are not admissible as set-off in an action by the administrator of the estate.

A motion for judgment for want of a sufficient affidavit of defence is in the nature of a demurrer.

Chipman *v.* Bank, 120 Pa. 86, distinguished.

Appeal of the National Bank of the Northern Liberties, from the judgment of the Common Pleas No. 2 of Philadelphia, entered in making absolute a rule for judgment for want of a sufficient affidavit of defence in an action of assumpsit, wherein Abbie Hicks, administrator of the estate of Henry Hicks, deceased, was plaintiff, and appellant, defendant.

The suit was brought to recover $707.78, being the amount of a deposit which Henry Hicks, the husband of the plaintiff, claimed to have in the National Bank of the Northern Liberties in his lifetime. Henry Hicks died June 24, 1894. The following facts were set forth in the affidavit of defence: That at the time of Mr. Hicks' death there was standing to his credit on the books of the bank $234.73. That the estate of Henry Hicks is solvent. That shortly after his death several promissory notes fell due, which had been discounted for him on the faith of the said deposit and for which that deposit had been held as payment. These amounted to about $2,800. That the bank had an understanding with Henry Hicks, confirmed by acts of his in his lifetime, that the balance in bank should be used to pay these notes, and that subsequent deposits should also be charged up against them. That after Mr. Hicks' death, on June 28, 1894, his widow deposited in his account $132.78, and on July 2, 1894, upon demand of the bank, and for the express purpose of paying off a protested note, she deposited $340.27. That, instead of the bank owing the plaintiff anything, his estate is really indebted to the bank for $2,044.

The sufficiency of the facts averred in the affidavit was not questioned.

The Court made the rule absolute, JENKINS, J., delivering an oral opinion in which he relied upon Chipman *v.* Bank, 120 Pa. 86.

The defendant took this appeal.

William H. Lex, for appellant.

In the suit by executors or administrators of solvent estates a set-off is admissible.

Bank *v.* Shoemaker, 11 WEEKLY NOTES, 215.
Thomas *v.* Winpenny, 13 WEEKLY NOTES, 93.

But where the estate is insolvent no set-off can be entertained.

Bosler *v.* Bank, 4 Pa. 32.
Light *v.* Leininger, 8 Id. 403.
Bank's Appeal, 48 Id. 58.
Skiles *v.* Houston, 110 Id. 254.

Charles F. Linde, for appellee.

No set-off can be made in this case.

Chipman *v.* Bank, 120 Pa. 88.
Bosler *v.* Bank, 4 Id. 33.
Bank's Appeal, 48 Id. 57.

Solvency is a fact, that can only be ascertained when the final settlement of the estate is made, and cannot be anticipated by a debtor when called on to pay money due by him to the administrator of the decedent.

The affidavit merely states a conclusion drawn from some papers in the hands of the president of the bank, and does not even make an attempt to say what the statement held by him discloses, therefore his affidavit is insufficient in not setting forth what the statements of the decedent were, from which the conclusion, that he was solvent, was drawn.

In all the cases cited by the appellant the question of solvency or insolvency was an admitted fact, and the principles of law as laid down therein could be applied, but that is not the case here, the question of solvency is in dispute, and hence the right to set-off the appellant's claim will disturb the due course of administration.

A very significant fact is disclosed by the statement of demand and affidavit, viz., that of the sum of $707.78 sued for, all but $367.51 were deposited after the decedent's death by the administratrix, which of course are trust funds, and belong to the estate for the purposes thereof, and against which the appellant's demand could not possibly be a set-off.

May 30, 1895. MCCOLLUM, J. It is a well-settled rule, supported by reason and authority, that in an action by the administrator of a solvent estate the defendant may set-off against the claim of the plaintiff a debt due by the decedent when the suit was brought. In such a case no valid reason appears for compelling the defendant to pay what he does not owe and look to his debtor's estate for the repayment of it. By requiring him to do so the commissions of the administrator may be increased at the expense of the estate and the defendant may be driven to an action against it for money he paid under compulsion of the law. It will thus be seen that the probable result of a departure from the rule above stated would be to delay the settlement of the estate, to increase litigation, and to subject

Digitized by Google

the parties concerned to additional and unnecessary trouble and expense in the adjustment of the accounts between them.

It was thought by the learned Court below that the rule we are considering was overthrown by Chipman *v.* Ninth National Bank of Phila., 120 Pa. 86, which was an action by an assignee for the benefit of creditors to recover deposits made by the assignors with the defendant, and in which it was held that drafts and notes discounted for them before and maturing after their assignment were not admissible as a set-off. In this case the familiar rule that in an action by the administrator of an insolvent estate the debts of a decedent maturing after his death are not admissible as a set-off was applied, and properly so. An assignment for the benefit of creditors is a badge of insolvency. It is presumably made because the assignor is not able to pay his debts as they become due in the ordinary course of his business. Chipman *v.* The Bank, *supra*, did not consider or allude to the rule as to set-off in actions by administrators of solvent estates, but dealt with an insolvent estate and the rights of the assignor's creditors in it. The cases cited in the brief of the plaintiff's counsel enforced the rule as to set-off in actions by insolvent estates, and recognized the rule applicable to it in actions by solvent estates, and in the opinion of the Court, Beckwith *v.* The Union Bank, 9 N. Y. 211, which was an action by an assignee for the benefit of the creditors of an insolvent firm, was cited as like the case then under consideration. We conclude that Chipman *v.* The Bank is not in conflict with the defendant's contention in the case before us.

A motion for judgment for want of a sufficient affidavit of defence is in the nature of a demurrer. It admits the existence of the facts averred and denies their sufficiency as an answer to the claim. By the affidavit filed in this case it sufficiently appears that Henry Hicks was solvent at the time of his death and that the defendant has valid claims against his estate, some of which matured before the suit was brought. It follows from what has been said that it was error to enter the judgment appealed from.

Judgment reversed and procedendo awarded.

W. D. N.

July, '94, 114. January 16, 1895.

Smith v. Snyder.

Landlord and tenant—Lease—Waiver—Affidavit of defence—Notice.

In a written lease a covenant to give notice of a termination of the tenancy in writing may be waived by either party, and a verbal notice will be sufficient. The waiver may be evidenced by express agreement or by declarations and conduct from which a fair implication of it arises.

But the sufficiency of the notice is not in itself available to create a new tenancy, albeit negotiations for such are pending at the time the vacation of the premises should have taken place.

Appeal of John A. Snyder, defendant, from the judgment of the Common Pleas No. 2, of Philadelphia County, entered against him on a rule for judgment for want of a sufficient affidavit of defence in an action of assumpsit, wherein J. Futhey Smith, executor of the estate of J. H. McFetrich, was plaintiff.

Plaintiff was lessor and defendant lessee in a lease for one year from September 1, 1889, of premises 2221 Wallace street, Philadelphia. The lease contained, *inter alia*, a mutual covenant that "It is hereby further agreed, that if the said lessee should continue on the above described premises after the expiration of the above term then this contract is to continue in full force for another year, and so on, from year to year until either party shall give the other three months' notice in writing before the end of any term, of an intention to terminate the same."

The defendant on May 20, 1893, gave verbal notice to plaintiff of his intention to vacate the premises on the expiration of the current year, and in August following he told plaintiff that if he would make it a monthly term he would remain. Plaintiff said he would have to consult with the person for whose benefit he was acting, but would let defendant know the result of the conference in time to prevent his being prejudiced. After the first of September had passed plaintiff said the month to month tenancy was not acceptable. On November 7, 1893, defendant vacated the premises and delivered the key to plaintiff, which he accepted.

Plaintiff sued for rent for four months in advance from December 1, 1893, to March 1, 1894, on which day the premises were leased to another tenant. Defendant set forth in his affidavit of defence the foregoing facts and as follows:—

"That having given the notice three months before the expiration of the current year of my intention to leave, I remained upon the premises after September 1, relying upon the representations of the plaintiff and believing therefrom that I remained simply as a tenant from month to month. I further aver that I have paid all rents due during my possession of said premises as aforesaid."

The Court made absolute a rule for judgment for want of a sufficient affidavit of defence, and defendant appealed.

J. Campbell Lancaster (*Malcolm G. Campbell* with him), for appellant.

Digitized by Google

Defendant's notice of intention to vacate the premises was sufficient, because the plaintiff received it as such.

Pratt *v.* Richards, 69 Pa. 53.
Vetter's Appeal, 99 Id. 52.
Wilgus *v.* Whitehead, 89 Id. 131.
Auer *v.* Penn, 92 Id. 444.

A party who dispenses with or prevents performance of a contract, written or verbal, may not take advantage of the non-performance of the other.

Grove *v.* Donaldson, 15 Pa. 128.
Brownfield's Ex'rs. *v.* Brownfield, 151 Id. 567.

In addition to this, the claim and judgment embrace the month of March, 1894, during which month the defendant avers the plaintiff leased the house and put another tenant in possession. This, it cannot be doubted, relieved the defendant at least from that month.

Auer *v.* Penn, 92 Pa. 444.
Auer *v.* Penn, 99 Id. 370.
Tiley *v.* Moyers, 43 Id. 404.
Wolf *v.* Guffey, 161 Id. 276.

E. O. Michener, for appellee.

May 30, 1895. McCollum, J. The lessee gave notice in time of his intention to terminate the tenancy at the end of the current year. True, the notice was not in writing as required by the lease, but it was competent for the lessor to waive this requirement, and to accept and act upon the verbal notice as sufficient for the purpose for which it was given. A waiver may be evidenced by express agreement, as by declarations and conduct from which a fair implication of it arises. When the verbal notice was given there was no objection or suggestion made that it was not such notice as the lease called for. When the lessee in the last month of the term proposed to remain in possession of the premises after the expiration of it, as a tenant from month to month, the lessor's agent, to whom the proposition was made, promised to see whether the lessor was willing that he should so remain, and to let him know in time so that he should not be prejudiced by holding over. In this promise there was a recognition of the sufficiency of the notice and the resultant right of the lessee to terminate the tenancy at the end of the current year. The agent did not communicate to the lessee before the term expired the result of his conference with the lessor, and the lessee, construing the failure to do so as an acceptance of his proposal to remain in the house thereafter as a tenant from month to month, continued in possession of it. Was he justified in so construing the broken promise of the agent? We confess our inability to discover in it any authorization of a continued possession of the premises on new terms. If the lessee in pursuance of the notice he gave had vacated the premises and the lessor had sued him for rent accruing the next year on the ground that he had not given the notice required by the lease, a jury would have been justified in finding from the conduct of the lessor a waiver of written notice, and such finding would have defeated his claim. But this conduct did not create a new tenancy nor authorize a finding from it of an acceptance of the lessee's proposal.

Judgment affirmed. W. D. N.

Jan. '95, 431. May 2, 1895.

Kies v. City of Erie.

Negligence of municipal corporation—Defective construction of engine house.

Where a person walking upon the street of a city is injured by the sudden opening of the doors of a building used by the fire department, she is entitled to recover damages from the city, if the necessary and natural and probable operation of the doors is dangerous, although accompanied by the use of ordinary care.

If the accident would have been provided against by the use of reasonable care on the part of the firemen when opening the door, the city is not answerable.

Appeal of the City of Erie, defendant, from the judgment of the Common Pleas of Erie County, in an action for damages, wherein Maria Bertha Kies was plaintiff.

At the trial, counsel for the defendant submitted the following points:

1. The City of Erie, defendant, is not liable in damages for any of the acts of its firemen.

2. The City of Erie is not liable in damages for any accident occasioned by the construction of a building owned by it, unless said accident was a necessary result of the manner of the construction of said building; and that if the building could have been operated with safety, in case the employees of the city in its fire department had exercised reasonable care, then the City of Erie is not responsible for any accident occasioned by the operation of any of the parts of said building.

3. The evidence in the case does not show that the building opposite which the plaintiff was injured was dangerous in itself, or in the manner of its construction, and that the defendant is not liable for the injury suffered by the plaintiff as alleged in her declaration.

4. Under all the evidence in this case, the verdict of the jury be for the defendant.

The first point was affirmed, the third and fourth were refused and to the second the Court replied: "The City of Erie is not liable in dam-

Digitized by Google

ages for any accident occasioned by the construction of a building owned by it, unless said accident was a probable result of the manner of the construction of said building; and if the building could have been operated with safety, in case the employees of the city, in its fire department, had exercised reasonable care, then the City of Erie is not responsible for any accident occasioned by the operation of any of the parts of said building."

Verdict for the plaintiff in the sum of $5,000, whereupon this appeal was taken, and the refusal of the third and fourth points, above mentioned, assigned as error.

Joseph P. O'Brien, for appellant.

The fact that the doors of the engine house could have been operated with perfect safety by the fireman had he used reasonable care, remains as true now as it was when the case was heard before. If the building was not negligently constructed in the prior suit, the character of its construction certainly cannot be altered by the phraseology of a declaration.

The defendant is willing to rest its case entirely upon the decision of this Court already rendered in—

Kies *v.* City of Erie, 135 Pa. 144.

E. A. Walling, (with him *William A. Galbraith* and *J. W. Galbraith*), for appellee.

The appellant places his sole reliance upon Kies *v.* City of Erie, 135 Pa. 144. He could safely do so provided a compulsory non-suit were a bar to another action, but it is not.

Fitzpatrick *v.* Riley, 163 Pa. 65.
Bournonville *v.* Goodall, 10 Id. 133.

The undisputed evidence in this case shows that the very object of these springs was to open the doors without the assistance of the firemen, and not simply "to aid the firemen in swinging open the heavy doors," as the evidence in the former case seemed to show.

The former case was argued in this Court on the right theory, but unfortunately no evidence had been offered to sustain the argument, and the plaintiff was subjected to all the costs and expenses of that trial, and had to bring a new suit in order to reach the merits of the case.

July 18, 1895. FELL, J. The specifications of error raise the single question whether the testimony justified the submission of the case to the jury. The same parties were before the Court in 1890, in an action to recover for the same injury, that action being based upon the alleged negligence of a fireman in the employ of the City of Erie, in suddenly and violently opening outward over the pavement the doors of a building used by the fire department. The judgment of non-suit entered in the Common Pleas was affirmed by this Court for the reason that the municipality was not responsible for the negligent act of a fireman, and that there was no evidence that the accident was the result of the defective construction of the building: Kies *v.* City of Erie, 135 Pa. 144. This action rests upon the allegation that the building was so constructed that its doors were opened outward by means of springs, and that such a construction was dangerous and negligent.

The building in question was on the house-line of the street, and was provided with heavy wooden doors, ten or twelve feet high and six feet wide, which swung outward, and when open extended half way over the pavement. Large steel springs were attached to the outside of the doors and so arranged as to open them rapidly when the bolts were drawn. The pulling of a rope unfastened the doors, and the powerful springs caused them to swing with rapidity and force across the pavement. That this was a constant menace to passers-by seems to be too clear for discussion. It was claimed, however, by the defendant, that the springs were only intended to aid the firemen in opening the doors, and that after they started to move, it was their duty to hold on to them and prevent a too rapid and violent motion. If this was the purpose, the usefulness of such a device is not manifest, as the force of the springs would not be fully exerted until the doors had started to move and the necessity for controlling their motion had arisen. This claim, however, gave rise to the question whether the injury to the plaintiff was caused by the negligence of the fireman, and the question was fully and fairly submitted to the jury. As the defendant is not answerable for the neglect of an employee in its fire department, the issue was narrowed to the inquiry whether the usual and necessary use of the doors without negligence was dangerous to persons passing on the pavement. This question was submitted to the jury. The learned Judge in his charge said: "If the operation of these doors, with reasonable care would have provided against danger and accident to the passers-by the city is not liable. If the necessary and natural and probable operation of these doors was dangerous even though accompanied by the use of ordinary care on the part of the employees, the city is liable for the result." This was the real test of liability, and the testimony fully justified the submission.

The judgment is affirmed.

W. C. S.

[See 26 WEEKLY NOTES, 112.]

Digitized by Google

July, '94, 170. February 1, 1895.

The City of Philadelphia v. The Thirteenth and Fifteenth Streets Passenger Railway Company of Philadelphia.

Passenger railways—Thirteenth and Fifteenth Streets Passenger Railway Company of Philadelphia—Duty of to repair streets—Acts of April 8, 1859; May 16, 1861; and March 27, 1873—Paving and repaving—Municipal corporations—Power to stop the running of passenger railway cars for the repair of the streets—Set-off.

The Act of March 27, 1873, confirming the merger of the Thirteenth and Fifteenth Streets Passenger Railway Company with The Navy Yard, Broad Street and Fairmount Railway Co., providing for the surrender of certain corporate rights, and conferring other rights and making them exclusive, which was duly accepted by The Thirteenth and Fifteenth Streets Passenger Railway Co., is the operative charter of the consolidated company.

In order to find the grants and limitations thereof, and the burdens and obligations imposed by this charter, it is necessary to look to the terms of the two original charters of the separate companies which remained unchanged and confirmed.

By these original charters the railway companies were required to keep in repair the streets traversed and occupied by them in accordance with the regulations of councils.

These provisions of the original charters in reference to keeping the streets in repair are general and applicable to all streets on which the tracks are laid, and are not limited to the space between the rails, but extend to the entire roadway from curb to curb, in accordance with the requirements of the ordinances of the councils of the City of Philadelphia.

The duty to repair, where it exists, extends to the replacement of an old pavement by a new one of a different and improved kind.

Phila. *v.* Ridge Ave. R. W. Co., 28 WEEKLY NOTES, 388, followed.

Whether a macadamized road is or is not a paved street is a question of intention, but the question does not arise in this case. as there is nothing on the record to show that the paving for which suit is brought was a first or original paving.

The defendant company being subject to the ordinances of councils requiring them to pave, and upon refusal, authorizing the stopping of their cars until the ordinance is fully complied with, evidence of the injury suffered by such stopping, as a set-off to a claim against the companies for the cost of paving, is irrelevant.

Appeal of The Thirteenth and Fifteenth Streets Passenger Railway Company of Philadelphia, defendant, from the judgment of the Common Pleas No. 4, of Philadelphia County, in an action of assumpsit brought by the City of Philadelphia against the said defendant, to recover damages for money expended by the City in the paving of certain portions of Broad street and other streets in the city of Philadelphia used by said company defendant.

Upon the trial, before THAYER, P. J., the following facts appeared: On April 8, 1859, The Thirteenth and Fifteenth Streets Passenger Railway Company was chartered to lay out and construct a railway on certain designated streets in the city of Philadelphia, in which Broad street was not included. By section 9 of this charter the councils of the city of Philadelphia were authorized to regulate by ordinance the paving and repairs of said streets, and the company was required to keep the same in good order and repair. On May 16, 1861, The Navy Yard, Broad Street and Fairmount Railway Company was chartered and empowered to occupy certain streets in the city of Philadelphia, among which were certain parts of Broad street. By section 9 of this charter The Navy Yard, Broad Street and Fairmount Railway Company were required, upon the removal of certain railroad tracks from Broad street, to pave, curb and macadamize Broad street from South street to Chestnut street; and section 10 provided "That the said company shall be compelled to keep in constant repair that portion of the street which they use and occupy, and subject to such ordinances of councils as relate thereto not inconsistent with this Act."

Subsequently and some time prior to April 4, 1868, the defendant company and The Navy Yard, Broad Street and Fairmount Railway Company were duly merged and consolidated into The Thirteenth and Fifteenth Streets Passenger Railway Company of the City of Philadelphia, under the terms of an Act relating to railroad companies, passed May 16, 1861, and its supplements, and all the rights and franchises of The Navy Yard, Broad Street and Fairmount Railway Company became vested by this merger in the defendant company. Some doubt having been thrown upon the validity of the merger, an Act was passed March 27, 1873, confirming the merger and providing in consideration of the renunciation and surrender by the railway company to the Commonwealth "of all rights to construct any railroad, railway, or tramway upon Broad street possessed or claimed by them under the said merger of the corporate rights and franchises of The Navy Yard, Broad Street and Fairmount Railway Company, or otherwise howsoever, and the discontinuance of all legal proceedings to enforce such rights, then, upon the said company making such surrender, and filing the same (within a stipulated time) in the office of the secretary of the Commonwealth, and accepting the provisions of said Act, all the corporate rights, privileges, and franchises heretofore granted to The Navy Yard, Broad Street and Fairmount Railway by the Act of" May 16, 1861, "excepting those so surrendered, shall be and thereupon are hereby granted and confirmed to and declared to be fully vested in the said The Thirteenth and Fifteenth Streets Passenger

Digitized by Google

Railway Company, under and by virtue of said merger; that is to say, the privilege of constructing and operating a single or double railway passenger track or tracks upon any part of said Broad street, from time to time, south from Carpenter street as far south as said street may be opened, and north from Columbia avenue as far north as said street may be opened, together with the privilege of maintaining the now existing connections between said tracks and the company's tracks on Thirteenth and Fifteenth streets; and in further consideration of such surrender, no franchise or privilege to construct a track or tracks or any artificial tramway for the conveyance of passengers for hire, upon any portion of said Broad street or upon Thirteenth or Fifteenth streets, or other of said company's connections, or to run any cars upon any part of said routes, shall be hereafter granted to any person or persons, or body politic: *Provided*, that as each six consecutive squares of Thirteenth and Fifteenth streets northward from Columbia avenue, as well as the street or avenue at the northern terminus thereof, running at right angles to and joining Thirteenth and Fifteenth streets, or so much thereof as may be necessary to form circuits, shall be, from time to time, opened, graded, and paved, The Thirteenth and Fifteenth Streets Passenger Railway Company shall remove their tracks from the six squares of North Broad street between the same cross streets, and shall lay them upon the corresponding six squares of Thirteenth and Fifteenth streets and said northernmost cross street, for the purpose of completing their circuits or connections, and that when the depot of the Philadelphia, Wilmington and Baltimore Railroad Company, or its successors, shall be removed from Broad street between Washington avenue and Carpenter street, then as each six consecutive squares of Thirteenth and Fifteenth streets southward from Carpenter street, as well as the street or avenue at the southern terminus thereof, running at right angles to and joining Thirteenth and Fifteenth streets, or so much thereof as may be necessary to form circuits, shall be, from time to time, opened, graded, and paved, The Thirteenth and Fifteenth Streets Passenger Railway Company shall remove their tracks from the six squares of South Broad street between the same cross streets, and shall lay them upon the corresponding six squares of Thirteenth and Fifteenth streets and the said southernmost cross street, for the purpose of completing their circuits or connections, and all Acts or parts of Acts inconsistent herewith are hereby repealed."

Section 2. "If the Thirteenth and Fifteenth Streets Passenger Railway Company (having accepted the provisions of this Act as aforesaid) shall not at any time proceed to comply with the same, after notice in writing to them by the mayor, the chief commissioner of highways, or the common council of the city of Philadelphia to do so, then the chief commissioner of highways is hereby empowered and directed to remove the tramway and rails of the said Thirteenth and Fifteenth Streets Railway from Broad street, and repave and repair the bed of said street forthwith, at the expense of said company."

The defendant company accepted the provisions of this Act and filed its renunciation and surrender of its rights as required, and laid and operated its tracks upon Broad street in the manner prescribed by the Act. Up to 1890, Broad street was paved partly with macadam and partly with cobble stones; but in 1890 city councils provided by ordinance for paving North Broad street with an improved sheet asphalt pavement. Claiming that, by virtue of the Acts above cited and sundry ordinances of councils, the company defendant was liable therefor, the City of Philadelphia required them to make these repairs, which the railway company refused to do, alleging that the charter of 1859 gave them no rights on Broad street, and that it and the ordinances referred to were applicable only to streets other than Broad street. They further claimed that the Act of March 27, 1873, was not a charter but a contract between the Commonwealth and the defendant company, authorizing them to use Broad street temporarily, but conferring no liability whatever with regard to the repairing or paving of the streets. The city then directed that the street should be poled off, thereby stopping the running of the defendant company's cars, and when the paving was done, brought suit for the cost against the company. The defendant claimed a set-off, against its liability for repairing streets other than Broad street, arising from the injury to its operations by the stopping of its cars through the poling off of Broad street. Its offers of testimony as to such injury, were, on objection, refused. The Court instructed the jury to find a verdict in favor of the plaintiff, reserving the following point: "Whether the Act of 1873, and defendant's acceptance of its provisions, or any other Acts which have been given in evidence, relieved the defendant from the obligation of paving Broad street;" and subsequently entered judgment for the plaintiff upon the point reserved. Whereupon the defendant took this appeal, assigning for error, the admission of the Acts and ordinances referred to, unless restricted as to liability to streets other than Broad street; the refusal of the testimony offered as to the injury suffered by the poling off of Broad street, and the action of the Court in entering judgment for the plaintiff.

George W. Biddle and *John G. Johnson*, for appellant.

Digitized by Google

The defendant can not be held liable under the charter of 1859, because that does not refer in any way to Broad street; nor under the Act of 1873, which merely empowered the defendant to merge with another railway company, and imposed no liability in regard to the paving and repairing of streets.

The defendant is not liable under the charter of The Navy Yard, Broad St. and Fairmount Railway Co., because it was only bound under that charter to repair Broad street between its tracks.

Harrisburg *v.* Harrisburg Pass. Railway Co., 1 Pearson, 298.

The Legislature could not have intended to impose such a liability; for when the charter of 1861 was granted Broad street was under the control of and liable to be kept in repair by other corporations, as is shown by sundry Acts and ordinances.

The case of The Thirteenth and Fifteenth Streets Passenger Railway Company *v.* City, decided by ELCOCK, J., 13 WEEKLY NOTES, 487, was decided without reference to the legislation above referred to, so that this case can not be considered as any authority in the present controversy.

Even under the charter of 1861, the defendant would only be liable to repair, not to pave or repave.

Fort Wayne and Elmwood Ry. Co. *v.* City of Detroit, 34 Mich. 78.
State *v.* Corrigan Street Ry. Co., 85 Mo. 263.
Farrar *v.* City of St. Louis, 80 Id. 379.
Western Paving and Supply Co. *v.* Citizens' Street Railroad Co., 128 Indiana, 525.
Chicago *v.* Sheldon, 9 Wallace, 50.

No passenger railway company in Philadelphia is liable for the repaving of a street not already paved, and as Broad street was macadamized and not paved at the time the alleged cause of action arose, the defendant could not be required to pave it.

Leake *v.* Philadelphia, 150 Pa. 643.

The evidence as to set-off should have been admitted. The work on Broad street having been done recklessly and illegally, the loss the railway suffered thereby was a subject of set-off to the damages claimed for the paving of other streets.

Easton, etc., Pass. Ry. Co. *v.* City of Easton, 25 WEEKLY NOTES, 493.

E. Spencer Miller, assistant city solicitor, and *Charles F. Warwick*, city solicitor, (*James Alcorn*, assistant city solicitor, with them), for appellee.

The plenary liability of the company defendant to repave Broad street, and the general liability of passenger railways as to the streets, has been fully declared.

The Thirteenth and Fifteenth Streets Pass. Ry. Co. *v.* The City of Phila., 13 WEEKLY NOTES, 487.
The Phila. and Gray's Ferry Pass. Railway Co. *v.* The City of Phila., 2 WEEKLY NOTES, 639.
The City of Phila. *v.* Ridge Avenue Pass. Railway Co., 28 WEEKLY NOTES, 388.

Damages in tort can not be a subject of set-off proper, and they can not constitute a defence at all save in the transaction wherein they arise.

Patterson *v.* Hulings, 10 Barr, 506.
Ellison *v.* Weed, 2 Northampton Co. Rep. 107.

July 18, 1895. MITCHELL, J. The railway company appellant was formed by the merger of two passenger railway companies previously existing, one of the same name, chartered April 8, 1859, and the other called The Navy Yard, Broad Street and Fairmount Railway Company, chartered May 16, 1861. The validity of the merger under then existing laws having been questioned, an Act of Assembly was passed March 27, 1873, P. L. 435, confirming the merger, providing for the surrender of certain corporate rights, and conferring other rights and making them exclusive. This act was solemnly accepted by the appellant by deed in the form prescribed by the Act, filed in the office of the secretary of the Commonwealth, April 8, 1873, and thus became the amended and operative charter of the consolidated company appellant.

It is argued that this was not in any sense a charter nor an amendment to a charter, but merely a contract between the Legislature and the railway company by which the former confirmed certain rights other than those on Broad street, and the company abandoned its rights on Broad street, with a temporary license to run its cars thereon until Thirteenth and Fifteenth streets should be opened from time to time for six consecutive squares north or south of specified points. This claim, however, cannot be sustained. The Act is in its nature and effect a grant of franchises, some positive and at least one negative privilege in the nature of an amended franchise, the right to abandon a part of the franchise to lay tracks on Broad street that was contained in the charter of the Navy Yard, Broad street and Fairmount Railway. The facts that the consideration to the State for passing the Act was the surrender of other rights or franchises claimed by the company, and that the occupation of Broad street was terminable on specified contingencies, did not vary the nature of the Act as a legislative grant of new franchises as well as a confirmation of others claimed under prior charters. These charters were by the Act continued and confirmed, as to all the franchises and powers of both companies, except so far as changed or taken away by the Act itself, and of course the franchises so continued were accompanied with all the incidents, duties and ob-

Digitized by Google

ligations attached to them in the first instance.

The Act of 1873, therefore, is the operative and controlling charter of the appellant, but we must look for its grants and limitations, as well as for its burdens and obligations on the appellant, to the terms of the two original charters which remained unchanged and confirmed.

The charter of the original Thirteenth and Fifteenth Streets Railway provided in section 9, "That the councils of the City of Philadelphia may from time to time by ordinances, establish such regulations in regard to said railway as may be required for the purposes of paving, repaving, grading . . . . and the said company shall conform to the grades established by councils of the several streets and avenues traversed by the said railway . . . . The streets thus occupied by said company shall be by them kept in good order and repair at their own proper expense."

The charter of the Navy Yard, Broad Street and Fairmount Company provided in section 10, that "the said company shall be compelled to keep in constant repair that portion of the street which they use and occupy, and (be) subject to such ordinances of councils as relate thereto, not inconsistent with this Act."

By both of these provisions the company is charged with the duty to keep in repair. Both provisions are general, applicable to all streets on which tracks are laid, and continuing, that is, applying from time to time whenever repairs may become necessary. The fact that part of Broad street at the time of the charter of the Navy Yard, etc., Company was required to be kept in repair by other parties who had privileges thereon, would not prevent the duty becoming incumbent on the appellant when circumstances should otherwise raise it. There is nothing, therefore, peculiar in regard to the situation of Broad street which makes the duty of the appellant in regard thereto any different from that in regard to any other street upon which its tracks are laid.

The duty to keep the streets in repair being thus clear under either and both charters, two questions arise as to its extent. First, does it include the whole street from curb to curb between the points longitudinally where the line is laid on it, or is it restricted to the space between the tracks? Secondly, does it extend to a practical repaving with a different and improved pavement?

First, the obligation to repair the whole street from curb to curb, if not expressly decided, has been so clearly foreshadowed as to leave little doubt of what the conclusion must be. Under the charter of the Thirteenth and Fifteenth Streets Company the question could hardly arise, for the words are that the company shall conform to the grades of the streets traversed by the said railway and *the streets thus occupied* shall be kept in good order and repair. This so clearly means the whole of the streets which the railway traverses that further elaboration seems to be unnecessary. But it is argued that Broad street is only occupied by virtue of the franchise of the Navy Yard, etc., Company, and the obligation of that charter is only to keep in repair "that portion of the street which they use and occupy," which should be construed to mean that portion between the tracks. To this argument it would be sufficient answer that at most the words can only be claimed as doubtful and ambiguous, and in such cases all public grants are to be construed liberally in favor of the public and strictly against the grantee: Pittsburgh R. R. Co. *v.* Bruce, 102 Pa. 23. But it is not necessary to resort to this rule. As already said the provisions of both the original charters in reference to keeping the streets in repair, are general and applicable to all streets on which tracks are laid, and are meant to be of continuous application from time to time as circumstances may require. Both charters included the right to lay tracks on several streets and on different streets at different times but neither looked to the occupation of the whole length of any of the streets named. The right was given to occupy certain portions longitudinally of the specified streets, and the corresponding duty was imposed of keeping those portions in repair. Whether the language used was as in the one case "the streets traversed and occupied," or as in the other, "that portion of the street which they use and occupy" the idea was the same, to wit, that the franchise to occupy and the obligation to keep in repair should be co-extensive. In Pitts. and Birmingham R. W. Co. *v.* Pittsburgh 80 Pa. 72, a somewhat analogous case where the question was not what part of the street but what kind of obstruction the company were bound to remove, the principle was well stated, that under the general law the obligation to keep the whole street in repair rested on the municipality, and that obligation the charter transferred to the company. So it is in the present case, whatever the duty of the municipality would have been as to repairs upon the streets where the tracks are laid, is now the duty of the railway company laying and using the tracks, and that plainly includes the whole width of the street.

But the duty does not rest on these provisions alone. It arises independently, but with equal conclusiveness from other parts of the charter. Section 10 of the Act of incorporation of the Navy Yard, etc., R. W. Co. provides that "the said company shall be compelled to keep in constant repair that portion of the street which they use and occupy, and (be) subject to such ordinances of councils as relate thereto." This includes existing as well as future ordinances, and among those existing at the date of the charter,

Digitized by Google

was the general ordinance of July 7, 1857 (Ord. 1857, p. 248), which provided that all passenger railroad companies should be "at the entire cost and expense of maintaining, paving, repairing and repaving that may be necessary upon any street . . . occupied by them." This, as was well said by THAYER, P. J., in Phila. and Gray's Ferry R. W. Co. *v.* Philadelphia, 2 WEEKLY NOTES, 639, means "not upon a portion of the street occupied but upon the whole street." The subject was elaborately and very ably discussed in that case, and the opinion of THAYER, P. J., is cited with approval in Philadelphia *v.* Ridge Ave. P.R.W. Co., 143 Pa. 444, where the present Chief Justice says, "It has never been seriously doubted, nor can it be, that the duty to repair or to repave, when either is adjudged necessary, extends to the entire roadway from curb to curb."

Secondly, that the duty to repair, where it exists, extends to the replacement of an old pavement by a new one of a different and improved kind was expressly held in Phila. *v.* Ridge Ave. R. W. Co., 143 Pa. 444 (471-2) where it was said by the present Chief Justice, "The duties specified in (the company's) charter were imposed with reference to the changes and improved methods of street paving which experience might sanction as superior to and more economical than old methods. In other words the company is bound to keep pace with the progress of the age in which it continues to exercise its corporate functions. The city authorities have just as much right to require it to repave at its own expense with a new, better and more expensive kind of pavement as they have to cause other streets to be repaved in like manner at the public expense."

In the present case of Broad street, the fact that the occupation is terminable upon certain contingencies which may happen at any time, and at the will of the city, does not destroy the obligation. As a fact the occupation has already lasted some years, and from the nature of the surface of the ground and its existing uses, is likely to last some years longer, but however this may be it does not alter the mandate of the charter, and the ordinances to keep the street in repair so long as it is occupied.

A question is raised in the argument that the appellant is not liable because the so-called repair or repaving of Broad street was, in fact, a first or original paving, and there is no obligation to pave in the first instance, as so much of the ordinance of July 7, 1857, as required paving of a street not previously paved, was repealed by the ordinance of April 1, 1859, (Ord. 1859, p. 138). There is nothing on the record, however, to show the fact now alleged. The appellant did not at any time offer to prove it, nor ask to have the jury pass upon it. The facts were practically treated as undisputed. The Judge directed the verdict as a matter of law and there is no assignment of error to his action in so doing. Gen. Wagner, for the plaintiff, testified that the former pavement was partly cobble and partly macadam, and other witnesses speak of a paving with macadam in the centre and cobble at the sides. Even if the whole street was macadamized it would not follow necessarily that it was not paved. That is a question of intention. Some misapprehension seems to exist in the professional mind as to our recent decisions on this subject, and they have, therefore, been reviewed and the *ratio decidendi* discussed in Philadelphia *v.* Eddleman, opinion filed herewith, to which reference is made for all that is necessary to be said on the present point.

The only remaining assignments of error to be noticed, relate to the exclusion of appellant's offer to show damages by way of set-off from the improper method of paving Broad St., causing stoppage of the cars and consequent loss of profits.

Passing by the question whether the offer was clearly within the exception to the general rule that a set-off in tort cannot be made to an action *ex contractu*, these offers substantially sought to raise the question of an abuse of the municipal authority and discretion. By the ordinance of September 25, 1890, (Ord. p. 301), the councils instructed the director of public works to stop the running of the cars "on Broad street north from Glenwood avenue until the said street is repaved in accordance with the notice to do such work served by him on the passenger railway company . . . as required by the ordinance of July 7, 1857," etc. The ordinance of July 7, 1857, sec. 4, provides that "it shall be the duty of any company as aforesaid . . . to pave or repave the highways, as hereinbefore provided, and should they refuse or neglect to do so for ten days from the date of such notice . . . councils may forbid the running of any car or cars upon the said road until the same is fully complied with." As heretofore shown, the appellant is subject to the ordinance of 1857, and it thus appears that the Act of stopping the cars while the repaving was being done was expressly authorized by that ordinance. It was not offered to be shown that the state of facts which justified the action of councils did not exist, to wit, the resolution for repaving, the notice to appellant to do its part, and the failure to do so in the time required. Appellant's offer was to show that the work could have been done without stopping the cars, and therefore with less loss to appellant. But as the city was acting on its express legal rights, the offer was immaterial and irrelevant. It was not for appellant, or even the Court and jury, to review the city's exercise of its unquestionable discretion.

Judgment affirmed. S. H. T.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, AUG. 2, 1895.* [No. 25.

Superior Court.

[Established by Act approved June 24, 1895.]

RULES.

TERMS AND RETURN DAYS.

RULE I.

The Judges of the Superior Court will annually hold terms of the said Court, and appeals shall be returnable, at the following times and places, except as provided in Rule VIII:

First, — At Philadelphia, (Supreme Court Rooms):

For the first Monday of November, the County of Philadelphia.

For the second Monday of November, the County of Philadelphia.

For the third Monday of November, the Counties of Lancaster and Berks.

For the first Monday of December, the Counties of Chester, Delaware and Bucks.

For the second Monday of December, the Counties of Schuylkill, Lehigh, Northampton and Montgomery.

For the third Monday of December, the County of Philadelphia.

Second,—At Scranton:

For the first Monday of January, the Counties of Luzerne, Columbia and Montour.

For the second Monday of January, the Counties of Lackawanna, Monroe, Carbon and Wyoming.

For the third Monday of January, the Counties of Bradford, Susquehanna, Wayne and Pike.

Third,—At Williamsport:

For the first Monday of February, the Counties of Northumberland, Union, Snyder, Lycoming and Sullivan.

For the second Monday of February, the Counties of Centre, Clearfield, Clinton, Cameron and Elk.

For the third Monday of February, the Counties of McKean, Potter and Tioga.

Fourth, — At Harrisburg, (Supreme Court Rooms):

For the first Monday of March, the Counties of Dauphin, Lebanon and York.

For the second Monday of March, the Counties of Adams, Franklin, Fulton, Cumberland, Juniata and Perry.

For the third Monday of March, the Counties of Mifflin, Huntingdon, Bedford and Blair.

Fifth, — At Pittsburgh, (Supreme Court Rooms):

For the first Monday of April, the County of Allegheny.

For the second Monday of April, the County of Allegheny.

For the third Monday of April, the Counties of Westmoreland, Fayette, Washington and Greene.

For the first Monday of May, the Counties of Somerset, Indiana, Cambria, Jefferson and Clarion.

For the second Monday of May, the Counties of Armstrong, Butler, Beaver, Lawrence and Mercer.

For the third Monday of May, the Counties of Erie, Crawford, Venango, Warren and Forest.

ATTORNEYS.

RULE II.

No person shall be admitted to practice as attorney in this Court, unless he has been admitted to practice in the Supreme Court of this State, and presents with the certificate of such admission due proof of good character,* or unless he has served a regular clerkship, within the State, to some practicing attorney or gentleman of the law, of known abilities, for the term of four years, and afterwards shall have practiced as an attorney in one of the county Courts of Common Pleas, for the term of one year, or served such clerkship three years, and practiced two years: *Provided always*, That in the case of a person applying to be admitted who shall appear to have studied the law with assiduity, under the direction of some practicing attorney or gentleman of the law of this State, for the term of two years after his arrival at the age of twenty-one years and afterwards practiced in some one of the county Courts of Common Pleas for the term of two years, he may be admitted.

Any graduate of the law department of the University of Pennsylvania or of the Dickinson School of Law, who has passed the preliminary examination before the board of examiners of any

*This provision applies only to attorneys who had not been admitted to practice in the Supreme Court prior to the first day of July, 1895.

Digitized by Google

county of this Commonwealth and an examination upon Latin, and who has taken the full course of three years and received the diploma and degree of Bachelor of Laws, may be admitted to practice in this Court upon the expiration of three full years from the date of his preliminary examination, upon filing with the prothonotary a certificate of the dean of the law department of said University or School of Law, stating these facts, and upon exhibiting his diploma, together with a certificate of good character, as in other cases.

RULE III.

Attorneys from other States, who have been admitted to any Court of Common Pleas of this State, may immediately thereafter be admitted in this Court: *Provided*, That they are in good standing, and have practiced for five years in the State from which they have removed.

RULE IV.

All agreements and notices of attorneys touching the business of the Court shall be in writing, otherwise they will be considered of no validity.

RULE V.

No attorney of this or any other Court, sheriff's officer, bailiff or other person concerned in the execution of process shall become bail on appeal except by special leave of the Court previously obtained.

APPEALS AND ARGUMENTS.

RULE VI.

Whenever an appeal shall be taken to this Court, due notice thereof, in writing, shall be forthwith given by the appellant to the appellee or his counsel of record. A copy of said notice, with proof of service endorsed thereon, shall be filed with the proper prothonotary of this Court, at which time the statutory fee shall be paid to him.

In all cases in which an appeal shall be taken and perfected in accordance with the provisions of the Act of General Assembly of Pennsylvania, approved June 24, 1895, the Court below shall make up and certify the record in accordance with the practice which now obtains in cases of appeal to the Supreme Court of Pennsylvania.

The prothonotary or clerk of any Court in which an appeal shall be taken and perfected shall thereupon forthwith furnish the certificate required by the said Act, and in addition thereto shall further certify to this Court the fact that an appeal has been taken, the date when taken, by whom taken, the title of the case and the names of all the parties thereto as the same appear of record in the Court below.

RULE VII.

In all cases the record shall be filed with the prothonotary of this Court on or before the first day of the week to which the case is assigned for argument; and if the record shall not be filed on or before such day the Court on motion of any party interested may quash the appeal.

RULE VIII.

All cases appealed to this Court shall be placed upon the docket in the order in which the certificate of the respective prothonotary or clerk of the Court below, that the appeal has been taken and perfected, shall be received by the prothonotary of this Court. All cases shall be placed upon the argument list for the county from which the appeal shall be taken next succeeding their entry upon the docket and in the order in which they stand thereon, unless advanced or transferred by the special order of the Court: *Provided*, that no case shall be placed on the argument list unless it has been placed on the docket twenty days before the return day: *Provided also*, that not more than forty cases shall be placed on the argument list for each week assigned for hearing appeals from Philadelphia and Allegheny Counties: and *Provided also*, that unless this Court shall specially order otherwise, appeals from sentences upon indictment shall be returnable, and be set down for argument at the head of the list on the third Monday (exclusive of the day of taking the appeal) following the taking of the appeal at the place where this Court shall then be in session; but if this Court shall not be in session at that time then the same shall be returnable, and be set down for argument as aforesaid, at the time when and place where the Court shall next be in session; and the clerk of the Court from which any such appeal shall be taken, shall certify the record to the prothonotary of this Court, at the place where such appeal will be heard according to the foregoing provisions.

RULE IX.

The Court will call the cases for argument in the order in which they stand on the printed argument list. If neither party be present or ready to proceed with the argument, the case shall be non-prossed, unless reason to the contrary be shown to the satisfaction of the Court.

RULE X.

When any case is called for argument should

Digitized by Google

either party fail to appear, on proof of due notice of the taking of the appeal and of service of paper book upon such party, or his or their counsel of record, in accordance with the rules of this Court, the Court may proceed with the argument *ex parte* or quash the appeal or affirm the judgment.

RULE XI.

No cause shall be continued when reached without permission of the Court, and except for a sufficient cause. Engagements of counsel in the lower Courts will not be recognized as a reason for the continuance or postponement of a cause except when they are actually engaged in a trial, which has been commenced in a previous week, and is unfinished.

RULE XII.

In all appeals in criminal cases wherein a special allocatur is required by law and has not been had, the prothonotary is instructed by this Court to forthwith enter "writ quashed," and the records shall be returned to the Courts from whence they came.

RULE XIII.

In all cases when the appeal is taken from any order, judgment, or proceedings in relation to a public or private road, this Court will not suffer the merits of the case to be entered into, nor reverse the order of the Court of Quarter Sessions, unless for some irregularity apparent on the record, or because the Court below have exceeded their jurisdiction, or have erred in their judgment in point of law.

ASSIGNMENTS OF ERROR.

RULE XIV.

In all cases the counsel for appellant shall specify in writing the particular errors which he assigns, and file the same with the prothonotary of this Court on or before the first day of the week to which the case is assigned for argument, and on failure so to do the Court may quash the appeal or affirm the judgment.

RULE XV.

Each error relied on must be assigned particularly, and by itself. If any assignments embrace more than one point, or refer to more than one bill of exceptions, or raise more than one distinct question, it shall be considered a waiver of all the errors so alleged. This rule does not apply to cases of judgment on facts agreed upon in the nature of a special verdict. In such cases it is enough to say that the judgment is erroneous without more.

RULE XVI.

When the error assigned is to the charge of the Court, or to answers to points or to findings of fact or law, the part of the charge or the points and answers or findings referred to must be quoted *totidem verbis* in the assignment.

RULE XVII.

When the error assigned is to the admission or rejection of evidence, the assignments must quote the full substance of the bill of exceptions, or copy the bill in immediate connection with the assignment. When the error is as to the admission or rejection of a writing, a full copy of the writing must be printed in the paper book. Any assignment of error not according to this and the last rule will be held the same as none.

PAPER BOOKS.

I. GENERAL PROVISIONS.

RULE XVIII.

Paper books shall be furnished in the shape and size of a common octavo pamphlet, on ordinary printing paper. All paper books exceeding twenty pages in length shall contain a full and complete table of contents in addition to the index upon the cover.

RULE XIX.

In all cases the cover of paper book, whether of appellant or appellee shall contain:

1. The title of the case in the Superior Court.
2. The term and number.
3. The place where the appeal is returnable.
4. The county in which the appeal is taken.
5. The title of the Court below.
6. The words "Paper Book of Appellant," or as the case may be.
7. The names of all the counsel for the party whose book it is.
8. An index.

RULE XX.

The history of the case must contain a closely condensed statement of all the facts of which a knowledge may be necessary, in order to determine the points in controversy here; and the want of such a statement cannot be supplied by reference to another part of the paper book. The history of the case must not contain an argument or any portion of the testimony.

Digitized by Google

RULE XXI.

The brief of the argument must contain a clear statement of the points on which the party relies, with such reasons and arguments as he may see proper to add, together with all the authorities which he thinks pertinent. Where the error assigned is to the finding of fact by an auditor or master, the printed argument shall contain a synopsis of all the evidence bearing upon such disputed question of fact, with a reference to the page or pages of the paper book where such evidence may be found *in extenso*.

RULE XXII.

Where an authority is cited, the principle intended to be supported by it must be stated. A mere reference to the book will not be sufficient. Pennsylvania Supreme Court cases decided since the commencement of the State Reports must be cited by the volume of said State Reports. The decisions of this Court must be cited by the volume of the Pennsylvania Superior Court Reports. Counsel citing decisions of this Court or of the Supreme Court from legal periodicals, shall certify at the end of their briefs that such cases are not reported in the Superior Court Reports or in the State Reports. In the absence of such certificate the cases will not be considered.

RULE XXIII.

The paper book of the appellee may, if he chooses, contain no more than his argument, to which Rules XXI and XXII will be held to apply. But he may make it to embrace counterstatement, giving such version of the facts as he asserts to be the true one.

II. PAPER BOOKS—SPECIAL PROVISIONS.

RULE XXIV.

In all cases where the appeal is from a judgment on a verdict the paper book of the plaintiff in error shall contain the following matters, in the following order:

1. The names of all the parties as they stood on the record of the Court below at the time of the trial, and the form of the action.
2. An abstract of the proceedings, showing the issue, and how it was made.
3. The verdict of the jury and the judgment thereon.
4. A history of the case.
5. The points, if any, which were submitted in writing to the Court below.
6. The charge of the Court.
7. The assignments of error.
8. A brief of the argument for the appellant.
9. An appendix, containing the evidence, and, if necessary, the pleadings in full.

RULE XXV.

Where the judgment below is on a case stated in the nature of a special verdict, the facts as agreed on by the parties, the opinion of the Court, and the argument of counsel, will be sufficient.

RULE XXVI.

In all cases where the appeal is from a final judgment at law in the Common Pleas, not founded upon a verdict or on a case stated, the paper book of the appellant shall contain:

1. The names of all the parties as they stood on the record of the Court below, at the time of entry of the judgment and the form of the action.
2. An abstract of the record showing the exact points presented for the decision of the Court and the manner in which the same were presented.
3. The report of the referee, or the findings of fact and law by the Judge sitting without jury, if any.
4. The judgment of the Court.
5. The opinion filed, if any.
6. The assignments of error.
7. The argument of counsel.
8. An appendix, containing the record in full, and if necessary the evidence submitted to the Court below.

RULE XXVII.

In all cases where the appeal is from a proceeding in equity or from a proceeding in the nature thereof in the Court of Common Pleas, or from the Orphans' Court, the arrangement of the appellant's paper book shall be as follows:

1. The names of the parties and the nature of the proceedings.
2. A short abstract of the bill or petition and answer.
3. A history of the case.
4. The requests for findings of fact or law with the answers thereto, and the findings of the Judge.
5. The report of the auditor, referee, or master, if there were one.
6. The exceptions taken to the report in the Court below.
7. The opinion of the Court on the exceptions, and the decree made.
8. Assignments of error.
9. Argument on part of appellant.
10. Appendix containing such documentary or other evidence as may be necessary.

Digitized by Google

RULE XXVIII.

In all cases where the appeal is from proceedings in the Court of Quarter Sessions or Oyer and Terminer, and not provided for in Rule XXIV, the paper book shall contain:

1. An abstract list or brief of all the petitions, motions, orders, reports, exceptions, etc., which may be necessary to give the Court here a full view of the record at once; and this in the percise order of their respective dates, and with the date of each prefixed.
2. The exceptions which were overruled or sustained by the final order or judgment of the Court.
3. The opinion of the Court, if it were filed in writing.
4. Assignments of error.
5. The argument.
6. Appendix, containing the record in full.

III. PAPER BOOKS—SERVICE OF, ETC.

RULE XXIX.

In cases originating in the County of Philadelphia, the appellant shall serve a copy of his paper book on the opposite party, or his attorney of record, at least ten days before the first day of the week to which the case is assigned for argument; and when the cause is called, shall furnish one copy to each of the Judges, and file nine with the prothonotary—two for the reporter, one for the Law Association of Philadelphia, one for the WEEKLY NOTES OF CASES, one for the State Library, one for the Legal Intelligencer, one for the West Publishing Company, one for the Hirst Free Law Library, and one to be filed in his office. The appellee shall serve a copy of his paper book on the opposite party or his attorney of record at least five days before the argument, furnish a copy to each Judge, and file nine with the prothonotary for the same purpose as the paper books of the appellant.

RULE XXX.

In all cases except those originating in the County of Philadelphia, the appellant shall serve a copy of his paper book on the opposite party or his attorney of record, at least twelve days before the day appointed for hearing the case; and the appellee shall serve a copy of his paper book on the opposite party or his attorney of record, at least five days before the time appointed for hearing as aforesaid. But if the appeal shall have been taken thirty days or more before the day assigned for the hearing as aforesaid, the paper book of the appellant shall be served at least twenty days, and that of the opposite party at least five days, before the day assigned for the hearing of the said cause. When the cause is called, each party shall furnish a copy of his paper book to each Judge, and file nine copies with the prothonotary, one of which is to remain with the records, two to be delivered to the reporter, one for the WEEKLY NOTES OF CASES, one for the State Library, one for the Law Association of Philadelphia, one for the Legal Intelligencer, one for the West Publishing Company and one for the Hirst Free Law Library.

RULE XXXI.

When the appellant is in default according to these rules, he may be non-suited on motion; and when the appellee is in default he will not be heard by the Court except on the request of his adversary, and not then if his negligence has been gross.

RULE XXXII.

When paper books are furnished which differ in any material respect from those here prescribed, the parties furnishing them shall be considered in the same default as if none had been furnished, and on a proper occasion the Court will, of its own motion, non-suit or silence the defaulting party, or suppress the paper book.

GENERAL PROVISIONS.

RULE XXXIII.

In all cases, where in pursuance of the judgment of this Court, a cause goes back to the Court below for further proceedings, it shall be the duty of the prothonotary to certify and send back with the order, decree or judgment, a copy of the opinion of the Court which shall have been filed.

RULE XXXIV.

Every judgment, order or decree of this Court shall be noted by the prothonotary on the minute-book kept at the place where the Court shall be in session, at the time, and together with the opinion or opinions filed therewith, be forthwith certified and transmitted to, and entered of record by, the prothonotary in whose office the appeal was entered.

RULE XXXV.

Sec. 1. In all cases when these rules do not apply the practice of this Court shall be regulated by the then present practice of the Supreme Court of Pennsylvania, so far as the same may be reasonably applied.

Sec. 2. These rules shall take effect from and after the twenty-fourth day of July, 1895, and shall apply to all appeals heretofore taken.

Digitized by Google

Supreme Court.

Jan. '95, 94. March 27, 1895.

The City of Philadelphia to use of Mack v. Eddleman.

Highways—Paving—Macadamizing— Original paving—What constitutes — Cases on this subject, examined and compared—Conclusions drawn from such examination.

It is only the first, or original pavement, whatever it be composed of, converting a common road into a street, for which the municipality can charge the property owner.

Inasmuch as the municipality has the exclusive right to determine in the public interest, when, and with what material such conversion into a street shall take place, it is essential to such a first pavement as shall exonerate the abutting owner from further charge for improvement, that it shall be laid or adopted by the municipal authority.

The kind of pavement used, whether wood, cobble stones, macadamizing or otherwise, and who paid for it, are subordinate questions, and are only material or relevant as bearing on the main issue of municipal recognition, but municipal recognition of the pavement of the street, as such, must appear, either by action in the first instance, or by acquiescence and adoption subsequently.

There is no conflict in the decisions upon these points, and from an examination and review of the cases the following rule may be deduced: "A first pavement, in the legal sense, which exempts the abutting property owner from liability for any subsequent improvement, may be defined generally as one that is put down originally or adopted or acquiesced in subsequently by the municipal authority, for the purpose and with the intent of changing an ordinary road into a street. It may be of macadam or of anything else. That is a matter of evidence only. If the purpose and intent be wanting, a mere surfacing of the road, however carefully or expensively done, will not be a paving, but if the intent and purpose be present, or to be fairly inferred, then there is a paving whatever the material may be."

Appeal of William Eddleman, defendant, from the judgment of the Common Pleas No. 1 of Philadelphia County, in an action of scire facias sur municipal claim, brought by the City of Philadelphia to the use of John M. Mack, against William Eddleman, owner or reputed owner, to recover $403.29 for paving the roadway in front of defendant's property on Ridge avenue, Roxborough, in the City of Philadelphia, with stone blocks.

The defendant filed an affidavit of defence in substance as follows: That the paving done by plaintiff was not the original paving of this street, but a repaving, for which defendant's property is not liable. That, in 1811, the Commonwealth created a corporation for the express purpose of paving this street with macadam and keeping it in good order. That this corporation did make this street a paved macadamized street and so maintained it until 1873. That the City of Philadelphia acquired this street, with its pavement, in 1873, and from that time on kept it as a paved macadamized street, and from time to time repaired and repaved it, and that in 1890 the plaintiff tore up this macadam pavement and put down the pavement for which the lien is filed.

The plaintiff took a rule for judgment for want of a sufficient affidavit of defence, which the Court made absolute. Whereupon the defendant took this appeal, assigning for error this action of the Court.

John Dolman, Jr., for appellant.

Abutting owners are only liable for the original paving of a street.

Hammett *v.* The City of Philadelphia, 65 Pa. 146.

Where a street has been once paved, and macadamizing is a paving within the law, it does not make any difference at whose cost the original paving was done, the abutting property is not liable for a repaving.

City of Harrisburg *v.* Segelbaum, 30 WEEKLY NOTES, 553.
Boyer *v.* City of Reading, 30 WEEKLY NOTES, 557.

In the case of City *v.* Dibeler, 147 Pa. 261, all that councils authorized to be done was to make repairs; and though these repairs were substantial and consisted in part of macadamizing, they were held to be repairs only and not an original paving, which would relieve property owners, when subsequently councils ordered the street to be paved.

The facts set forth in the affidavit of defence showed a paving under authority, and that the City of Philadelphia acquired the road so paved, and repaired and repaved it for several years.

E. O. Michener, for appellee.

The case at bar is ruled by City *v.* Dibeler, 147 Pa. 261.

A street is only duly paved where it is paved by order of the municipal authority. Mere appropriations to repair do not constitute a paving.

Phila. *v.* Jewell, 26 WEEKLY NOTES, 292.
City *v.* Baker, 140 Pa. 11.
Alcorn *v.* The City, 17 WEEKLY NOTES, 368.
Phila. *v.* Ehret, 153 Pa. 1.

July 18, 1895. MITCHELL, J. No particular material is necessary to constitute a pavement. It may be made of anything which will produce a hard, firm, smooth surface for travel. But that with which we are specially concerned in the class of cases to which this belongs, is a pavement

Digitized by Google

which marks the conversion in a legal sense, of a common road into a street, for that is the only kind for which under the settled line of authorities from Hammett *v.* Philadelphia, 65 Pa. 146, down, an abutting property owner can be compelled to pay. As said by the present Chief Justice in Harrisburg *v.* Segelbaum, 151 Pa. 172, "the controlling consideration is not so much whether the prior improvement of Market street by macadamizing was in the strict sense of the word a paving thereof, as whether by said improvement the street was changed from an ordinary clay road into a good, reasonably smooth and substantial artificial highway, practically equivalent to an ordinarily well improved street, paved with cobble stone or other materials then used for paving."

But as on the one hand it is only the first pavement, whatever it be composed of, converting the road into a street, for which the city can charge the property owner, so on the other hand, as the city has the exclusive right to determine in the public interest when, how and with what material such conversion into a street shall take place, it is essential to such a first pavement as shall exonerate the abutting owner from further charge for improvement, that it shall be laid or adopted by the municipal authority. Not necessarily by formal ordinance declaring the change, for it is not always convenient or even possible to make such documentary proof, but municipal recognition of the pavement of the street, as such, must appear, either by action in the first instance or by acquiescence and adoption subsequently. The other questions which usually arise as to the kind of pavement, whether by wood, or cobble stones or macadamizing or otherwise, and who paid for it, are subordinate, and are only material or relevant as bearing on the main issue of municipal recognition. They have been treated, therefore, by this Court not as questions of law but as questions of fact whose weight and bearing depended on the other evidence and the circumstances of each case.

There is no conflict in the decisions, but as their exact effect has not always been clearly understood it may be worth while to review them so as to settle any existing doubts. The cases may for convenience be grouped into those in which wood or macadam was held to be a street pavement, and those in which they were held not to be such pavement.

First. In Alcorn *v.* Philadelphia, 112 Pa 494, the point was not directly raised, but was distinctly foreshadowed by the language of TRUNKEY, J.: "There is no evidence that councils did anything in obedience to that provision. Neither ordinance nor contract is proved. And the oral testimony is too meagre to warrant submission to the jury to find whether the said part of Broad street had been macadamized under and in pursuance of an ordinance of the city," thus implying that if it had been, it would have been a sufficient paving by municipal authority.

In Williamsport *v.* Beck, 128 Pa. 147, it appeared that the street had been paved with wood, by the city under an ordinance, and it was held that a property owner could not be charged for a subsequent pavement, the change to a paved city street having already been made by the municipal authority, and the question who paid for it being therefore immaterial.

In Greensburg *v.* Laird, 138 Pa. 533, the affidavit of defence averred among many other things, that the street in question was a great public thoroughfare, one of the principal streets in the borough, and had been macadamized for many years and for at least thirty had been kept up and repaired at the public expense. This Court held that the facts set up were sufficient to go to the jury as evidence of municipal adoption of the macadamized road as a borough street.

In Harrisburg *v.* Segelbaum, 151 Pa. 172, it appeared that Market street had been a macadamized highway in the central built up part of the city for more than half a century, and had been kept in repair as such at the corporate expense. The Court below declining to say that macadamizing and paving were always identical, nevertheless directed a verdict for defendant on the ground that the whole evidence and circumstances of that case showed it was a pavement under the municipal authority, and this was affirmed.

Boyer *v.* Reading, 151 Pa. 185, was very similar to the last case. It was a bill to enjoin a contract by the city for an asphalt pavement at the cost of the property owners, averring that the street in question was a street in the built up portion of the city, maintained as such at the public expense for a hundred years, turnpiked in 1805 and after abandonment by the turnpike company, torn up and reconstructed, "spalled" or macadamized, by the city. The answer admitted the foregoing facts, and that the paving was of the same character as the other streets of the city of Reading. It was held that the property owners could not be charged for the new asphalt pavement.

In Philadelphia *v.* Ehret, 153 Pa. 1, it appeared by case stated that a strip in the centre of Allegheny avenue, then in a suburban district of the city, had been macadamized in 1869 under the authority of an ordinance of councils, and paid for by the property owners. It was held that the owners could not be charged with the cost of a new paving of this strip with asphalt in 1891, when Allegheny avenue was with-

Digitized by Google

in the built up portions of the city, with gas and water pipes, sewers, etc., in front of defendant's property.

Secondly; the class of cases in which macadamizing has been held not to be a street pavement.

In Philadelphia *v.* Baker, 140 Pa. 11, the claim was for paving with vitrified brick, and the affidavit of defence averred that the street had been macadamized at the cost of the property owners, and "said macadamizing was in the style universally adopted for years past in the Twenty-second Ward where said property is situated." The Court below gave judgment, and it was affirmed on the distinct ground that there was "no averment that the city in any way recognized the kind or quality of pavement which the defendant alleges was placed on Miller street."

In Philadelphia *v.* Dibeler, 147 Pa. 261, at the trial of a claim for paving Woodlands avenue, an old county road, with vitrified brick under an ordinance of councils, defendant offered to prove that the city had previously appropriated a very large sum for the repair of the street, under which a contract for macadamizing had been made and carried out, and further to show the substantial nature of the work done thereunder. The Court excluded this evidence, and was sustained on the ground that an appropriation for repairs although extensive and of a reasonably permanent character did not amount to a municipal recognition of the road as a paved street.

Philadelphia *v.* Hill, 166 Pa. 211, was another claim on the same street, Woodlands avenue, and under the same facts as Phila. *v.* Dibeler, and was decided on the authority of that case.

Leake *v.* Philadelphia, 150 Pa. 643, is not unfrequently cited as one of this class of cases, but it simply decided that the Court below was right in refusing a preliminary injunction. The subject of paving was learnedly discussed by the Court below, but this Court as is the usual practice in such cases refrained from passing on the merits of any of the questions involved until final hearing. The case has no material bearing on the present inquiry.

These are all the cases upon the subject, and bringing them thus together in review shows that although they have sometimes led to diverse conclusions on the varying facts and circumstances, they are all governed by one single principle, the municipal recognition of a change from an ordinary road to a village or city street. A first pavement, therefore, in the legal sense, which exempts the abutting property owner from liability for any subsequent improvement, may be defined generally as one that is put down originally or adopted or acquiesced in subsequently, by the municipal authority, for the purpose and with the intent of changing an ordinary road into a street. It may be of macadam or of anything else. That is a matter of evidence only. If the purpose and intent be wanting, a mere surfacing of the road, however carefully or expensively done, will not be a paving, but if the intent and purpose are present, or to be fairly inferred, then there is a paving whatever the material may be.

It may perhaps be safely stated as a corollary that *prima facie* macadamizing is not a street paving in Philadelphia or probably in other large cities, while on the other hand there may be a presumption the other way in smaller cities or towns, as indicated in Greensburg *v.* Laird, Harrisburg *v.* Segelbaum, and Boyer *v.* Reading. Some illustrations of the legislative use of the word in relation to paving will be found in the opinion of WILLSON, J., quoted in Leake *v.* Phila., 150 Pa. 643, 649-50, and in some of the other cases cited *supra.* But Philadelphia *v.* Ehret, 153 Pa. 1, shows that there is no hard and fast rule on the subject of the kind of paving. It is a question of fact in each case, and the governing consideration is the nature of the municipal action with regard to it. When the boundaries of the City of Philadelphia were made coterminous with the county, by the Consolidation Act of 1854, certain rural and suburban districts, with their roads, were brought under the municipal jurisdiction. Some of these were mere township roads, while others were main arteries of travel and trade, built up closely for considerable distances so as to be practically streets. Radiating from the old city were several principal thoroughfares, such as Moyamensing and Passyunk roads to the south, Frankford, Old York, Germantown and Ridge roads to the north. These the city might continue as ordinary though important and much traveled roads, and keep in repair as such until the proper time should arrive for the change, or on the other hand might recognize or adopt as streets sufficiently well paved for all the requirements of the present or near future. And if the latter course was adopted as to any road or any portion thereof, no matter how or with what material it was paved, then it became a street as a result of such action, and the future growth of the city, and necessity of a different pavement would not change its character or subject the abutting owners to charge for new paving. The case of Allegheny avenue, Philadelphia *v.* Ehret, 153 Pa. 1, is an illustration of this result.

The present claim is for paving with Belgian blocks a part of Ridge avenue, one of the main thoroughfares above referred to, leading northwest from the old city. The affidavit of de-

Digitized by Google

fence sets forth that the road was macadamized by the Ridge Turnpike Company in 1811 and so maintained until it was acquired by the city in 1873, and since 1873 the city "has maintained the said road or turnpike as a public highway, and has repeatedly repaired and repaved the same with macadam." There is nothing here to show that Ridge avenue, where appellant's property is situated, has ceased to be a road and become a street, still less that it has become so by municipal action or acquiescence. The Ridge Turnpike by the charter of 1811 (P. L. 167), was to begin at Tenth and Vine streets in Philadelphia, and to extend to Perkiomen Bridge in Montgomery County. In fact it began at Ninth and Vine streets. We might assume from our general knowledge of the localities that in 1890 it had certainly become a street at Ninth and Vine, and almost certainly had not become a street at Perkiomen Bridge. But its status as a road or a street at the intermediate point in Roxborough does not appear and the affidavit showing that down to 1873 it was not a paved street, the burden was on appellant to show that its character in that respect had changed. This the affidavit fails to do. Mere maintenance as a highway, and repairs and repavings for the purpose of such maintenance, are all that are averred, and these are not sufficient: Phila. *v.* Dibeler, 147 Pa. 261.

Judgment affirmed.

S. H. T.

Jan. '94, 320. February 25, 1895.

Jones v. The Erie & Wyoming Valley Railroad Company.

Railroad companies—Location of right of way—Designation of boundaries—By a release—Right of railroad companies to use city streets—Limitations on—Nature of—How determined.

Where a railroad company has taken land for the purpose of its right of way, it has the power to define the limits thereof, so as to exclude whatever is unnecessary to the construction and operation of its line; and the proper time to do this is when the appropriation is made.

A failure, however, to define its boundaries at that time does not take away the power to define them. It may be exercised afterwards within a reasonable time.

There is no rule of law, or public policy, that compels a railroad company to take the utmost that it has the power to take. By release to the owner it may withdraw from all of the sixty feet, which it is authorized to take under the general provisions of the railroad law, not necessary for the construction, maintenance and operation of its road; and when this is done the owner has no claim against the company for the land so released.

The presumption arising under the general railroad laws that a railroad company takes, when it enters by virtue of the right of eminent domain, the full breadth of sixty feet for its right of way is only applicable where the entry is adverse and upon property subject to seizure or appropriation under general laws.

It does not apply to an entry upon a public street whether made under the authority of the Act of Assembly incorporating the company or by virtue of municipal consent.

The rights of the railroad company in such a case depend upon its charter, or upon the terms of the municipal grant; and unless the grant confers in express words or by necessary implication the right to occupy the street for the breadth of sixty feet, the railroad company acquires no more than a right of passage over them of such a width as is reasonably necessary for the construction and operation of its road.

Penna. Schuylkill Valley Railroad Company *v.* Phila. & Reading Railroad Company, 33 WEEKLY NOTES, 272, followed.

The construction of its road by the company and an actual occupation of the street shows just what is reasonably necessary for the purpose of passage; and is a definition by the company of its needs, and a construction by it of the municipal grant.

A railroad company being authorized by the municipal authorities of the city of S. to extend its line of railroad into said city by a route which passed directly over the intersection of two streets, at the northeast corner of which was the property of one J., erected a bridge over the intersection of the streets, from the southeast to the northwest corner, the centre line of which was about twenty-five to twenty-seven feet from the corner of the property of J.; so that the right of way of the railroad company, as it was supposed the law would define it, would reach over upon the corner of the property a few feet, and overhang a triangular piece of ground beyond the street lines having that depth at the corner. A bond having been given by the railroad company, J. began proceedings to assess damages for the taking of his land. Pending these proceedings the defendant company executed and delivered to J. a release of all claim it might have upon his property:

Held, that this release was a definition by the company of the extent of its right of way, so as to exclude them from any portion of the plaintiff's land:

Held, also, that such a definition having been made within a reasonable time was a bar to the owner's claim against the company for the land so released.

But it appeared that there was no grant to the railroad company to occupy the whole of the space over the intersection of the streets:

Held, that the power of the railway company under the grant was exhausted by the building of the overhead crossing that was authorized, and that the company had not taken, and had no right at all upon, the plaintiff's lands.

Appeal of John P. Jones, plaintiff, from the judgment of the Common Pleas of Lackawanna County, in an action of trespass brought by said plaintiff against the Erie and Wyoming Valley Railroad Company to recover damages for injuries occasioned by the location of its right of way upon his property.

The facts of this case will be found fully set forth in Jones *v.* Erie and Wyoming Valley R.

Digitized by Google

R. Co., 29 WEEKLY NOTES, 167; and in Jones *v.* Erie and Wyoming Valley R. R. Co., 31 WEEKLY NOTES, 1.

A venire facias de novo having been awarded by the Supreme Court, the case came on for trial. The plaintiff offered to prove that the defendant's railroad was constructed over and upon Washington avenue and New street, in the city of Scranton, without the consent of the councils of the city. Objected to. Objection sustained. (Third assignment of error.) The Court directed the jury to find a verdict for the defendant; the said Erie and Wyoming Valley Railroad Company having filed a release to said plaintiff, "of all the estate, right, title, interest, claims and demand whatsoever of said company, its successors and assigns" in or upon any of his property, which is the subject matter of this suit. (First and second assignments of error.) Verdict for defendant accordingly and judgment thereon; whereupon the plaintiff took this appeal, assigning for error the rejection of his evidence as above, and the action of the Court in directing a verdict for the defendant.

H. M. Hannah and *S. B. Price*, for appellant.

The railroad company acted in bad faith in delaying for five years after the location of its road before filing the release, and it cannot now claim exemption from the damage done to the plaintiff by the taking of his land.

P. & R. R. Co. *v.* Obert, 109 Pa. 193.

The location of a road over and upon an owner's land is the "taking" which the law contemplates, and the owner may recover damages, though there should never be an actual, physical occupation of his ground.

Neal *v.* Pittsburgh, etc., R. R. Co., 31 Pa. 19.
Western R. R. Company *v.* Johnston, 59 Id. 296.
Beale *v.* Penn. R. R. Co., 86 Id. 509.
Pittsburgh, etc., R. R. Co. v. Com., 101 Id. 196.

Railroad companies and municipal corporations cannot escape the payment of damages by abandoning a part of its right of way.

Lake Erie & Western R. R. Co. *v.* Griffin, 107 Ind. 464.
Reid *v.* Wall Township, 34 N. J. L. 275.
Randolph on Eminent Domain, 204.

By the tender of a bond, as in this case, the title to the easement at once became perfect in the company, and subject to all its liabilities, as much as if the payment for damages had been made in cash.

McClinton *v* R. R. Co., 66 Pa. 404.
Fries *v.* R. R. Co., 85 Id. 73.
Hoffman's Appeal, 20 WEEKLY NOTES, 496.
Wallace *v.* New Castle, etc., R. R. Co., 138 Pa. 168.
Keller *v.* R. R. Co., 31 WEEKLY NOTES, 11.

A railroad company has no right to make experimental locations for the purpose of chaffing with property holders, and shift from one to the other, as they may find one or the other more or less expensive.

Neal *v.* Pittsburgh, etc., R. R. Co., 31 Pa. 19.
Darlington *v.* United States, 82 Id. 388.

Having taken title by locating their road, the easement becomes subject to any mortgages of the company, even though made before the property was acquired.

P. W. & B. R. R. Co. *v.* Woelpper, 64 Pa. 366.
Collins' Appeal, 107 Id. 590.

The paper filed by the defendant releases to the plaintiff the part of his land which had been included within the company's right of way. This is not a limitation or definition; it is a release and reconveyance. It is not excluding from the original taking the land in dispute. It is the very reverse of that; it implies a taking, and undoes the taking by reconveying. But this is what the company has no legal power to do.

Everett Warren, (with him *Edward N. Willard* and *Henry A. Knapp*), for appellee.

July 18, 1895. WILLIAMS, J. This proceeding was begun upon the theory that an entry by a railroad company upon the streets of a city is made by virtue of the right of eminent domain alone, and secures to the railroad company a right of way in and upon the streets so entered sixty feet wide, precisely as though the entry had been made upon the lands of a private owner. The plaintiff claimed that such a right of way would not only cover the street opposite his premises but reach over a few feet upon his lot; and this taking was the injury complained of.

The case was tried in the Court below upon the same theory. It came into this Court by appeal and is reported in 144 Pa. 636. The question presented was over the power of the railroad company, to define the boundaries of its right of way in such a manner as to take less than the maximum it was permitted to take under the general railroad laws. Confining our attention to the questions presented on the record, we held that the company had the power to define the limits of its right of way so as to exclude therefrom whatever was unnecessary to the construction and operation of its line. The proper time to do this we said was the time when the appropriation was made; but a failure to define its boundaries at that time did not take away the power to define them. This might be exercised afterwards within a reasonable time. The judgment was reversed and a new venire awarded.

Upon the second trial the defendant company was permitted to file a paper defining the limits

Digitized by Google

of its right of way as coincident with the street lines at the point where it was alleged the land of the plaintiff was invaded, and releasing any claim upon the plaintiff's land which it might have by reason of the location of its right of way. After the filing of this paper the learned Judge of the Court below directed a verdict in favor of the defendant. This appeal brings up the correctness of the ruling of the trial Court upon this subject. The case was last tried upon the same theory as before. The right of the railroad company to the exclusive use of sixty feet for its roadway seems to have been assumed, and the contest was over the right of the company to renounce a part of that to which it might have laid claim, and leave its owner undisturbed. We concur in opinion upon this subject with the Court below. If we assume the company had the right to locate its right of way in a public street in the same manner and of the same breadth as over property of a private owner, we know of no rule of law or public policy that compels a railroad company to take the utmost that it has the power to take. On the contrary it seems very clear that such company may withdraw from, and release to the owner, all of the sixty feet not necessary for the construction, maintenance and operation of its road; and that when this is done the owner has no claim against the company for the land so released. But we are not willing to affirm this judgment and leave it to stand upon the ground on which it was placed by the Court below.

There is another and more important question which although not raised by any assignment of error is plainly presented by this record, and is conclusive of this case. The defendant's bridge or overhead structure is located over the intersection of two of the streets of the city of Scranton. Permission to cross these streets was given by the municipal government. The rights of the railroad company upon and over them depend upon the terms of the municipal grant and not upon the provisions of the general railroad laws.

Unless the grant confers in express words or by necessary implication the right to overhang these streets for a breadth of sixty feet, the railroad company acquired under it only a right of passage over them and this authorized the occupancy of no more space than was reasonably necessary for the purpose of passage. The structure that was erected under this grant shows just what was reasonably necessary for the passage of the defendant's road over these streets, and is a definition by the company of its needs, and a construction by it of the municipal grant.

The presumption arising under the general railroad laws that a railroad company takes, when it enters by virtue of the right of eminent domain, the full breadth of sixty feet for its right of way, is only applicable where the entry is adverse and upon property subject to seizure or appropriation under general laws. It does not apply to an entry upon a public street whether made under the authority of the Act of Assembly incorporating the company, or by virtue of municipal consent. In either case in the absence of express words, or their equivalent, giving an exclusive right to the street or to a defined part of it, the grant whether legislative or municipal will be construed most strongly against the grantee, and most favorably in aid of the previously existing public right of passage. The Commonwealth is the owner of the public highways. The municipality is charged with the duty of laying out and maintaining such highways as are necessary to accommodate the public within its territorial limits. A grant to a corporation of a privilege upon a highway, such as to enter, cross or pass along it, is, in the absence of a clearly expressed intention to the contrary, a grant subject to the existing public right of use, and is to be exercised in such manner as shall interfere as little as possible with those for whose benefit the way was originally laid out and opened.

The situation in this case is greatly simplified by the application of these principles. The railroad company has no express grant from the Legislature or from the city of Scranton to occupy the whole of the space over the intersection of Washington avenue and New street. It has permission to cross the intersection by an overhead structure, and this authorizes the use of so much space as is necessary for the purpose of making this passage and no more. How much is needed is shown by the structure that was erected under the permission. The power of the railroad company under the grant was exhausted by the building of the overhead crossing that was authorized; and nothing more can be done without a new application from the company, and a new grant by the city. The company has no right of way in the streets outside the terms of the grant by virtue of which it enters, and what was done by the engineers in marking an exterior line for the right of way at this point was done without any lawful authority, and had no effect upon the rights of the plaintiff. It was a trespass ignorantly or lawlessly committed on the lot owner for which an action of trespass was the appropriate remedy.

We had this precise question before us in the recent case of Pennsylvania Schuylkill Valley Railroad Co. *v.* Philadelphia and Reading Railroad Co., 157 Pa. 42. A grant had been made to one railroad company to pass along certain streets in the city of Reading. This grant was found in the Act of Assembly incorporating the

Digitized by Google

railroad and had also been formally given by the city. Subsequently the city gave to another company the right to pass along the same streets. It was objected that the first grant was exclusive, as the right of way of sixty feet covered the entire surface of both streets. But we held that in all cases where the grant to a railroad company is not in express words a grant of an exclusive use in a street, it must be construed as a grant of so much only as is reasonably necessary for the purpose of passage. Our brother DEAN stated the rule very clearly in that case, and we can do no better than to repeat his words. He said, "There can be no constructive appropriation of the whole of a public street, under a right of passage, that will be effectual to bar the right of the public to the part not in actual use for the purpose granted." This was merely a practical application to the facts of that case of the rule, formulated as early as Commonwealth *v.* Erie and Northeast R. R. Co., 27 Pa. 339, that "the powers of a corporation must be given in plain words or by necessary implication," and that powers not so given are withheld.

It follows from what has been said that the defendant company has no right of way over the intersection of Washington avenue and New street except that which it actually occupies with its overhead structure. It has no further right in the streets, and no right at all on the plaintiff's lands. The plaintiff having suffered from no entry upon his premises has no claim on the defendant in this form of proceeding; but must depend on his action to recover damages for the additional servitude which the overhanging of so much of the highway as would upon its vacation belong to him imposes. This subject was sufficiently discussed in Jones *v.* Erie and Wyoming Valley Railway Company, 151 Pa. 30, and it is not necessarily involved in this case.

The judgment is affirmed. S. H. T.

July, '94, 161. February 26, 1895.

Delaware & Hudson Canal Co. v. Genet.

Titles to land—Quieting of—Act of 10 June, 1893, P. L. 415—Ejectment—Coal lease.

In a petition under the Act of June 10, 1893, to quiet the title to certain coal *in situ*, where there was no adverse claim to the land or its possession, but to a part of the product after it had been severed and become personalty, and where the answer set up no right which could have been asserted in ejectment, and nothing which could not have been asserted in a personal action for the severed coal or for its value if it had been wrongfully sold, the case was not within the statute.

Appeal of the President, Managers and Company of the Delaware & Hudson Canal Co., plaintiff, from the decree of the Common Pleas of Lackawanna County, in dismissing a petition filed against Augusta G. Genet, under the Act of Assembly of 10th June, 1893.

The facts are set forth in the opinion of the Court, EDWARDS, J., as follows:

"The proceedings in this case are under the Act of 10th June, 1893, entitled, "An Act to provide for the quieting of titles to land," the second section of which provides, *inter alia*, as follows:

"'When any person or persons, natural or artificial, shall be in possession of any lands or tenements in this Commonwealth, claiming to hold or own possession of the same by any right or title whatsoever, which right or title or right of possession shall be disputed or denied by any person or persons as aforesaid, it shall be lawful for any such person to apply by bill or petition to the Court of Common Pleas of the county where such land is situate, setting forth the facts of such claim of title and right of possession and the denial thereof by the person or persons therein named, and thereupon the said Court shall grant a rule upon such person or persons, so denying such right, title or right of possession, to appear at a time therein named, and show cause why an issue shall not be framed in said Court, between the parties, to settle and determine their respective rights and title in and to said land.

"'And, if upon the hearing of such rule, it shall appear to the Court that the facts set forth in such petition are true, it shall be the duty of the Court thereupon to frame an issue of such forms as the Court shall deem proper between the respective parties, to settle and determine the right and title of the respective parties to said land, and the verdict of the jury in such issue shall have the same force and effect upon the right and title and right of possession of the respective parties in and to said land as a verdict in ejectment upon an equitable title.'

"The plaintiff alleges that on March 28, 1864, the defendant executed and delivered to the plaintiff a lease of all the coal under a certain tract of land in Lackawanna County; that this lease was a conveyance in fee of the coal under said tract to the plaintiffs, its successors and assigns; that the plaintiff entered upon said tract and took possession of the coal, by mining and removing the same, claiming to hold the said coal in fee by virtue of said lease and that it is still in possession under this lease; that the defendant, from time to time, has asserted and claimed and now asserts and claims title to said coal to be in herself, notwithstanding the execution and delivery by her of the lease of March

Digitized by Google

28, 1864, and that she denies that the said lease was a valid and effectual deed of conveyance of all the coal aforesaid to the plaintiff.

"The defendant, in her answer, admits the execution and delivery of the instrument or lease of March 28, 1864, but asserts that it is not a deed of conveyance in fee of all the coal under said tract of land; that it is a conditional contract under which the plaintiff has certain rights and privileges, and the defendant admits that the plaintiff is in the full enjoyment of whatever title and possession it is entitled to in law by virtue of the said contract or lease.

"It is apparent that the dispute between the parties in this case is purely one of law. It involves the construction of the lease or contract of March 28, 1864. The plaintiff claims a conveyance in fee of all the coal under a certain tract of land; the defendant denies this claim. Both parties base their contention upon the same instrument of writing. There is no dispute as to the execution or validity of this instrument. It is admitted by the defendant. The plaintiff is in possession under it. The construction of the contract or lease between these parties must necessarily be determined by the Court. There are no questions of fact to be settled by a jury. And in the absence of any dispute as to the facts there can be no issue framed requiring the intervention or assistance of a jury.

"Now May 21, 1894, the rule granted in the above case is discharged and an issue refused."

W. H. Jessup, (*Alfred Hand* with him), for appellant.

The lease between the parties was a conveyance of the coal. The title to this coal is disputed by the defendant. The plaintiffs are in possession and cannot bring ejectment. The Act in question provides the only remedy they have to settle their right and cause litigation to cease. The Act protects the right of trial by jury. The Court should have awarded the issue that the right might be settled.

Everett Warren, (*Edward N. Willard* and *Henry A. Knapp* with him), for appellee.

That jurisdiction under the Act of June 10, 1893, is limited by its express terms to cases where questions of fact in regard to title alleged in the petition such as are triable by a jury in an action of ejectment, are in dispute, does not admit of question. Neither does it admit of question that the only fact alleged in the petition to confer jurisdiction under the Act is the making of the agreement and the possession under it of such possessory right as it gave plaintiff company. It is not true that the respondent denies the agreement or any right to possession that it gives the petitioner; on the contrary, she admits both. Her views and claims as to the extent of those rights, their nature, extent and duration, possibly differ quite materially from the extreme and violent views of the petitioners, and she has been sustained in them by the judicial decisions of competent Courts. But these questions are questions of law, not of fact. They depend upon the legal construction of the writing by the Court.

The petitioners cannot maintain a right to any benefit under this Act because it is founded upon an alleged title to land which they allege they hold in fee and in possession. The petitioners base their claim (that the respondent shall be compelled to bring an action of ejectment against them under the Act of 1893) solely upon the written agreement that forms a part of their petition which they allege is a conveyance to them in fee of the respondent's ninety-six acres of land which is supposed to contain the coal to which the agreement relates. This agreement is the sole source of their rights, whatever they are, and the rights of the parties to it depend solely upon its construction, which presents questions of law alone and not questions of fact.

Genet *v.* Del. & Hudson Canal Co., 136 N. Y. 593.
2 Sharswood's Blackstone, 232.

An agreement, whose sole subject and object is the mining and removal of the coal from the land relates to personal property and not to land, and the construction and meaning and rights of the parties under such an agreement as this is, are not within the provisions of the Act of 1893. They depend upon the agreement above, which is a contract.

Douglas *v.* Shumway, 13 Gray, 502.
Claflin *v.* Carpenter, 4 Metcalf, 580.
Smith *v.* Surinam, 9 Barn & Cress, 561.
Marshall *v.* Green, L. R. 1 C. P. Div. 35.
Genet *v.* Del. & Hud. Canal Co., 136 N. Y. 593.
Sugden on Vendors, Perkins Ed. Note N. page 125.
Union Petroleum Co. *v.* Bliven Petroleum Co., 72 Pa. 173.
Sanderson *v.* Scranton, 105 Id. 469.

The writing relied on here is an executory contract, and neither a bill of sale nor a conveyance of land.

It begins by declaring that it is an agreement; wherefore its obligations are mutual and not unilateral.

Booth *v.* Cleveland Mills, 74 N. Y. 23.

An executory contract of sale is a contract in which something is to be done by one or both parties.

2 Black. Com. 447.

It is rather an agreement to sell than a sale.

Story on Sales, secs. 232, 242, 246.
Story on Contracts, sec. 16.

The agreement was made in the City of New York, in the State of New York, between a citi-

Digitized by Google

zen of that State and a corporation chartered by that State, and having no existence beyond the territorial jurisdiction of that State, except by the comity of States. The royalties are to be paid to Mrs. Genet, at the company's pay office in the State of New York. The fact that the company had to employ men in Pennsylvania to mine the coal is of no importance. The contract was, therefore, both made and to be performed in New York. It is, therefore, to be interpreted by the laws of New York.

Story's Conflict of Laws, sec. 558.
Trimbey *v.* Vignier, 1 Bing. (N. C.) 151.
British Co. *v.* Drummond, 10 B. & C. 903.
Delavega *v.* Vianna, 1 B. & A. 284.
2 Kent's Com. B. 118.
Andrews *v.* Herriot, 4 Cow. 508.
Newton *v.* Bronson, 3 Kernan (N. Y. Ct. of Appeals), 587.
Robinson *v.* Armstrong, 34 Maine, 145.
Mostyn *v.* Fabrigas, Smith's Leading Cases.
Morrice *v.* Hurry, 7 Taunton, 306.
Stanway *v.* Heslop, 3 B. & C. 9.
Watson *v.* O'Hern, 6 Watts, 362.
Lyon *v.* Miller, 24 Pa 392.
Koch's Appeal, 93 Id. 434.

July 18, 1895. MITCHELL, J. We are unable to concur in the view of the Court below that the petition should be dismissed because there are no facts in dispute, and the controversy between the parties is one of law only, on the construction of the contract of 1864. The Act of 10th June, 1893, P. L. 415, is entitled "An Act to provide for the quieting of titles to land," and the second section, with which we are concerned, was intended to give a party in possession the right and the opportunity to institute a proceeding to test his title as against an adverse claimant. At common law the adversary might lie by, concealed or quiet, and choose his own time for the contest subject only to the risk that the statute of limitations might shut him out. The party in possession could do nothing but await the attack. Equity came to his aid by bills to perpetuate testimony, to quiet title, etc., but this assistance was limited, and not always adequate. In this state the Act of 21 May, 1881, P. L. 24, gave the party in possession the further right, as against an adversary who had once asserted his claim in an ejectment, to rule him to bring his further action, or be barred. The Act of 1893 is another step in the same direction. The party in possession is no longer bound to await the attack, but may act on the offensive and bring on the battle at once. The proceeding under the Act is by petition setting forth the facts of such claim and right of possession, and the denial thereof, and if the Court is satisfied that the facts set forth are true, it shall award an issue, and the verdict thereon shall have the force and effect of a verdict in ejectment on an equitable title. But this does not mean that disputed facts to be passed on by a jury, are essential to the remedy. What the party in possession needs, and what the Act gives him, is the right to a present adjudication of his title, but not necessarily by a verdict on conflicting evidence. The facts required to be set forth in the petition and found by the Court to be true, are the facts of petitioner's possession and the adversary's denial of his title. When these appear, the issue is to be awarded, and if it should turn out at the trial that the dispute is not over facts, but over the law resulting from them, this would not affect the remedy any more than it would affect an equitable ejectment. The right to the issue having been shown by the possession and the denial of title, the issue goes on to trial on the facts and the law as in other cases.

The petition in the present case showed possession, under claim of title, and asserted, though in very vague and general terms, a denial of the title by the appellee. *Prima facie* it came up to the requirements of the statute, and had the answer disputed the right of possession, by denying the validity of the lease, or in any other manner, or had it set up any adverse title which the appellee could have asserted by ejectment, the right to an issue would have been complete.

But the answer raised no such controversy. It distinctly admitted the execution of the lease or contract on which appellant based its possession, and disclaimed explicitly any dispute or denial of the appellant's lawful rights thereunder. It then went on to state appellee's view of such rights, so far as regarded the coal which appellant was to own and pay for, and other coal which it asserted was not to pass to appellant but to remain the property of appellee, but which appellant had used without accounting for. That coal *in situ* is land, and that a lease of the entire body of coal in a tract with unlimited right of mining, etc., has been treated in our decisions as a sale of the coal as land, as elaborately argued by appellant, may be freely conceded, though the cases are very far from holding that all leases or conveyances of mining rights to coal, even when unlimited, are necessarily and for all purposes to be considered sales of the land. But there was no dispute about this; the lease was admitted; the right of possession, and the right to mine the whole of the coal, were not denied; there was no question of petitioner's title to the land. What was disputed was the petitioner's duty to account and pay royalty for a part of the coal, after it had been mined, and appellee's right to other parts of the coal, also after it had been mined. There was no claim to the land or to its possession, but to a part of the product after it had been severed and become personalty. It was as if a lessee farming on shares

Digitized by Google

had ruled his lessor to come into Court and try a question of the division of the gathered crops. The answer of appellee set up no right which could have been asserted in ejectment, or which was within the class of adverse claims the statute was intended to cover; nothing which could not have been asserted in a personal action for the severed coal, or for its value if it had been wrongfully sold by the appellant. The case was not within the statute, and the learned Judge was right in refusing the issue.

Order affirmed. W. C. S.

Oct. '94, 234. November 2, 1894.

Diehl v. Rodgers.

Witness—Competency of—Disability of—Removed by pardon.

The general rule is that a pardon does away with the future consequences of the criminal act as completely as if it had never been committed.

The Constitution deals with the pardoning power not as a prerogative claimed by divine right, but as an adjunct to the administration of justice recognized in all civilized governments as necessary by reason of the fallibility of human laws and human tribunals. The power so recognized is granted without distinction in regard to offences or their consequences, with no exception or limitation but one, of impeachment.

Hence a pardon restores the competency to be a witness of one who has been convicted and sentenced for perjury, notwithstanding the disqualification contained in the language of the Acts of March 31, 1860, and May 23, 1887.

A testator may be prevented from signing his will by the extremity of his last sickness within the meaning of the statute although both mentally and physically able to do so, if the exertion would be at the risk of his life.

Appeal of James McA. Rodgers *et al.*, defendants, from the judgment of Common Pleas No. 2 of Allegheny County, in an issue of *devisavit vel non* wherein Jane Diehl, *et al.*, were plaintiffs.

Robert C. Elliott, a citizen of Pittsburgh, died on June 23, 1893. On the previous day his condition was considered critical by his physicians, and after a consultation they advised him to arrange his worldly affairs. In addition to the three doctors, there were present in the bed-room of the deceased, Robert H. Lindsay and William J. Diehl, a son of the principal devisee in the case. From the testimony of the family physician it appears that the deceased, when informed that he was in a critical condition, exclaimed in a loud and strong voice, "Bob, all this house and all I own to Mrs. Diehl, but five thousand dollars to Mrs. Cluley." The witnesses testified that there was no direction given to write or to prepare a will, but Lindsay took from his pocket a pass-book and wrote what the decedent told him. He then, as he testifies, read it to the decedent, who responded "That's right. That's what I want. Sign it." Then Lindsay says, "I signed it." After the death of Mr. Elliott this will was offered for probate, but the register certified the matter to the Common Pleas for trial on the two questions: whether the said Elliott made or intended to make a will as proposed; second, whether the name of Elliott was signed at his request and by his express direction.

It appears from the evidence that Robert H. Lindsay had been convicted and sentenced for a term of years for wilful and corrupt perjury in 1874, but had been pardoned by the Governor in 1876. The Court being of the opinion that he was a competent witness permitted him to testify. He appears to have been the scrivener of the proposed will, and upon his testimony rests the proof, by more than one witness, that the will offered was dictated to and written by him. He attached the name of Robert C. Elliott and also attached the names of the witnesses that were called for this will.

The Court at the trial directed the jury to find for the plaintiff.

This appeal was taken, and it was assigned as error that Robert H. Lindsay, who testified in favor of the proponents, was not a competent witness to testify; and further that the Court directed a verdict for the plaintiff.

James Fitzsimmons and *W. D. Moore* (with them *John M. Rourke* and *James McF. Carpenter*), for appellants.

Lindsay was an incompetent witness.

Act of March 31, 1860, P. L. 388.
Act of May 23, 1887, P. L. 158.
Greenleaf on Evidence, Vol. 1, Sec. 378.
Bouvier's Institutes, Vol. 2, Sec. 3188.
2 Hargr. Jur. Arg. 221, etc.
Russell on Crimes.
11 Am. Jur. 360.
Foreman *v.* Baldwin, 24 Ill., 299.
Wharton's Criminal Ev., 8th Edition, Sec. 365.
Robert's Digest of British Statutes, p. 268.

The sixth section of the Act of April 8, 1833, P. L. 249, provides that: "Every will shall be in writing, and unless the person making the will shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express direction; and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses, otherwise such wills shall be of no effect."

The proponents do not offer this will as a nuncupative will. They did not attempt to prove it as such, and are, therefore, remitted to whatever rights they have under the Act of 1833, above referred to.

Digitized by Google

Cavett's Appeal, 8 W. & S. 21.

J. S. Ferguson and *E. G. Ferguson* (with them *Clarence Burleigh* and *John B. Harbison*, for appellees.

Under the Constitution as it stood at the time of the passage of the Act of 1860, the Governor had "power to remit fines and forfeitures and grant reprieves and pardons, except in cases of impeachment."

Article IV., Sec. 9.

If the argument of the appellants amounts to anything, it amounts to this: the Legislature can lessen the power to pardon which the Constitution has conferred upon the Governor. Such a proposition, of course, cannot be sustained. The Legislature never intended to interfere with the Governor's power of pardon. Pardon is an act of grace proceeding from the powers entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.

United States *v.* Wilson, 7 Peters, 150.
3 Inst. 233.
1 Bish. Crim. Law, Sec. 898 and note.
Cuddington *v.* Wilkens, Herb. Rep. (Eng.) 81-82.
Knote *v.* U. S. 95 U. S. 149.
Osborn *v.* U. S. 91 Id. 474.
Wood *v.* Fitzgerald, 3 Oregon 568.
Com. *v.* Bush, 2 Duv. (Ky.) 264.

Where one has been disqualified on account of conviction of crime to testify, his competency is restored by a pardon.

Hester *v.* Com. 85 Pa. 139.
State *v.* Dodson, 16 S. Car. 453.

Pardon also restores competency to sit on a jury.

Puryear *v.* Com. 83 Va. 51.
Schuylkill Co. *v.* Copley, 67 Pa. 386.
Report on Penal Code, 38.
Act March 31, 1860, Sec. 181, P. L. 426.

July 18, 1895. MITCHELL, J. The main question is the competency of the witness Lindsay, who had been convicted of perjury, but pardoned by the Governor prior to the events to which he testified.

The general rule is that a pardon does away with the future consequences of the criminal act, as completely as if it had never been committed. It is said in a case which will be noticed more fully hereafter (1 Parker's Crim. Rep. 241), that the doctrine of restoration of competency is modern, and that the authority of COKE is against it, but that later HOLT and others established it. Passing by the obvious doubt whether any doctrine established by Lord Chief Justice HOLT can fairly be called modern, we find that what COKE says in Brown *v.* Crashaw, 2 Bulst. 154, is, citing 11 Henry 4, fol. 41 b., that one attainted of felony, but pardoned, is not a competent witness, for *poena mori potest culpa perennis erit.* The authorities, however, are unanimously against this maxim. "If the king pardon these offenders they are thereby rendered competent witnesses, though their credit is to be still left to the jury, for the king's pardon takes away *poenam et culpam in foro humano*:" 2 Hale's Pleas of the Crown, 278. "It is now settled that a pardon removes not only the punishment, but all the legal disabilities consequent on the crime:" 2 Russell on Crimes, 975; 7 Bacon's Abridg. tit. Pardon, H. (Bouvier's ed. p. 416.)

In England, however, a special exception is made in the case of perjury, where a distinction is taken between conviction on an indictment at common law, and on an indictment under the statute of 5 Eliz. c. 9, which declares that no person so convicted shall thenceforth be received as a witness to be deposed and sworn in any Court of record until such judgment be reversed: 2 Russell on Crimes, 604. The distinction appears to have been first made by Lord C. J. HOLT, who in Rex *v.* Greepe, 2 Salk. 514, says "Where one is convict upon the statute it is part of the judgment to be disabled (to be a witness), but at common law it is only a consequential disability," and he accordingly held that the king's pardon removed the latter disability, but not the former. This ruling he repeated in Rex *v.* Crosby, 2 Salk. 689; Rex *v.* Ford, 2 Salk. 691; and Anon., 3 Salk. 155. It is now accepted as the settled law in England. "A pardon removes not only the punishment but all the legal disabilities consequent on the crime . . . wherever the disability is a consequence of the judgment; but where it is declared by an Act of Parliament to be part of the punishment, as in the case of perjury on the 5 Eliz. c. 9, the king's pardon will not make the witness competent:" 2 Russell on Crimes, 975.

The American text writers have generally followed this distinction without question, and apparently without much consideration. The ablest discussion to be found is in an article published in 1834 in 11 American Jurist, 356, signed "G." which perhaps may be safely conjectured to be by Prof. Greenleaf, who was then writing his work on Evidence, in which he adopts the same view and quotes the article at considerable length. The writer, whether Greenleaf or another, follows the English distinction, but says with accurate logic and great candor "the soundness of the reason is not as apparent as the justness of the exception. . . . If the culprit be sentenced to a fine, and imprisonment and the pillory and the whole offence is pardoned, by what authority shall any of these punishments be inflicted? And if instead of the pillory he is sentenced to incapa-

Digitized by Google

city as a witness, is the case altered? The pardon takes away the effect of the judgment and nullifies all its consequences. Of what importance is it then whether the incapacity makes part of the judgment by statute, or follows it by the common law? . . . It would be more satisfactory, therefore, if a reason for this exception could be found independent of the form in which the sentence may have been awarded." Instead, however, of pursuing the true course and where the reasons of a rule are altogether unsatisfactory, inquiring carefully into the soundness of the rule itself, *ratio legis anima legis*, he proceeds ingeniously to find a reason in the idea that while the disqualification to be a witness is a part of the punishment, and may operate severely against the convict, yet it may also be regarded as a rule of evidence which is within the legislative province to adopt or remove.

The American Courts, however, have not accepted the rule or its reasons as unquestioningly as the text writers. The diligence of counsel, and my own investigations have only succeeded in finding two cases which have followed the English rule. In Houghtaling *v.* Kelderhouse, 1 Parker, N. Y. Crim. Rep. 241, the point was expressly raised and decided, on the line of argument, and largely on the authority of the article in the American Jurist above quoted, but also, on the words of the New York statute, that one convicted of perjury shall not be received as a witness unless the judgment be reversed, while in regard to other offences the incompetency is declared, unless pardoned, showing that the Legislature had pardons in contemplation, a point that will be noticed hereafter in connection with our own statute. The other case is Foreman *v.* Baldwin, 24 Ills. 298, which simply rules the point on the English cases without discussion, saying that competency can only be restored by the Legislature, and adding the surprising statement that "at every session there are applications of this character." In Holridge *v.* Gillespie, 2 Johns. ch. 35, the point appears, but so briefly as a mere note at the end of the report, that no satisfactory evidence can be got from it of the views of the chancellor, KENT.

On the other hand in Perkins *v.* Stevens, 41 Mass. 277, it was held that a general pardon would unquestionably restore competency destroyed by conviction of forgery, and while the Court held the pardon in that case to be only limited and partial, yet they say that the statute providing that a pardon should not restore qualification for office "unless expressly so ordered by the terms of the pardon" plainly "acknowledges the power of the executive to remove even the statute disqualification." In Wood *v.* Fitzgerald, 3 Oregon, 568, it was held that the power of pardon given by the Constitution being without limitation, a full pardon would restore the right to vote to one who had been convicted of arson, though the Constitution itself declared that the privileges of an elector should be forfeited by conviction of any crime punishable by imprisonment in the penitentiary.

These are the only decisions on the particular point, but in the long roll of cases, especially in our own State and in the Supreme Court of the United States, where the general subject has been most frequently and ably discussed from a great variety of points of view, there is nowhere any hint of such a restriction on the effect of a pardon. In Hoffman *v.* Coster, 2 Whart. 453, where the offence was passing counterfeit money, it is said, p. 468, "One of the consequences resulting from the sentence was the disability of the party to be sworn as a witness; and when all the sentence is removed, together with the consequences of the sentence, except what had been suffered, this disability is removed. It cannot exist separate from the source from which it is derived." And the general effect of all the cases is thus stated in *Ex parte* Garland, 71 U. S. 333, 380, "A pardon reaches both the punishment prescribed for the offence and the guilt of the offender, and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. . . . It removes the penalties and the disabilities, and restores him to all his civil rights."

In this position of the adjudicated cases, we are left free to follow what seems to us the sounder and more weighty reasons. The English distinction is not substantial. All penal consequences of crime, whether by common law or by statute, are equally results of the transgression of the law, and even the common law consequences are historically presumed to be of statutory origin. There is no basis in sound reason for including one and excluding the other from the power to pardon. The reason assigned by COKE was repudiated by HOLT; the reason substituted by HOLT is shown by the writer in the American Jurist already quoted, to be equally unsatisfactory; and with deference to the latter's evident learning and ability, his reason is little better. Mr. Hargrave in a very learned and elaborate discussion of this subject of competency, unfortunately not extending to the consideration of convictions on the statute, suggests a reason which is explanatory if not convincing. "Where parliament imposes a disability, to attribute to the king, singly, a power of removing it, might at least approach to the assertion of a dispensing power in the crown," referring to the great case in the reign of James 2d. on the power of dispensing with the Test Act: 2 Hargrave's Juridical Arguments, 224. The king's prerogative of pardon is by the com-

Digitized by Google

mon law, but an Act of Parliament is supreme, and can change the common law in respect to prerogative as well as to other matters, and if it has done so the prerogative is thereafter limited accordingly.

This reason cannot apply to the American States under written Constitutions which are superior to the legislative power. The Constitution of the United States gives the President power to grant pardons, except in cases of impeachment, and "the power thus conferred is unlimited with the exception stated, . . . it is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions:" *Ex parte* Garland, 71 U. S. 333, 380. It is true there was a strong dissent in that case by nearly half the Court, but it was based on the questions, whether the qualifications of attorneys were matters for legislative or judicial control, and whether a disqualification imposed on an attorney by statute after his admission was an *ex post facto* law. There was no difference of opinion as to the power of pardon or the effect of its exercise upon all parts of the penalty or punishment.

The Constitution of Pennsylvania gives the Governor the same unlimited power of pardon with the same single exception of cases of impeachment, though the exercise of the power is controlled by the condition precedent of a recommendation by certain officers conveniently known as the board of pardons. The Constitution deals with the pardoning power not as a prerogative claimed by divine right, but as an adjunct to the administration of justice, recognized in all civilized governments as necessary by reason of the fallibility of human laws and human tribunals. The power so recognized is granted without distinction in regard to offences or their consequences, and with no exception or limitation but the one noted, of impeachment. The fact that one is made shows that the subject of exceptions was considered, and therefore, *expressio unius exclusio alterius est.* The power cannot now be further restricted, or its operation limited, by legislation.

Nor in fact has any such restriction been attempted. There is no conflict between the statute and the executive act in this respect any more than in any other. The Act of 1860 says the person convicted of perjury "shall be forever disqualified from being a witness in any matter in controversy," but it also says he shall be fined and imprisoned. Both are statutory consequences of the conviction, and the remission of one is no more a violation of the statute than the remission of the other. The statute does not say in either case, "unless he shall be pardoned," because the Legislature in enacting the statute was not contemplating the exceptional case of a pardon, nor considering its effect on any part of the Act. The word "forever" was introduced in the disqualification not with any reference to the effect of a pardon, but to show that it was not merely to run with the term of imprisonment, and to concur with the exception of the case of perjury in section 181 of the same Act, providing that the endurance of the punishment shall have the effect of a pardon. The result of the two sections read together is that nothing shall remove the disqualification except a pardon, and this is the intent indicated by the commissioners who reported the criminal code, when they say that section 181 is new, and the object was previously attained through the pardon of the Governor: Report, Purdon's Dig., ed. 1894, p. 563 note.

The same views apply to the Act of May 23, 1887, P. L. 158, relating to the competency of witnesses, etc. That is a careful revision and consolidation, by a very competent hand, of the whole law on the subject, and when in section 5 it provides that a person convicted of perjury shall not be a competent witness although his sentence may have been fully complied with, etc., it merely continues the law of the two sections of the Act of 1860, already discussed, with an express provision as to the effect of a reversal of the conviction, which would have been the legal result even without such expression, and a humane exception in cases of injury to the convict's person or property. But this Act did not, any more than the previous one, have any reference to the effect of a pardon.

Even if this were less clear than it is as a matter of statutory construction, the argument *ab inconvenienti* would be very strong. Suppose Lindsay was the only witness to a murder, must justice be baffled because of his inability? And yet how is it to be removed if not by a pardon? It is said in 24 Ills. 298, cited *supra*, that applications are made in that State, to the Legislature. Besides the practical difficulties in the delay and the running of the statute of limitations there would be other objections in this State. If such application be regarded as a pardon, the power is in the Governor, not the Legislature, and if it be regarded as a law, then it is special, and must run the gauntlet of the prohibitions against special laws relating to practice and evidence in judicial proceedings.

For each and all of these reasons we are of opinion that Lindsay was a competent witness, and the learned Court below was right in admitting his testimony.

On the other points we have had some doubt as to the propriety of directing a verdict for the plaintiff, but are not convinced that it was error.

Digitized by Google

The issue was one in which the Judge sat as a chancellor, and both parties treated it as a question of law, and requested binding instructions. The exceptions and assignments of error as to this are not that the Judge directed a verdict but that he directed it for the plaintiff instead of the defendant. If Lindsay was a competent witness and was believed, the requisites of the statute as to wills were complied with. His credibility was for the jury if either party had asked that it be submitted, but neither did so.

We do not see any sound reason to question the result. The testator was in full possession of his faculties of mind, and had strength of body to sign the will, but he had the injunction of the physicians to keep quiet, enforced by the information that if he had another hemorrhage he might die in fifteen minutes. He ordered his will written, and when it was done ordered it signed. Undoubtedly he was physically able to sign it himself, but at a risk to his life that he was not bound and could not be expected to take. All the evidence shows an extremity of a last sickness of which the testator was aware, and which he met with notable clearness and resolution. The case belongs to the class which the statute was meant to provide for.

Nor is there any reason to doubt that he meant his directions for a will, and regarded it as fully executed. He desired to know his condition, and after consultation his physicians informed him he might die in fifteen minutes and if he had any worldly matters to settle he had better do so. He at once gave his clerk the directions, had them written down, and when read to him, said they were what he wanted and ordered the paper signed. His acts do not admit of any other meaning than that he intended to make a will and believed he had done so.

Judgment affirmed. W. C. S.

Jan. '95, 216. April 2, 1895.

Merrall v. Dobbins.

Partnership—Intention to create, determines—Construction of agreement.

When an agreement entered into shows an intention of the parties thereto, to become joint owners of the business to be carried on, they are partners; and it is not necessary to consider whether they would become such against their will by operation of law.

In such case, it is not material to determine whether the contract is governed by the early rule which made profit-sharing conclusive of partnership, or by the later rule, making such profit-sharing strong, but not conclusive, evidence thereof.

Certiorari sur appeal of C. W. Dobbins *et al.*, defendants, from the judgment in favor of W. J. Merrall *et al.*, plaintiffs, in Common Pleas No. 3 of Philadelphia County, on case stated.

The case stated set forth the contract between R. J. Dobbins and Hugh F. Griffin, of which the material points are stated in the opinion of the Supreme Court. The plaintiffs having sold and delivered a large quantity of merchandise to the Howland House at Long Branch, during the summer of 1892, for account of which, there was a balance due them of $1777.-71, sought to hold the estate of R. J. Dobbins liable therefor, upon the ground that a partnership had existed between him and Hugh F. Griffin. The Court entered judgment for plaintiff for the sum of $2022.14. The defendant appealed, assigning as error the entry of judgment for plaintiff and the failure to enter judgment for defendant.

Pierce Archer, (*Elias P. Smithers* with him), for appellants.

The agreement between the parties was a lease; a mere agreement giving one a possible contingent interest in the net profits, does not constitute a partnership as to secret partners.

Irwin *v.* Bidwell, 72 Pa. 244.
Walker *v.* Tupper, 152 Id. 1.
Dunham *v.* Rogers, 1 Id. 255.
Heckert *v.* Fegely, 6 W. & S. 139.
Brown *v.* Jaquette, 94 Pa. 113.
Edwards *v.* Tracy, 62 Id. 381.

The law of New Jersey, the place of execution of the contract, is the same as that of Pennsylvania.

Perrine *v.* Hankinson, 6 Halst. 181.
Seabury *v.* Bolles, 51 N. J. Law, 103.
Wild *v.* Davenport, 58 N. J. Law, 129.

And so is the law of New York, (the *lex loci contractus*).

Dake *v.* Butler, 28 N. Y. Supp. 134.

And the rule contended for is recognized in other States.

Parker *v.* Fergus, 43 Ill. 437.
Holmes *v.* R. R., 5 Gray, 58.
Thayer *v.* Augustine, 55 Mich. 187.
Reed *v.* Murphy, 2 Greene, Iowa, 574.
Bowyer *v.* Anderson, 2 Leigh, 598.
Felton *v.* Deall, 22 Vt. 170.
Parsons on Part., 4th ed., sec. 71, page 62.
Kent's Com, Vol. III., page 33.
Story on Partnership, sec. 43.
Am. & Eng. Encyclopædia, 17 vol., 849.

Samuel M. Hyneman, for appellees.

A careful reading of the document shows it is unquestionably a partnership agreement.

Even where the early rule of Waugh *v.* Carver has been modified, the agreement in this case would create a partnership as to creditors of the business; but the Courts of the State of New York have not gone so far as those of England, New Jersey and Pennsylvania in abrogating the earlier rule.

Digitized by Google

Hackett *v.* Stanley, 115 N. Y. 625.

An examination of the cases cited by the appellant shows that they support the above proposition.

July 18, 1895. FELL, J. The question raised by the case stated is whether Richard J. Dobbins and Hugh F. Griffin were partners as to third parties in conducting the business of the Howland Hotel at Long Branch, in 1892. Their relation is to be determined entirely by the agreement into which they entered, as no facts outside of it are stated. By the first three clauses of the agreement Dobbins leased the Howland Hotel together with all the personal property on the premises for three months to Griffin for $20,000, payable in four equal instalments. Thus far the agreement is a lease, but at this point in form, substance and apparent intent the similitude ceases. The additional provisions inconsistent with the relation of lessor and lessee, which indicate a joint interest between the parties as owners of the business, are in their order as follows: (1), that Griffin shall give his undivided attention and devote his best energies to the promotion of the business to be done on the said premises; (2), that Dobbins or his representatives shall have the right of free access to the premises at all times; (3), that in addition to the sum of $20,000 Dobbins shall have 80 per cent. of the net profits derived from all of the business done on the premises; (4), that in addition to the current expenses of the hotel and the business done therein there shall be charged to the expense account the cost of insurance, water and sewer rents, license fee, interior repairs, and the salary of a person to be designated by Dobbins who shall keep the books and act as cashier, receive all money, deposit it in his own name, and make all payments; (5), that at the termination of the agreement a statement shall be made of the business done, and that Griffin shall receive 20 per cent. of the net profits; (6), that at the expiration of the lease Dobbins shall pay to Griffin $1000, and that Dobbins shall have the right at any time upon 24 hours' notice to annul the agreement and assume sole and exclusive possession of the property; (7), that Griffin shall have absolute control and management of the business during the continuance of the agreement, and assents to a transfer of the license if the agreement shall be annuled.

This agreement is called by the parties a lease, and it provides that Dobbins shall not be liable for the business done or for the debts contracted by Griffin. In favor of construing it as a lease it may be said that its unusual provisions are explained by the unusual character and use of the property. Valuable real estate and a large amount of personal property were being used for a business that was precarious. The season was short and the outcome uncertain, and dependent upon conditions beyond the control of the lessee. To apportion the rent under such circumstances so that a part should be fixed and certain and a part conditional was a reasonable and not unusual business arrangement, and the provisions were to ascertain and secure the payment of the conditional rent.

This construction, however, makes a new agreement for the parties. It assumes what they do not say, that the 80 per cent. of the net profits derived from the business is to be paid as additional rent. The rent named is $20,000, and this amount is twice named as the total rent. The 80 per cent. of the net profits is in addition to the rent. It cannot be considered a part thereof without disregarding the words used and giving effect to an undisclosed intention. The difficulties in the way of considering the agreement a lease are insuperable. The lessor would be given a share of the profits, not a sum proportionate to a share, and not as rent, but directly as profits. He would have the right of access to the premises at all times and for all purposes; to appoint a book-keeper and cashier who should receive all moneys, make all payments and retain possession of the balance. He would have the right to an account, and was bound to pay his lessor $1000, and could at his option with or without cause terminate the lease. The lessee would contract for the exclusive control of his own business, and covenant to give it his entire time and attention; he would be forbidden to keep his own books or to touch a dollar of his own money; he could neither receive nor pay any money derived from his business, and had no control of the net balance; he gets nothing until the end, when after the statement of an account he is to receive 20 per cent.; at the expiration of the term or its earlier termination at the will of the lessor he is to be paid by the lessor $1000, and this in any event, whether there are profits or not. These are not the characteristics of a lease, but of a partnership.

The business to be carried on is not spoken of as the business of Griffin, except in the single instance where it is provided that "the party of the first part shall not in any wise be liable for the business done by the party of the second part." In all other parts of the agreement it is spoken of or referred to as "the business done on the premises." It is to "the business done on the premises" that Griffin is to give his whole attention, of it that the book-keeper is to take charge, an account to be stated and the net profits ascertained, and from it that he is to be paid and the parties to receive, the one 80 per cent. and the other 20 per cent. The business of which the agreement speaks and of which an

Digitized by Google

account is to be kept, a statement made and the profits divided, is the business of a distinct entity, a partnership, in which the parties are joint owners and in which they share as proprietors. This seems to be the only fair conclusion to be drawn from the acts of the parties.

The agreement is our only guide. If it is evidence of the intention of the parties to become joint owners of the business to be carried on we need not consider whether they became partners against their will by operation of law. We are not concerned with the question whether the law of the State by which the contract is governed is in harmony with the old English rule of Grace *v.* Smith, 2 Wm. Blackstone, 998, and Waugh *v.* Carver, 2 H. Blackstone, 235, which makes participation in the profits conclusive of the liability of the participant to creditors without regard to the agreement or intention of the parties, or with the modern rule of Cox *v.* Hickman, 8 H. L. C. 268, under which a participation in profits is held to be strong but not conclusive evidence of a partnership, and the whole transaction is taken into consideration in order to determine whether the relation of partners was to be created. If there was a partnership resulting from intention, all other questions drop out of the case.

The judgment is affirmed.

J. D. B., Jr.

Jan. '95, 239. April 3, 1895.

Glase v. City of Philadelphia.

Municipal corporation—Negligence—Contributory negligence—Conflicting testimony for the jury.

Plaintiff was injured by falling astride the cover of a manhole of defendant, which revolved to a vertical position. The testimony showed that the accident occurred in a public park; that the manhole was close to a column; that plaintiff was excited and running to get around the column:

Held, that whether he exercised due care under the circumstances was a question for the jury.

The plaintiff's testimony not being consistent, it is for the jury to reconcile the conflicting phases.

Whether the defendant had actual or constructive notice of the unsecured condition of the manhole, was also a question for the jury. If this manhole was covered, as plaintiff claims, by a revolving lid which being unsecured, turned when stepped upon, it was a mantrap, the very design of which was negligence. It could hardly be said that the city did not know that its own contrivance, thus unsecured, and thus placed, was highly dangerous to the public.

Appeal of Joseph Glase by his next friend, Alexis Limeburner, plaintiff, from the judgment of non-suit entered on motion of the defendant, the City of Philadelphia, by Common Pleas No. 1, of Philadelphia County, a motion to take off the non-suit having been refused.

The Court below, Biddle, J., having non-suited the plaintiff, the Court subsequently refused to set aside the non-suit, and plaintiff appealed, assigning as error this action of the Court, and also the exclusion of certain testimony.

The facts are stated in the opinion of the Supreme Court.

A. W. Horton and *David W. Sellers*, for appellant.

Howard A. Davis, assistant city solicitor, and *Charles F. Warwick*, city solicitor, for appellee.

July 18, 1895. Dean, J. A number of adjoining buildings on the Schuylkill river, known as Fairmount Water Works, were erected and owned by the City of Philadelphia; they are used by the city as a pumping station; the natural surface of the ground slopes somewhat abruptly to the river, so that the roof of the engine-house, at the rear, is on a level with the ground; the roofs of all the buildings are on a level with that of the engine-house, the whole forming a roof area of four hundred by fifty feet. This large roof surface looking out upon the river, is used by the public upon the invitation of the city, as a place of rest and pleasure. In the centre is a row of twenty or thirty columns, each three feet in diameter, and about twenty-five feet in height; close to one of these columns, and back of it, is a manhole, used for putting in coal, and closed by a plate eighteen inches in diameter in centre, being vertical when the hole is open, and horizontal, or on a level with the roof, when closed. On May 30, 1889, being Decoration day, many of the public were on the roof, among them the plaintiff, a boy about sixteen years of age. He was on the land side of the columns, when another boy cried that a big fish had been caught; plaintiff, with other boys, ran towards the river side to see the fish, when, just as he passed one of the columns, he stepped on the plate; it turned vertically, and he fell with his full weight astride of it, very seriously and permanently injuring him. Suit was brought against the city for damages, in not protecting the manhole by a proper covering securely fastened.

At the trial, the learned Judge of the Court below, non-suited the plaintiff, on the grounds that: 1. Plaintiff was guilty of contributory negligence. 2. The defendant was not shown to have had actual or constructive notice of the insecure condition of the manhole.

The plaintiff appeals, and argues, that the question of contributory negligence was for the jury, and that the very design and operation of

Digitized by Google

the plate, was evidence of notice to the city of the dangerous condition of the covering of the manhole.

The boy, Joseph Glase, testified, that he was standing right back of the colonnade, leaning on the rail, then this question in chief was put to him:—

"Q. What were you doing, standing there? A. I was talking there for awhile, and one of the boys hollered, there was a girl's hat blew overboard, and another one hollered, there is a big fish caught, and as I ran to see, I stepped in this hole, and the lid went in."

On cross-examination, he made these answers: "Q. You say you were standing talking along the rail? A. Yes, sir. Q. When the girl's hat blew overboard, did you run around the post? A. No, sir; not until one of the boys hollered, there was a fish caught, and then I ran around the post. Q. Why did you run around the post, when you were standing along the railing? A. I don't know—because the rest of them ran around the post, and I ran to get ahead of them. Q. To see the fish? A. Yes, sir."

Then further on in his testimony:—"Q. Were you ahead of these boys, or were they behind you? A. No; they were ahead of me. Q. And your companions did not see anything of it until you were in the hole? A. Until I was in the hole, and one of them came and helped me out. Q. Was the lid on the hole? A. No, sir; it was about half-way on. Q. When you were running on it? A. When I stepped on it. Q. How did you know it was only half-way on? A. When I stepped on it. Q. When you stepped on it? A. No, sir; didn't see it when I stepped on it, I imagine it was half-way on."

He then says, he saw it was half-way on when he was running towards it. His companions testified to the running, when the cry of "fish caught" was raised, in substantial accord with the plaintiff. It therefore clearly appears they were standing, first, on the side of the columns furthest from the river, when the cry was raised of "fish caught." Boys of this age, and perhaps men of mature age, would be excited by such a cry, and they started to run for the side next the river; the column was between them and the manhole, and the manhole was close to the column; it was not directly visible until they partially passed the column; then another step, and he was on the revolving plate or disk. We think the question whether the boy exercised care according to the circumstances, was for the jury. True, he says, in part of his examination, he saw the lid was half off when he was running; but his position, astride of the vertical plate, when taken up by his companion, and there are several witnesses to this, indicates that he probably stepped on the side, and the plate then turned; if the accident occurred by stepping on the side of a closed but unsecured revolving plate, is it probable it was turned and standing vertically when he stepped in the hole? If it was half off, then it must have been vertical. His evidence is not consistent; he first states he imagines it was half off, and then that he saw it when he was running. The excitement of the boy, the speed at which he ran, the partial concealment of the manhole by the column, and his whole statement, should, it seems to us, have been submitted to the jury, to determine whether there was an absence of care according to the circumstances. In Ely *v.* Railroad Co., 158 Pa. 233, the testimony of plaintiff as to whether he stopped, looked and listened, before he drove on a railroad crossing, was somewhat contradictory, but Justice MITCHELL, in delivering the opinion of the Court, says:

"This (plaintiff's testimony) was contradictory, and the net result of it by no means clear. On part of it, he was plainly entitled to go to the jury; on the other part, equally plainly, he was not. Under these circumstances, the case must go to the jury, whose province it is to reconcile conflicting statements, whether of the same or different witnesses, or to draw the line between them, and say which shall prevail."

As to the second question, that was also for the jury. If this manhole was covered, as plaintiff claimed, by a revolving lid, which, being unsecured, turned when stepped upon, it was a mantrap, the very design of which was negligence. Its character and design were questions for the jury. It could hardly be said that the city did not know its own contrivance, thus unsecured, and thus placed, was highly dangerous to the public invited upon that roof. It was not compelled to provide any such place of rest and pleasure, but when it did so, and invited the public to go upon it, clearly, according to all the cases, it owed to the public the duty of at least ordinary care.

The judgment is reversed, and a procedendo awarded. J. D. B. Jr.

Jan. '95, 241. February 21, 1895.

Light v. The Countrymen's Mutual Insurance Co.

Insurance—Insurable interest—Mutual companies—Estoppel—Agents—Judgment.

The mere holding of a judgment by the vendor against the vendee to secure part of the purchase money of a property will not confer an insurable interest.

Grevemeyer *v.* Southern Ins. Co., 62 Pa. 342, followed.

The function of an estoppel is to prevent the party who

Digitized by Google

is bound by it from alleging the truth of the matter against which he is estopped.

Where an agent of an insurance company instructs or advises a holder of a policy as to what course of action to pursue when selling the property on which the insurance exists, advising him to retain the policy and that he still has an insurable interest, the company is estopped from denying its liability in an action by the holder of the policy to recover its amount, although his course was not in conformity to the rules of the company or the custom in similar cases.

Mentz *v.* Lancaster Fire Ins. Co., 79 Pa. 475, and Wachter *v.* Phœnix Assurance Co., 132 Id. 428, followed.

Appeal of Ezra H. Light, from the judgment of the Common Pleas of Lebanon County, entered on a point reserved on the trial of an action in assumpsit wherein appellant was plaintiff and the Countrymen's Mutual Insurance Company of Lebanon County, was defendant.

The appellant was the owner of a barn situate in Swatara Township, Lebanon County, insured in the defendant company for $400. In September, 1889, he contracted to sell, *inter alia*, the premises upon which the barn was erected, to David H. Tice, and at the consummation of the sale took a judgment bond as part payment of purchase money. Before the delivery of the deed to Tice, Light called upon Adam Gettle, secretary of defendant company, and asked his advice what to do with the policy so that it would be good in case of loss by fire.

He was informed by the secretary of the company that he had an insurable interest and could retain the policy, as he had held it theretofore; that then the assessments would be sent to him and he could see that they were paid; and that if they were sent to Tice he might permit the policy to be forfeited by not paying the assessment and the plaintiff would know nothing about it.

In accordance with this advice the plaintiff returned the policy, delivered the deed and took a purchase money judgment. The assessments were laid in his name, sent to him, and he paid them to the company in January, 1890, February, 1891, and in March, 1892.

On the night of the 30th of May, 1892, the barn was destroyed by fire,—a total loss. The company refused payment on the ground that the appellant had no insurable interest.

The verdict was for the plaintiff but judgment was entered *non obstante veredicto* for the defendant on the point reserved, whether the action of the secretary of the company in giving the appellant the advice above mentioned operated as an estoppel.

The plaintiff appealed, assigning this as error.

Thomas H. Capp, (*George B. Schock* with him), for appellant.

It is not necessary that the assured should have either a legal or equitable interest, or indeed any property interest in the subject-matter insured. It is enough if he holds such a relation to the property, that its destruction by the peril insured against, involves pecuniary loss to him or those for whom he acts. It need not be an existing *jus in re* nor *jus in rem.*

Wood on Fire Insurance, 493.
F. M. Ins. Co. *v.* Turnpike, 122 Pa. 47.
Rohrback *v.* Ins. Co, 62 N. Y. 47.
Farmers & Mechanics' Ins. Co. *v.* Meckes, 10 WEEKLY NOTES, 306.

Where a man fully and candidly explains his title, takes his insurance in the manner in which he is advised by an officer of the company, pays premiums for years, rests in perfect security by reason of the acts and declarations of the company, he is entitled to the indemnity which he had reason to believe he had purchased.

Burson *v.* Fire Association, 136 Pa. 283.
Mentz *v.* Lancaster Fire Ins. Co., 79 Id. 475.
Wachter *v.* Phœnix Assurance Co., 132 Id. 428.

J. G. Adams, (*J. M. Funck* with him), for appellee.

The by-law which declares that alienation of the property shall, *ipso facto*, avoid the policy, is of no consequence; for such, without it, is the law of contract. Interest in the property insured is an essential link in the relation of insurance. It is therefore an incident of such a relation that it may be dissolved by the insured by parting with his interest. In mutual insurance companies all the insured are members, and all members are insured. He who sells his insured property excludes himself from membership, and from all its liabilities therefor accruing. He is no longer insurer or insured. He can claim no benefits nor be bound for subsequent losses.

Wilson *v.* Trumbull Mutual Fire Ins. Co., 19 Pa. 372.
Grevemeyer *v.* Southern Mutual Ins. Co., 62 Id. 340.
Ruth's Appeal, 54 Id. 173.

The lien of this judgment was a general lien; the fact that it was due for purchase money did not draw after it a specific pledge of the land.

The secretary's action did not operate as an estoppel.

Bank *v.* Hartford Fire Ins. Co., 11 Cush. 265.
Mentz *v.* Lancaster Fire Ins. Co, 79 Pa. 478.

July 18, 1895. GREEN, J. There is no doubt that when Light sold and conveyed the land on which the barn in question stood, he parted with all his title, and after that he had no insurable interest in the barn. It is equally true that the mere holding of a judgment for part of the purchase money of the property sold would not confer an insurable interest, and no recovery could

Digitized by Google

be had on the policy for the protection of the judgment: Grevemeyer *v.* Southern Ins. Co., 62 Pa. 342.

The learned Court below ruled the case finally on the proposition that the plaintiff had no insurable interest in the barn at the time of the fire, and therefore could not recover.

But the ruling on that question does not dispose of the case. There was raised upon the record a question of estoppel, and if the facts which make out an estoppel were established by the testimony then another question altogether arose. The function of an estoppel is to prevent the party who is bound by it from alleging the truth of the matter against which he is estopped. In other words, although he may have a perfectly good defence he can neither plead it nor prove it. He cannot assert it against the adverse claim.

In this case it is only necessary to inquire whether the facts which establish an estoppel against the defence of want of insurable interest in the plaintiff appear on the record. The plaintiff being examined in his own behalf testified, "When I had sold this property and had the papers then I took the papers and took the insurance policy with it, the deeds for the property and the judgment which I had drawn and insurance policy. I went to Gettle, the secretary of the company, to get an advice what to do with this policy so that it would be good. He said you could transfer this, but you have an insurable interest in it as it is, and you had better hold the policy as it is and the assessments will be sent to you, then you will be sure that they are paid, and after Tice pays you you can transfer the policy to him. Q. What did you do in accordance with that advice? A. So then I held the policy and didn't transfer it. Q. Did you deliver the deeds then? A. Yes. . . . . Q. In accordance with that arrangement did they afterwards send the assessments to you? A. Every year. Q. And did you pay them? A. Yes, sir."

The plaintiff then proved that three assessments were subsequently, in the years 1890, 1891 and 1892, levied upon his policy by the company and sent to him for payment, and that he paid them all. In all this testimony the plaintiff was substantially corroborated by the defendant's secretary, Gettle, as to the original transaction, and by their secretary, Bomberger, subsequent to Gettle, as to the assessments and their payment. There was no real controversy about these facts, and the jury has found them under the charge of the Court.

It appears therefore by the testimony and the verdict that the plaintiff, under the advice of the secretary of the company, continued to hold his policy, that he delivered the deed to the purchaser without transferring the policy, that the company subsequently, during three consecutive years, treated the policy as continuing in force, declared assessments upon it to cover losses and accepted payment of the assessments from the plaintiff during all that time. They of course knew of the sale of the property, and that the policy was retained by the plaintiff, and they undoubtedly treated it as an existing, active policy in full life up until the time of the fire. Can they be permitted now to repudiate their own voluntary action, and assert that it was a void policy for want of an insurable interest in the plaintiff at all times after the deed to Tice was delivered? We think certainly not. To permit such a defence to be made would be highly inequitable and unjust.

The policy was a perfectly good and lawful contract of insurance when it was made, and continued so to be without question up to the time of the sale, and both parties continued to treat it as such until the time of the fire. It was never an instrument void *ab initio*, as was held by the Court below, and therefore never needed an infusion of new life. It is in no sense analogous to the case of a policy effected originally by a judgment creditor, nor to a policy held over after a sale voluntarily by the insured. But it was a valid existing policy at the time of the sale, continued in force by the voluntary agreement of both parties to the time of the fire. We can not see how a clearer case of estoppel than this could be made out in any cause.

In the case of Mentz *v.* Lancaster Fire Ins. Co., 79 Pa. 475, the company's agent told the policy holder that the proper endorsement on the policy had been made, and we held the company bound by the declaration of their agent on the principle of estoppel. Said SHARSWOOD, J., delivering the opinion, "Now such a declaration made by a duly authorized agent or officer would clearly operate as an estoppel. It lulled the party to sleep by the assurance that the conditions of the policy had been complied with and that his indemnity was secured." The present case is much stronger than this because here the company fully ratified the action of their secretary by treating the policy as actually in force, and declaring and collecting assessments upon it for three years after the sale. If it was in force for the purpose of collecting assessments upon it, it was certainly in force for the purpose of paying the loss, for securing indemnity against which those assessments were paid by the plaintiff and received by the defendant. In our opinion it would be perpetrating a gross wrong to take any other view of the undoubted facts of the case.

In Wachter *v.* The Phœnix Assurance Co., 132 Pa. 428, the insured went to the agent of the

Digitized by Google

company, informed him of the sale of the property, inquired in regard to the transfer of the policy to Wachter, the mortgagee, and was assured by the agent that it was all right as it was, and that nothing more need be done. The company sought to avoid payment because the sale of the property without a transfer or endorsement on the policy rendered it null and void. We held the company estopped from setting up such a defence. The present Chief Justice delivering the opinion, said: "In view of the undisputed facts the defence is a most ungracious one, a defence which under the circumstances no reputable underwriter would think of interposing." And so we say here, this company demanded and received from this plaintiff, as the lawful holder of this policy, all the benefits and advantages which it was entitled to receive under it as a valid subsisting policy up until the moment of the fire, and it would be a perversion of justice to permit it now to deny its liability and to allow it to escape the payment of its just dues under the contract. That is precisely what estoppel means.

The judgment is reversed, and judgment is now entered on the verdict in favor of the plaintiff and against the defendant for the sum of four hundred and fifty-three dollars and six cents, as of the 16th day of October, 1894, with costs of suit.

W. D. N.

Jan. '95, 187. February 15, 1895.

City of Chester v. Pennell.

Municipal improvements—Unconstitutionality of Act—Curative legislation—Acts of Assembly of May 24, 1887, 204, and May 23, 1889, P. L. 272.

The Act of 1887 furnished a complete system of procedure in relation to the grading and paving of streets, and repealed all laws inconsistent with or supplied by it; and the Act of 1889 authorizes assessments and re-assessments for the cost of local improvements therefore made, at the same time providing for the collection of the same.

Appeal of Nathan Pennell, defendant, from the judgment of the Common Pleas of Delaware County in an action of assumpsit, wherein the City of Chester was plaintiff.

This action was brought to recover an assessment for paving in front of defendant's property on Madison street, in the City of Chester. This street was paved with asphaltum blocks during the year 1888, in pursuance of an ordinance of the city passed June 18, 1888. The supposed power of councils to pass this ordinance was derived from the Act of May 24, 1887, P. L. 204, which Act was declared to be unconstitutional by the Supreme Court in Ayars' Appeal, 122 Pa. 266.

On May 1, 1876, an Act was passed (P. L. 94) entitled "An Act prescribing the manner in which the councils of cities other than those of the first class may pass ordinances authorizing the grading or paving of avenues, streets, or alleys, and the construction of sewers or bridges." It is admitted by the city that the ordinance of June 18, 1888, did not comply with this Act.

On June 26, 1889, city councils passed a general ordinance, in pursuance of the re-assessment Act of May 23, 1889, P. L. 272, providing for the assessment of the cost of local improvements theretofore made, and in accordance with its provisions a commission was appointed to assess against abutting property the cost of the paving of this street.

At the trial, before CLAYTON, P. J., the plaintiff submitted the following point:—

"The defendant having signed the petition to the councils of the plaintiff city for the local improvements, being the paving of the roadway of Madison street, he is estopped from raising any question as to the want of authority in the plaintiff city, or to any irregularity in the passage of the ordinance of June 18, 1888."

The defendant submitted the following points:—

"1. The plaintiff having failed to show that the ordinance of June 18, 1888, complied with the requirements of the Act of May 1, 1876, in the necessary precedent requirements of said Act, the said ordinance is null and void, and thereby the paving of Madison street was a general improvement, and the plaintiff is not entitled to recover."

"2. In the absence of any municipal legislation for the paving of Madison street as a local improvement, the plaintiff is not entitled to recover."

A verdict was entered for plaintiff, and judgment was subsequently entered thereon on the points of law reserved, from which judgment the defendant appealed.

W. I. Schaffer, (*W. B. Broomall* with him), for appellant.

The Act of May 24, 1887, P. L. 204, having been declared unconstitutional by this Court in Ayars' Appeal, 122 Pa. 266, and void, and that Act having created city councils as it existed at the time of the passage of the ordinance, its attempted acts of legislation for the city were inoperative, and the ordinance of June 18, 1888, was a nullity.

The ordinance in question was also null and void under the Act of 1876. The Legislature passed the Act of May 23, 1889, P. L. 272, to

Digitized by Google

remedy not only the effect of the unconstitutionality of the Act of 1887, but if the contention of the city is to be sustained, in addition to cure the failure of city council to comply with the provisions of the Act of 1876, which was not repealed until May 27, 1889, P. L. 387. The provisions of the Act of 1876 have received the sanction of the Supreme Court.

City of Erie *v.* Brady, 127 Pa. 169.

If the requirements of the Act of 1876 were not complied with, this paving was a general improvement. It was therefore in the condition of a general improvement for a long time prior to the passage of the re-assessment ordinance. That ordinance provided for the re-assessment of properties benefited by local improvement, and, therefore, this property not being within the terms of that ordinance, the viewers were without authority as to it, and their assessment against it was invalid. The city being able to point to no valid municipal legislation for the paving of this street, as a local improvement, it must follow that the improvement was a general one, and judgment should have been entered for the defendant *non obstante veredicto*.

The defendant is not estopped from raising the question of want of authority in the city or irregularities in the passage of the ordinance of June 18, 1888, by reason of his having signed the petition for the paving. The signatures of a majority of the property owners were the prerequisite to the doing of the work. They had the right to expect that the city would perform its duty according to law.

A. A. Cochran, for appellee.

Counsel for the defendant make no mention of the Act of May 13, 1889, P. L. 196, validating councils and ordinances about which a question might have been raised by reason of the falling of the Act of 1887.

It was decided by this Court in a case from the city of York that the retroactive Act of May 13, 1889, *supra*, validated ordinances passed by councils operating under the Act of 1887, and ratified everything that had been done under it.

Devers *v.* The City of York, 150 Pa. 208.
Melick *v.* Williamsport, 162 Id. 408.

Where a statute covers the whole subject matter of an earlier one, and is evidently intended as a substitute for it, the former is impliedly repealed, as in the case of a general Act relating to boroughs and opening streets, where it was held that the general road law was impliedly repealed as to boroughs falling under the first mentioned Act.

Where the Legislature has the antecedent power to levy a tax it can by a retroactive law cure any irregularity or want of authority in the person levying the same.

Appeal of Hewitt, 88 Pa. 55.
Com. *v.* Marshall, 69 Id. 328.
Erie City *v.* Reed, 113 Id. 468.
Dunbar & Co. *v.* Williamsport, 9 Pa. C. C. 451.
Bidwell *v.* Pittsburgh, 85 Id. 412.
Dewhurst *v.* Allegheny, 95 Id. 437.
Harrisburg *v.* Baptist, 156 Id. 526.

July 18, 1895. McCollum, J. The improvement which the appellant desired was made by the municipal authorities in compliance with his request and he now seeks to escape liability for his share of the cost of it on the ground that the Act under which it was made was declared to be unconstitutional in Ayars' Appeal, 122 Pa. 266. That the ordinance in pursuance of which the work was done conformed to the provisions of the unconstitutional Act, and the councils that passed the former were created by the latter, appear to be conceded facts on which it is argued that the councils had no legal existence and the ordinance was a nullity. While the argument and the conclusions in which it culminates might in the absence of curative legislation be regarded as sound and fatal to the city's claim, neither of them can have any material influence in the decision of this case, because the Act of May 13, 1889, P. L. 196, legalized the councils and validated the ordinance: Devers *v.* York City, 150 Pa. 208, and Melick *v.* Williamsport, 162 Pa. 408. In Devers *v.* York, *supra*, our brother Mitchell, referring to this Act and speaking for this Court, said: "The intent of this Act is perfectly clear. It was to make all the *de facto* municipal bodies *de jure*, and to render all their acts done in their *de facto* capacity valid and effective in law. It was a universal statute making no exceptions, as there was no room for any. No foresight, legislative or other, could have discriminated among the vast mass of ordinances in all the cities similarly situated which would be required to bring order out of this chaos. The Legislature did not attempt it. It validated them all." The chaos referred to in this quotation was the result of the unconstitutionality of the Act of May 24, 1887, under and in reliance on which many improvements had been made or were in progress in the cities of the Commonwealth to which it was applicable, and among them was the improvement under consideration in this case.

It is claimed that the ordinance in question was invalid because the councils did not comply with the directions of the Act of May 1, 1876, P. L. 94, respecting the estimate of the cost of the improvement, the map or plan of the property liable to assessment for the same and the schedule showing the amount each property owner would be required to pay for it. This claim is based on the assumption that the Act of

Digitized by Google

1887 did not provide a complete and independent system or method for the authorization and construction of municipal improvements of this character, and that compliance with the provisions of the Act of 1876 was essential to the validity of any ordinance passed for the purpose of procuring them. But a reference to the Act of 1887 shows that this assumption is unwarranted; that it furnished a complete system of procedure in relation to the grading and paving of streets, and that it contained a clause repealing all laws inconsistent with or supplied by it. It appears to be inconsistent with the provisions of the Act of 1876, and that the Legislature thought the latter was "substantially supplied by subsequent legislation" is manifest from the preamble to the Act of May 27, 1889, P. L. 387, expressly repealing it. But waiving the matter of implied repeal, we think it is clear that the improvement in question is within the purview of the Act of May 23, 1889, P. L. 272, "authorizing assessments and re-assessments for the cost of local improvements and providing for and regulating the collection of the same." The assessment of which the appellant complains was made under this Act and we see no valid defence to it.

Judgment affirmed. W. C. S.

Orphans' Court.

October, 1892, 237.

Keys's Estate.

Interpretation of word "heirs" in will—When it does not include widow.

Where the subject of a gift is personal estate under a limitation to heirs, taking substitutionally or by way of succession after a prior gift to an ancestor, and the word heirs is used, not to denote succession or substitution, but to describe a legatee, and there is nothing in the will or surrounding circumstances to indicate a contrary intent, "heirs" is understood as meaning those to whom such property passes under the statute of distributions, not including a widow or husband of the first taker.

A testator gave his estate to his widow for life, and upon her death half of the principal to his heirs-at-law and the other half to her heirs-at-law:

Held, that the widow is not an heir-at-law of the testator in the sense intended by his will.

Petition for review.

The testator, Edward Keys, directed by his will as follows:—

"Whereas, a marriage is contemplated to take place between Matilda Belshaw and me in the near future, I give, devise and bequeath to the said Matilda, then my wife, all the rest, residue and remainder of my estate, real, personal and mixed, whatsoever and wheresoever the same may be situated at the time of my decease, to hold to her for and during all the term of her natural life. And immediately after the decease of the said Matilda, then I order and direct my executors to convert my estate into cash, and after deducting the necessary reasonable expenses to divide the remainder into two equal parts, one of which said parts I devise and bequeath unto my heirs-at-law, and the other of said parts I devise and bequeath unto the heirs-at-law of the said Matilda, to be divided between them in such proportions as they would be entitled to by law."

The testator died without issue, but leaving to survive him his wife, and father, John Keys. The father died subsequently, intestate.

The auditing Judge held that the widow took only a life estate under the will, consequently she elected to take against the will, and there was awarded to her one-half of the estate absolutely, and a certain sum to the guardian of a child, whom she had adopted after the death of her husband.

A petition for review was filed by the widow to this decree, alleging for error the holding that she took only a life estate, and was thereby induced to take against the will, when it was to her advantage to take under the will, by which she was given three-fourths of the estate absolutely. The administrator of John Keys alleged as error the awarding any sum to the guardian of the adopted child as an heir-at-law under the will.

George T. Hunsicker & Joseph W. Hunsicker, for the widow and guardian.

Charles G. Harres, *Louis Hutt* and *Charles W. Beresford*, for the administrator of John Keys.

Joseph W. Hunsicker, for the executors.

April 27, 1895. PENROSE, J. The right of he widow to recall her election to take against the will of her husband has not been questioned; and as it is conceded that she is entitled under it to one-half of the estate absolutely, and to the other half for life, and the administrator of the father, to whom a portion was awarded upon the theory that her rights did not extend beyond her life, has, by his counsel, declared that a decree directing the return of the amount so received would be promptly complied with, it only remains to consider whether under the limitation of one-half of the estate, at the widow's death, to the heirs of the testator, she is entitled to an additional absolute interest.

It is contended on her behalf that as the direction to sell at the time of final distribution works a conversion as of the date of the testa-

Digitized by Google

tor's death, (McClure's Appeal, 22 Smith, 414), and the entire estate is to be regarded as personalty, she is herself one of the "heirs" of the testator, and, as he died without issue, entitled as such to one-half of the share so limited.

It is true, where the subject is personal estate, that under a limitation to heirs, taking substitutionally or by way of succession after a prior gift to an ancestor, the word heirs is understood as meaning those to whom such property passes under the statute of distributions, including, of course, a widow, or husband (in Pennsylvania, though not in England) of such first taker (Gibbons *v.* Fairlamb, 2 Casey, 217; Eby's Appeal, 3 Norris, 241; Williams on Executors, 1193); but this doctrine, under the authorities, is inapplicable where the word is used not to denote succession or substitution, but to describe a legatee, and there is nothing in the will or surrounding circumstances to indicate a contrary intent: Mounsey *v.* Blamire, 4 Russell, 384; Hamilton *v.* Mills, 29 Beav. 193. It is a settled rule of construction that the word heirs in a will is to be understood in a strictly technical sense unless controlled by the context, or unless, if so taken, it will be meaningless (Reifsnyder *v.* Hunter, 7 Harris, 41; Auman *v.* Auman, 9 Id. 347; Porter's Appeal, 9 Wright, 201; Ivins's Appeal, 10 Outerb. 176; Dodge's Appeal, Id. 216, etc., etc., etc.), and especially where a modification of its meaning will prejudice the rights of those who, in the proper sense of the word, are the heirs of the testator. An heir will not be disinherited except by express words or necessary intendment, and all doubts will be resolved in his favor: Bender *v.* Dietrick, 7 W. & S. 284; Brendlinger *v.* Brendlinger, 2 Casey, 132. The question, of course, is not affected by the mere fact that the person claiming as heir is herself the tenant for life, and that the distribution is not to be made until her death (Holloway *v.* Holloway, 5 Vesey, 399; Buzby's Appeal, 11 Smith, 114; Bell's Appeal, 147 Pa. 383); but where the person so claiming is the widow, who as such is *not* an heir of the testator (Dodge's Appeal, *supra*), the fact that the distribution is so postponed affords a strong argument that no abnormal use of the word was intended; an argument which was regarded as conclusive in Henderson *v.* Henderson, 1 Jones, Law Rep. (N. Carolina) 221. The heirs of a decedent, as was said in Dodge's Appeal, following, in effect, the definition of Blackstone, are those of his kindred upon whom the law, immediately upon his decease, casts the estate in real property—the widow taking not as heir, but an interest in lieu of dower. The word heirs is *nomem collectivum*, and the interests as well as the persons who take are determined by the intestate laws: See Bullock *v.* Downes, 9 H. L. C. 1; Martin *v.* Glover, 1 Coll. 270. Where there are no lineal descendants, real estate passes, subject to the life estates of the widow and parents, if any, to collaterals; and it would seem, therefore, as the father, who was the sole surviving parent in the present case, is now dead, that the persons who, at the death of the testator, were his collateral heirs, will be entitled to the half of his estate becoming distributable among his heirs at the death of his widow; see Gwynne *v.* Muddock, 14 Vesey, 487.

We are of opinion that there was no right on the part of the father of the testator or of his administrator since his death, or on the part of the guardian of the adopted child of the widow, to a present distribution of the estate as against the widow electing to take under the will, and that she is entitled to one-half of the estate absolutely, and to the other half for life upon the entry of security for the protection of the interests of the heirs of the testator (of whom, in the sense intended by the will, she is not one), taking effect at her death. As, however, the awards to the father and to the guardian only became absolute by reason of her failure to file exceptions to the adjudication, all proper allowances, to be fixed by the Court if the parties cannot agree as to amount, will be deducted before restitution will be required.

The necessary decree, making provision for collateral inheritance tax, etc., etc., will be prepared by counsel and submitted to the Court for approval.

KEYS'S ESTATE.

An erroneous award to adopted child corrected.

Exceptions to adjudication.

The facts are to be found in the preceding case. The same counsel argued this case as appeared in the preceding one.

April 27, 1895. PENROSE, J. For reasons stated in the opinions which have been filed in the proceeding to review the adjudication of the first account of the executor, we think the award to the adopted child of the widow was erroneous; and, as she has recalled her election to take against the will, and it is admitted that under it she is entitled to one-half of the estate absolutely, and to the other half for life, the adjudication which is the subject of exceptions will be corrected accordingly—the exceptions being sustained to this extent and dismissed as to anything further.

The proper decree will be prepared by counsel and submitted to the Court for approval.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, AUG. 9, 1895.* [No. 26.

Supreme Court.

Jan. '95, 296. March 1, 1895.

New York & Ontario Land Co. v. Weidner.

Ejectment—Trustees, purchases by, from cestui que trust—Suit pending at time of passage of Act—General and special laws—Curative Acts—Defective acknowledgment.

The Act of Assembly 12 May, 1891, P. L. 53, validating conveyances and other instruments which have been defectively acknowledged, is a curative Act, in line with the presumption of the common law which dispenses with the production of the subscribing witnesses to deeds more than thirty years old, and in line also with prior Acts which have been held constitutional. Its object is not to reform defective acknowledgments, but to make certain deeds admissible in evidence notwithstanding such defects.

A justice of the peace who has certified an acknowledgment of a deed is not competent to prove that no such acknowledgment was made.

Appeal of A. J. Weidner and Laura C., his wife, defendants, from the judgment of the Common Pleas of Lackawanna County, in an action of ejectment, wherein the New York and Ontario Land Company was plaintiff.

The land for which this action is brought was owned by Alexander Dolph, who died in 1860, intestate. Edward Dolph, a son, was appointed administrator. There were other children, one of whom is Laura C. Weidner, the defendant here. In the year 1868 the administrator purchased of his sister, the defendant, the land in dispute, representing to her that if she did not accept the amount offered her, she would not receive anything from the estate. The assignment did not contain a separate acknowledgment by the wife.

In 1888 the defendant brought an action of ejectment for the land in dispute, basing her claim on the illegal purchase by the administrator and the want of a proper acknowledgment.

In 1890 the administrator died and his executors filed a bill in equity under the Act of May 25, 1878, P. L. 149, to have the defective acknowledgment reformed. This bill was dismissed, and upon an appeal to this Court the decree was affirmed in Hand *v.* Weidner, 151 Pa. 362.

The first ejectment was then brought on for trial, which resulted in a verdict for the defendant, who then ruled the plaintiff to bring a second action of ejectment within six months, whereupon this action was instituted.

The first ejectment was pending when the plaintiff's grantor, J. B. Kerr, purchased the interest of Edward Dolph in the land. At the trial of the case plaintiff's counsel offered the assignment from A. J. Weidner and his wife to Edward Dolph; it was objected to because not properly acknowledged. The objection was overruled and the evidence admitted, because of the statute curing defective acknowledgments, approved May 12, 1891, P. L. 53.

The defendant offered to prove that there was no acknowledgment of the assignment, but on objection this evidence was excluded. The defendant also offered to prove that the value of the property in suit was very much greater than Edward Dolph, the administrator, had paid for it, but this evidence, on objection, was excluded. The counsel for the plaintiff and defendant each asked for binding instructions. The Court, ARCHBALD, P. J., directed a verdict for the plaintiff for the land described in the writ, whereupon this appeal was taken.

S. B. Price, for appellant.

The first ejectment brought by Mrs. Weidner was based upon the illegal purchase by her brother, Edward Dolph, who was administrator of her father, as well as upon a want of acknowledgment of the deed of assignment under which it was conveyed. In other words, the administrator of the estate during the time he was litigating an alleged claim against the estate, which subsequently was not allowed, purchased the interest of a distributee for much less than it was worth. He was a *quasi* trustee and purchased a portion of the trust property from a *cestui que trust;* such a contract is *prima facie* void.

Spencer and Newbold's Appeal, 80 Pa. 332.
Greenfield's Estate, 14 Id. 489.
Diller *v.* Brubaker, 52 Id. 498.
2 Lewin on Trusts, 631, Blackstone Ed.

By the assignment from Mrs. Weidner the administrator not only obtained her interest in the real estate, but he obtained also the personal property; and as he obtained the property for less than its value, the deed was void.

"Every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity and casts upon that party the burden of proving affirmatively its compliance with equitable requisites and of thereby overcoming the presumption. . . . . The principle extends to every possible case in which a fiduciary relation exists."

Digitized by Google

8 Am. & Eng. Ency. of Law, 647.
Swayze *v.* Burke, 12 Peters, 11.
Davoue *v.* Fanning, 2 Johnson's Chancery (N. Y.), 252.
Rogers *v.* Rogers, 1 Hopkins' Chancery (N. Y.), 583.
1 Pomeroy's Equity Jurisprudence, 174.
2 Pomeroy's Equity Jurisprudence, 616.

One verdict and judgment in ejectment is conclusive upon an equitable title, for such action is to be regarded as a bill in equity and not as a possessory ejectment at common law.

Peterman *v.* Huling, 31 Pa. 432.
Treftz *v.* Pitts, 74 Id. 343.
Winpenny *v.* Winpenny, 92 Id. 440.

The Act of May 12, 1891, is not applicable to this case, because, when it was enacted the first ejectment by Mrs. Weidner against Dolph in his lifetime and his heirs after his decease was pending and undetermined; also the suit in equity brought by the executors of Edward Dolph under the provisions of the Act of May 25, 1878, P. L. 149, was then pending and undetermined. To give an Act of Assembly a retroactive effect the intention of the Legislature to that end must be clear.

Endlich on Interpretation of Statutes, 380, 382.
Ulshafer *v.* Stewart, 71 Pa. 170.
Dobbins *v.* First National Bank, 112 Ill. 553.
24 Am. & Eng. Ency. of Law, 493.
Ulshafer *v.* Stewart, 71 Pa. 174.

To give the Act the interpretation adopted by the Court below causes a violation of the fifty-fourth section of Article III. of the Constitution: "Nor shall any law be passed granting powers or privileges in any case where the granting of such powers and privileges shall have been provided for by general law, nor where the Courts have jurisdiction to grant the same or give the relief asked for."

Commonwealth *ex rel.* *v.* Halloway, 42 Pa. 446.
McCabe *v.* Emerson, 18 Id. 111.
Menges *v.* Dentler, 33 Id. 495.
Richards *v.* Rote, 68 Id. 248.
Barnet *v.* Barnet, 15 S. & R. 73.
Hand *v.* Weidner, 151 Pa. 367.
Schrader *v.* Decker, 9 Id. 14.
Confer *v.* Baker, 71 Id. 476.

A. J. Weidner, the witness on the stand and defendant in the suit, had been called in the equity suit by the executors, who were litigating the matter in their own interest and in the interest of the plaintiff, who was made a defendant. There had been no change by death of any of the parties since the trial in the equity case. The Court said the evidence was inadmissible because he was incompetent. Mr. Miller, in his work on competency of witnesses, writes: "Where a party has taken the testimony of his adversary under the Act of 1865, either by deposition or at the time of trial, he has rendered him competent for all purposes in the same trial, or in a subsequent trial of the same issue between the same parties."

Miller on Competency of Witnesses, 75.

This rule, as we understand it, is sustained by the decision of Judge SHARSWOOD in Forrester *v.* Kline, 64 Pa. 32.

Patterson *v.* Wallace, 44 Pa. 88.
Seip *v.* Storch, 52 Id. 210.
O'Connor *v.* The Amer. Iron Mountain Co. 56 Id. 234.
Bennett *v.* Williams, 57 Id. 404.

The release from Mrs. Weidner to Edward Dolph should have been rejected because the defective acknowledgment was not cured by the Act of 1891. The proviso that it should not apply to suits pending and undetermined brought this suit within the exception. If the ejectment which was pending at the time the Act was approved was not finally determined when judgment was entered in the case, and was not an ejectment on an equitable title, then it still remained undetermined when this suit was brought and will remain undetermined until final judgment in this case. Because one verdict and judgment in ejectment thereon is not a final determination of the action. It requires two actions but they constitute one suit.

Ulshafer *v.* Stewart, 71 Pa. 170.

The deed of a *feme covert* is void, if it does not appear from the certificate of acknowledgment that she was examined separate and apart from her husband.

Jourdan *v.* Jourdan, 9 S. & R. 268.
Watson *v.* Bailey, 1 Binney, 470.
Graham *v.* Long, 65 Pa. 383.
Wonder *v.* Phelps, 109 Id. 172.

The doctrine of estoppel does not apply to a married woman.

Stivers *v.* Tucker, 126 Pa. 74.
Quinn's Appeal, 86 Id. 447.
Buchanan *v.* Hazzard, 95 Id. 240.
Innis *v.* Templeton, Id. 262.
Davison's Appeal, Id. 394.

H. W. Palmer, (*Charles H. Welles* with him), for appellee.

The first proposition made by the plaintiff is that "the first judgment was final." The reasons given in support of this position are:—

(a) The first ejectment brought by Mrs. Weidner was based upon the illegal purchase by her brother Edward Dolph, who was administrator of her father. (b) Want of acknowledgment of the deed of assignment under which it was conveyed. The record and evidence in the "first" ejectment case disclose no such fact. It was the ordinary and usual form of ejectment for the recovery of the possession of an undivided interest, and it is true, as plaintiff in error says, "when the ejectment came on for

Digitized by Google

trial the defendants did not appear and the plaintiff, Mrs. Weidner, after proving title, received a verdict."

It is true that the acknowledgment of the deed from Laura Weidner and her husband Edward Dolph failed to set out that "she was examined separate and apart," but in every other respect the deed was perfect and the acknowledgment fulfilled all the requirement of the law.

The defendant in the trial of the present case made no offer to prove by parol or other evidence that the ejectment suit of Laura C. Weidner against Edward Dolph was an equitable ejectment, neither was it an equitable ejectment, and has none of the characteristics of one, either in the record or the evidence offered in support of the plaintiff's claim for the land.

Edward Dolph bought this undivided interest from Mrs. Laura C. Weidner and her husband April 17, 1868. This was more than two years after he had filed his first account, and she had every means of knowing the condition of her father's estate. The sale was made voluntarily and for an adequate consideration.

McCoy *v.* Scott, 2 Rawle, 222.
Torr's Estate, Id. 253.
Adams *v.* Adams, 4 Watts, 163.
Com'th *v.* Hilgert, 55 Pa. 237.
Schwartz's Estate, 14 Id. 47.
Bakes *v.* Reese, 150 Id. 46.

It is to be presumed that Mrs. Weidner sold for the price that it pleased her to take. It was the same paid the other heirs, some of whom were of age, some minors, as shown by their deeds in evidence. Whether the price was large or small is not important. If Dolph said what the witness was produced to prove, and if it was false, how did it differ from any other falsehood told by one who is bargaining for a purchase?

Huber *v.* Wilson, 23 Pa. 178.
McAleer *v.* McMurray, 58 Id. 126.
Harris *v.* Tyson, 24 Id. 347.
Phipps *v.* Buckman, 30 Id. 401.
Cazeaux *v.* Mali, 25 Barb. 586.
Seizer *v.* Mali, 32 Barb. 76.
Commonwealth *v.* Harmer, 22 Leg. Int. 76.

The proposition made by the defendant, that the Act approved the 12th day of May, 1891, is not applicable to this case is not tenable.

The Act makes a bad acknowledgment good. The Court can only perpetuate the evidence of a good acknowledgment by reforming a defective certificate so that it shall truly set forth what occurred. No Court can decree an acknowledgment good or allow it to be used as an instrument of evidence, if in point of fact the married woman was not examined separate and apart from her husband.

Spencer *v.* Reese, 35 WEEKLY NOTES, 449.

The omission to state in the certificate that the wife was separately examined, is cured by the Act of 1891.

Tate and wife *v.* Stooltzfoos, 16 S. & R. 34.
Shrawder *et ux.* *v.* Snyder, 142 Pa. 1.
Mercer *v.* Watson, 1 Watts, 330.

Parol evidence of the magistrate was not admissible to show there was no separate examination.

Jourdan *v.* Jourdan, *supra.*
Watson *v.* Bailey, 1 Binn. 470.
Jamison *v.* Jamison, 3 Wharton, 468.

July 18, 1895. MITCHELL, J. An outline of the facts in chronological order will assist in the consideration of the assignments of error:

I. 1868, deed by appellant to Dolph, predecessor in title to appellee.

II. 1888, first ejectment, appellant *v.* Dolph, November 1892, judgment, and December, 1892, rule on appellee terre tenant to bring second ejectment.

III. 1889 and 1890, deeds by Dolph to Kerr, and Kerr to appellee, and death of Dolph.

1890. Bill by Dolph's executors to reform acknowledgment of deed 1868, from appellant to Dolph.

1891. Act of Assembly relative to deeds. All the matters under this head occurred during the pendency of the first ejectment.

IV. 1893. Present ejectment by appellee *v.* appellant.

It is claimed by appellant that the first ejectment was conclusive, being founded on a purchase of an interest in land by an administrator from one of the heirs, and as alleged, upon misrepresentations as to the value of the estate. And appellant claims that although an administrator has no title to the real estate, he is in the position at least of a *quasi* trustee, and therefore within the rule as to purchases by trustees from their *cestui que trust.* Without going into this question it is sufficient to say that there is nothing on this record to show that that was an equitable ejectment. It is denied by the appellee, and it is clear that the appellant's claim in that action was partly, if not exclusively, on the defective acknowledgment of the deed of 1868. The record was offered in evidence "to show a former action of ejectment, and also to show an action pending when the Act of 1891 was passed," and *prima facie* it was against the conclusiveness of the first ejectment for it showed a rule by the appellant on the appellee to bring another ejectment or be barred.

Secondly, appellant argues that the Act of 1891 does not apply to this suit, because in a large sense, to-wit: in the sense of the controversy between the parties, it was pending at the time the Act was passed. This claim, however, is untenable. The word used in the proviso to

Digitized by Google

the statute is not "controversies" but "suits," and the Legislature is presumed to know that the controversy in ejectment is not settled by a single suit. The first ejectment was pending but judgment was entered after the Act was passed, and on habere facias the successful party was put into possession. That suit was certainly ended, and the present writ subsequently issued by a different party, and under compulsion of a rule, began a new and different suit.

But it is said that as applied to this case, the Act of 1891 would violate section 54 of Art. III. of the Constitution that no law "shall be passed granting powers or privileges in any case where the granting of such powers and privileges shall have been provided for by general law, nor where the Courts have jurisdiction to grant the same, or give the relief asked for." The application of this argument is not quite clear. The section of the Constitution quoted is a prohibition against local and special laws, while the Act of May 12, 1891, P. L. 53, is a general law applicable to all cases except those pending at the time of its passage. The exclusion of all retroactive force does not detract from its general character. If it be meant that the Act of May 25, 1878, P. L. 149, already supplied a remedy, nevertheless the Legislature might provide a new and different one. Under that Act the executors of Dolph filed a bill in 1890 to reform the defective acknowledgment of appellants' deed to Dolph. That bill was dismissed, Hand *v.* Weidner, 151 Pa. 362, and if that was a final adjudication of the same rights between the parties, undoubtedly no new statute could revive the controversy. But it was not. It was a bill in aid of a defence to the action of ejectment, and set out that the deed had been properly acknowledged by appellant, and asked to have the certificate corrected accordingly. The answer denied the facts averred, and under the chancery rule requiring two witnesses to overcome a responsive answer, the plaintiffs failed to make out their case. That decision was that the defective certificate of acknowledgment could not be reformed. The Act of 1891 has an entirely different purpose. It does not seek to correct defective acknowledgments, but makes certain deeds valid and admissible in evidence notwithstanding such defects. It is a general curative Act, in line with the presumption of the common law which dispenses with the production of the subscribing witnesses to deeds more than thirty years old, and in line also with the prior Acts of Assembly of February 24, 1770, April 3, 1826, April 16, 1840, April 10, 1849, April 15, 1851, May 5, 1854, March 20, 1860, May 25, 1874, May 26, 1874, and others, which may be found in Brightly's Purdon's Dig. tit. Deeds, etc., and which have been held constitutional: Barnet *v.* Barnet, 15 S. & R., 72; Tate *v.* Stooltzfoos, 16 S. & R. 35; Mercer *v.* Watson, 1 Watts, 330; Grim *v.* School District, 57 Pa. 433; Shrawder *v.* Snyder, 142 Id. 1.

The errors assigned as to the admission and rejection of evidence require little discussion. W. Dolph was called to prove that by direction of Edward Dolph, the subsequent grantee, he had told appellant that she had better accept the offer of Edward, for if not, she would get nothing out of the estate. The learned Judge rightly held that this was insufficient to set aside a deed delivered, consideration accepted, and no effort to charge fraud until twenty years later.

The deposition of Warner, the justice of the peace, who had certified the acknowledgment, was offered, not to show fraud or deny his signature, but to contradict the fact that he had taken the acknowledgment. His testimony was not admissible for this purpose, and his deposition was inadmissible for the additional reason that it was taken in a different suit between different parties.

A. J. Weidner was an incompetent witness. He was one of the grantors in the deed to Dolph and Dolph was dead. Nor was his testimony in the equity suit made admissible here by his having been called there by the plaintiffs for cross-examination. Neither the issue nor the parties were the same. In the equity suit the appellee and Weidner were co-defendants, and Weidner was called by the plaintiffs. Appellee could not have objected and he was not bound by the plaintiffs' waiver of the objection.

Judgment affirmed. W. C. S.

Jan., '95, 87. March 27, 1895.

Martin v. Fridenberg.

Entire contract—No recovery for part performance—Affidavit of defence—Fraud.

Where a party contracts to convey three houses, the failure or inability to convey two of them is a non-performance to that extent of the purpose of the contract, and there can be no recovery for the price of the one.

Plaintiff in his statement averred an agreement by defendant to purchase a house for $800 subject to a mortgage; that the deed had been delivered but that he had not been paid the cash consideration for which suit was brought.

The affidavit of defence averred that the contract mentioned in the statement was but part of the actual agreement, which was for the sale of three properties, in two of which a third person had an interest; that another paper had been drawn and was to have been executed at the same time, but the other party in interest did not attend, and that defendant was willing to pay upon completion of entire contract. Judgment was entered for plaintiff for want of sufficient affidavit of defence. On appeal:

Digitized by Google

Held, 1. That this was error; defendant, if he can establish his facts, cannot be called upon to perform but a part of his contract at the mere option of the other party.

2. That while there was no fraud in the original representation, the attempt to enforce but part was such fraud as would admit parol evidence to qualify the separate written contract for one property, and to show the real nature of the contract.

Appeal of Isaac H. Fridenberg from the judgment of the Common Pleas No. 2, of Philadelphia County, for want of a sufficient affidavit of defence.

The essential parts of the plaintiff's statement and the affidavits of defence are set out in the opinion of the Supreme Court, *infra*.

The Court entered judgment for want of sufficient affidavit of defence.

Defendant appealed, assigning for error this action of the Court.

Joseph L. Greenwald, (*Clinton O. Mayer* with him), for appellant.

The paper sued upon was but a part of the actual agreement, and was signed upon a contemporaneous declaration which induced the defendant to sign the same. Evidence of this parol agreement is admissible.

Greenawalt *v.* Kohne, 85 Pa. 375.
Walker *v.* France, 17 WEEKLY NOTES, 313.
Barclay *v.* Wainwright, 86 Pa. 191.
Juniata Building Association *v.* Hetzel, 103 Id. 507.

The contract was entire and not divisible, hence there can be no recovery for a part performance.

2 Parsons on Contracts, 517.
Lucesco Oil Co. *v.* Brewer, 66 Pa. 354.
Gill *v.* Lumber Co., 151 Id. 538.
Quigley *v.* DeHaas, 82 Id. 267.
Rugg & Bryan *v.* Moore, 110 Id. 236.
Hartley *v.* Decker, 89 Id 472.
Martin *v.* Schoenberger, 8 W. & S. 368.
Harris *v.* Liggett, 1 W. & S. 305.

Charles Kuni, Jr., for appellee.

On the hearing of a rule for judgment for want of a sufficient affidavit of defence, the Court may not go outside of the case as presented by the claim and affidavit to consider extraneous facts, either in support of or against the line of defence disclosed.

Allegheny City *v.* McCaffrey, 131 Pa. 137.
Philadelphia *v.* Baker, 140 Id. 11.

The written agreement is complete and makes no reference to any other contract, and hence parol evidence is inadmissible to contradict it.

Hennershotz *v.* Gallagher, 134 Pa. 9.
Rowand *v.* Finney, 96 Id. 196.
Eberle *v.* Bonafon, 17 WEEKLY NOTES, 335.

The affidavit did not tend to establish any fraud, accident or mistake, and hence could not change the written contract.

Martin *v.* Berens, 67 Pa. 459.
Hunter *v.* McHose, 100 Id. 38.
Ashman *v.* Weigley, 148 Id. 61.
Heydt *v.* Frey, 21 WEEKLY NOTES, 266.

There is no allegation that defendant was induced to sign the agreement on the faith of the alleged verbal statements.

Thorne *v.* Warfflein, 100 Pa. 519.
Sanders *v.* Sharp, 153 Id. 567.

The alleged parol agreement was not set out with sufficient particularity.

Willard *v.* Reed, 132 Pa. 5.
Erie *v.* Butler, 120 Id. 374.

The defendant having failed and refused to deliver the goods and money found due under the contract in suit, became liable for the consideration money with interest.

Singerly *v* Armstrong, 5 WEEKLY NOTES, 139.
White *v.* Thompkins, 52 Pa. 363.
Murray *v.* Ellis, 112 Id. 485 and 487.

July 18, 1895. DEAN, J. Judgment was entered in the Court below against Fridenberg, defendant, for want of a sufficient affidavit of defence, and he now appeals, alleging the affidavit was sufficient to send the case to a jury.

By his statement, plaintiff averred, a written agreement was entered into between him and defendant on August 6, 1894, whereby plaintiff agreed to sell and convey to defendant, a house and lot, 1523 South Twenty-first street in Philadelphia, for the consideration of $800, subject to a mortgage of $1,500, but clear of all other incumbrances; the $800 to be paid in watches, guns, rings, clothing, knives, forks, etc., at prices agreed upon, and bill of sale for same to be given upon delivery of deed for lot.

Further, that in pursuance of this contract, they met at defendant's place of business, four days afterwards, and the watches, guns, and other property were selected, values fixed, and property set aside for plaintiff; at the same time, plaintiff delivered to defendant, the deed for the lot, subject to the mortgage of $1,500, which had been reduced by payments to $1,430. That, at the same time, an account was stated between them, which left a balance due plaintiff of $58.51, which defendant agreed to pay plaintiff in goods and cash, the following Monday, August 13. On that day, plaintiff demanded of defendant the goods and cash, but payment was refused, and suit is therefore brought for the $858.51, with interest.

To this claim, the defendant answered by affidavit, as follows: That one Carter, agent for plaintiff, in the beginning of August, opened negotiations with him for the sale of three houses, 1217 North Twenty-ninth street; 2223 Carlisle street, and the one described in plaintiff's state-

Digitized by Google

ment, 1523 South Twenty-first street, the price for the three being $3,000, subject to mortgages of $2,000 on the first; $1,800 on the second; and, as before mentioned, $1,500 on the third; the consideration, $3,000, to be paid in merchandise, such as watches, guns, clothing, etc.; that on the 6th of August, plaintiff called to close the transaction, exhibiting to defendant two written agreements for signature, one of them being the same as set out in plaintiff's statement, for the sale of 1523 South Twenty-first street; the other being for the sale of the two properties on Twenty-ninth and Carlisle streets; in the second agreement, one Murphy was named as a party in the body of the agreement with Martin, because, as represented to defendant, the title to these two properties was in names of Martin and Murphy, but the second agreement not being signed by Murphy, it was further represented to defendant, that he was out of the city, but as soon as he returned, which would be that afternoon or next day, he would join in the execution of the contract; that, relying on this representation, defendant signed the agreement for the purchase of 1523 South Twenty-first street; he admits they agreed upon the goods and value thereof, as the consideration for the South Twenty-first street property, on August 10, 1894, but no satisfactory evidence of any payments on the $1,500 mortgage was exhibited to defendant, and no settlement of balance due was then had, and the deed, by agreement, was left in escrow with defendant's agent until the following Monday, which was the 13th of August, 1894, when final settlement was to be made, and the goods and cash delivered to plaintiff. On that day, plaintiff's agent called upon defendant, but would not make final settlement for the three properties, as stipulated for in the original agreement, and while the goods and cash claimed by plaintiff, would represent the proportion of the consideration of the South Twenty-first street property, plaintiff did not offer to settle the entire transaction, as promised, and therefore defendant declined to pay for the one property, and leave the other two unadjusted; and defendant avers his willingness and readiness to perform the entire contract as agreed upon, but that until plaintiff is ready to perform, he is not indebted in any amount to him.

It will be noticed, plaintiff's statement avers a separate, distinct agreement for the sale of the one property, 1523 South Twenty-first street; defendant's affidavit avers, that this is but part of the contract, the entire contract being for three properties, the one part of it signed, and the other not, only because a third party had an interest in the other two, and being absent on the day fixed for executing the whole contract, the transaction was not then consummated. If this be so, defendant cannot be called upon to perform part of his contract at the mere option of the other party. Nor does the affidavit lack precision, as contended by appellee. If, in the one transaction, he contracted to purchase three houses, and the plaintiff was ready to sell and convey but one, and then induced him to sign a contract specifying but one, on the promise that Murphy, in the afternoon of that day, or on the next day, would join him in the agreement for sale of the other two, and he now attempts to enforce the part of the contract thus obtained, such conduct is a fraud upon Fridenberg; he may not have intended a fraud by the representation, but he practices one, when he sues upon the fraction of a contract, obtained by misrepresentation. If the plaintiff had been the sole owner of the three properties, and the contract had been evidenced by one instrument, no Court would sustain his demand for the price of one, when he was not willing and ready to convey the other two. He is in no better position now, if Fridenberg, by proper evidence, can sustain his affidavit, wherein he avers, that it was one contract for the three houses, to be evidenced by two instruments only, because, as to two of them, there was an outstanding interest in Murphy, who would join in the second agreement. If the fact be as asserted by Fridenberg, his explanation is a plausible one. Murphy could not join in the contract for the one property, because he had no interest in it; Martin could not contract alone, by writing, to sell the other two, for he was not the sole owner.

There are some contracts on which there may be a recovery without a literal performance by plaintiff; when the main object of the contract has been accomplished, and immaterial or secondary stipulations are not performed, there may be a recovery, subject to a deduction for damages as to the parts not performed. But if, as defendant asserts, the contract was for the sale of three houses, the failure or inability to convey two of them would be a non-performance to that extent of the principal purpose of the contract, and there could be no recovery for the price of one house out of three. As is said in Martin *v.* Schoenberger, 8 W. & S., 367: "To permit a man to recover for part performance of an entire contract . . . would tend to demoralize the whole country. If the law were so, a man would perform just so much of his contract as would suit his convenience or cupidity." There are numerous cases which hold to the same doctrine, and those cited by counsel for appellee are not in conflict with it. These last hold, that where parties have deliberately put their agreement in writing, in the absence of fraud, accident or mistake, the writing is not only the best, but the only evidence of their

Digitized by Google

agreement. No one can question the correctness of this rule; but the trouble in applying it here, is, that the paper sued on by plaintiff, if the affidavit be taken as verity, is, that it does not embody the whole contract; another writing prepared and to be executed in connection with the one sued on, constituted the entire written contract.

We think the affidavit was sufficient to send the case to a jury, therefore the judgment is reversed, and procedendo awarded.

W. M. S., Jr.

Jan., '95, 54. April 23, 1895.

Dell v. The Phillips Glass Company.

Railroads—Injuries, while on tracks of—Contributory negligence—Voluntary occupation of a place of peril.

Railroad tracks, except at crossings, and then only under suitable caution against collision, are for the exclusive use of the cars and locomotives.

Where anyone goes upon a railroad track unnecessarily, and thus voluntarily assumes a position of peril, he is guilty of contributory negligence, and if he is injured by a car running upon the track, he cannot recover damages.

D., employed as a mail carrier, by a railroad company to carry mail bags to and from the station, on the arrival and departure of trains, came to the station one night, after dark, and some ten minutes before a train was due. While waiting for the train, he stood between the rails of a siding, and was struck and killed by a box car, which broke loose from its brakes, some distance off, and coming down grade, broke through the switch and followed the siding to where D. was standing.

***Held*: that D. was guilty of contributory negligence.**

Appeal of The Phillips Glass Company, defendant, from the judgment of the Common Pleas of Huntingdon County, in an action of trespass brought by Julia Dell against said defendant, to recover damages for the death of her husband, Archie Dell, caused by the alleged negligence of the said defendant.

The facts of this case are fully set forth in the opinion of the Supreme Court. The defendant submitted, *inter alia*, the following point:

2. "The plaintiff's decedent voluntarily assumed a specially hazardous place and was so guilty of contributory negligence as to bar recovery, by the evidence in this case."

Answer. This point we refuse. (Fourth assignment of error.)

The Court charged the jury, *inter alia*, as follows:

"If you find, then, that this defendant was guilty of negligence in the improper management and care of these cars, in not protecting them so that they would not escape, the next question that arises is: Was Mr. Dell guilty of what is termed in law contributory negligence? Contributory negligence is negligence on the part of the plaintiff or the plaintiff's decedent; and it consists of the want of such care and prudence as the circumstances of the particular case require. [Mr. Dell was the carrier of the mail; and, according to all the evidence in the case, there was nothing that would warn him of danger in occupying the position that he was in; and it was his duty, as soon as the accommodation came, to go to the north track and place the mail in the baggage car of the Altoona accommodation. He was there, according to the evidence, a few minutes before schedule time, when he was killed. Not having any apprehension of danger, being in the line of his duty and knowing that this defendant had no right upon that railroad track at the Mapleton station, so far as it was concerned, he was warned of no danger from its operations; and, giving that evidence its legitimate effect and considering and weighing all the circumstances surrounding the conduct of Mr. Dell, we feel constrained to say to you, upon the question of his contributory negligence, that there is no evidence in the cause affecting Dell with negligence on his part.]"

Verdict for plaintiff and judgment thereon, whereupon the defendant took this appeal, assigning for error, *inter alia*, the answer to their second point, and the portion of the charge in brackets, as given above.

George B. Orlady, for appellant.

A party cannot knowingly expose himself to danger and then recover damages for an injury which he might have avoided by the use of a reasonable precaution. Knowledge is to be presumed from habitual use for a long time, and he who knows must remember at his peril, and not to remember is contributory negligence.

Palmer *v.* Dearmy, 17 Week. Dig. (N. Y.), 145.
Pittsburgh Southern R. R. Co. *v.* Taylor, 104 Pa. 306.
Haven *v.* Bridge Co., 31 Weekly Notes, 191.

It was negligence, *per se*, for the decedent to stand as he did upon the siding. He was a mere trespasser, and can not recover, except for wanton injury, even though the negligence of the Company's agents contributed to the result.

Woods *v.* Lloyd, 16 Atl. Rep. 43.
Penna. R. R. Co. *v.* Aspell, 23 Pa. 147.
Railway *v.* Collins, 87 Id 405.
Mulherrin *v.* R. R. Co., 81 Id. 366.
Cauley *v.* P. C. & St. L. R. Co., 95 Id. 398.
Westerberg *v.* R. R. Co., 142 Id. 471.
Myers *v.* B. & O. R. R. Co., 30 Weekly Notes, 492.
Spisak *v.* B. & O. R. R. Co., 31 Weekly Notes, 297.

W. H. Woods, (with him *John M. Bailey* and *J. S. Woods*), for appellee.

Digitized by Google

A party can not be guilty of contributory negligence, unless he has some reason to expect danger, and there is a duty of care on his part in relation to it.

Gray *v.* Scott, 66 Pa. 345.
Brown *v.* Lynn, 31 Id. 510.
Pittsburgh *v.* Grier, 22 Id. 54.
Penna. R. R. Co. *v.* Ogier, 35 Id. 60.
Phila. & Trenton R. R. Co. *v.* Hagan, 47 Id. 244.

July 18, 1895. DEAN, J. The husband of plaintiff was an employé of the Pennsylvania Railroad Company; his work was to carry mail bags to and from Mapleton station, on arrival and departure of trains; he had been so engaged for about five years. After dark, on the evening of the 27th of October, 1892, about ten minutes before a train was due, he was at the station standing between the rails of a side track of the Pennsylvania railroad, being the inside track next the station house, when he was struck and killed by a box-car then in use by the defendant company. The occasion of the accident was this: Defendant is a corporation engaged in mining and shipping sand at that station; its sand quarry is about one mile from the station; a branch, called the Rocky Ridge railroad, extends from the quarry to the main line of the Pennsylvania railroad, and is connected with it by a switch at a point nine hundred and seventy feet from the station; the box car had been run on the branch, and loaded with sand, the day of the accident; the branch road has a very steep incline towards the main track; some distance towards the switch, from the quarry, a steep part of the grade, defendant had a wharf or platform from which to load sand; at that point, stood this loaded car; the brakes were on, and blocks at the wheels. Notwithstanding it was thus secured, the car that evening started down the steep grade, and having acquired great momentum, broke through the switch, followed the side track of the main line from the switch to where Dell was standing, and killed him. His widow, averring his death was caused by defendant's negligence, brought suit for damages. On the trial, the learned Judge of the Court below submitted the question of defendant's negligence to the jury, but peremptorily instructed them there was no evidence of any contributory negligence on part of deceased. Under this instruction, there was a verdict for plaintiff, and, as a consequence, this appeal by defendant, who prefers five assignments of error. It is not necessary to elaborately discuss all the several assignments; except the second and fourth, none of them can be sustained; in all other respects, the law was correctly stated, and the charge was altogether fair and impartial.

The fourth assignment alleges error in the Court's answer to defendant's second point, which point and answer were as follows:—

"The plaintiff's decedent voluntarily assumed a specially hazardous place, and was so guilty of contributory negligence as to bar recovery in this case." *Answer*. "This point we refuse."

The reasons for this refusal, which constitutes the second assignment of error, are to be found in the general charge, as follows: "Was Mr. Dell guilty of what is termed in law contributory negligence? Contributory negligence, is negligence on the part of plaintiff, or plaintiff's decedent, and it consists of want of such care and prudence as the circumstances of the particular case require. Mr. Dell was the carrier of the mail; and according to all the evidence in the case, there was nothing that would warn him of danger in occupying the position he was in; it was his duty, as soon as the accommodation came, to go to the north track, and place the mail in the baggage car of the Altoona accommodation. He was there, according to the evidence, a few minutes before schedule time, when he was killed. Not having any apprehension of danger, being in the line of his duty, and knowing that this defendant had no right upon that railroad track at the Mapleton station, so far as it was concerned, he was warned of no danger from its operations; and giving that evidence its legitimate effect, and considering and weighing all the circumstances surrounding Mr. Dell, we feel constrained to say to you, upon the question of his contributory negligence, that there is no evidence in the cause affecting Dell with negligence on his part."

It seems to us, there is manifest error in the conclusions here drawn from the established and undisputed facts. In front of the station and waiting room are four Pennsylvania railroad tracks; the two outside tracks are side tracks; the two middle ones for east and west bound trains; the side track next the station is about five feet from it; Dell's business there was to cross this track when the west-bound train arrived, and place the mail in the baggage car, and when struck, he had the mail bag on his shoulder, for the train which was to take it was due in five to eight minutes; when he first reached the track, he met three or four acquaintances, and stood between the rails of the side track next the station, talking to them, for from five to ten minutes; while so standing, the sand car came from the Rock Ridge branch, broke through the switch guards, ran on the side track where he was standing, and killed him.

From these facts, the learned Judge concludes: 1. There was nothing to warn him of danger in occupying the position between the rails of the side track, nor had he reason to apprehend danger. 2. That while between the rails of

Digitized by Google

this side track, he was in the line of his duty.

Certainly there was no evidence to impute contributory negligence to the deceased, if the law and facts warrant these conclusions. But do they? Negligence is the absence of care according to the circumstances. On railroad tracks, run cars and locomotives. Persons, animals and vehicles are in peril when on or between them, and except at crossings, and then only under suitable caution against collision, they are for the exclusive use of cars and locomotives: R. R. Co. *v.* Hummell, 44 Pa. 375; Clark *v.* R. R. Co., 5 WEEKLY NOTES, 119; Westerberg *v.* R. R. Co., 142 Pa. 471. This is the settled law; settled because of unvarying long observation and experience. If, then, Dell, at the time he was killed, was upon the track unnecessarily, he voluntarily assumed a position of great peril, unless there were something in the circumstances which took this particular track out of the dangers incident to railroad tracks. It was not frequently used for the passage of cars and trains; not nearly so often as either of the middle tracks, but that only rendered the danger comparatively less; the nature of its use, and the peril, though the latter in less degree, remained the same; the danger of being shot is great, if a volley be aimed and fired at a man; there is still danger, if but one gun be aimed and fired at him; and in each case, he has reason to apprehend danger, though less from the one gun than from the many. Standing between these rails, the deceased was in the way of any car that only happened, by accident or negligence, to run on that track. He doubtless assumed, no car would run upon the track at that time, just as he might have stepped further, and stood on the next one, or main track, on the assumption that the train would not reach him until schedule time. He knew the tracks were there for cars to run on, and not for use as waiting rooms, for arrival and departure of trains; and however mistaken his expectation of immediate danger, he knew it was a place of peril.

Nor, while standing there, was he in the line of his duty as mail carrier; he took his position in a place of peril, and occupied it for about ten minutes before the time for the arrival of the Altoona accommodation, on which he was to put the mail bag; his occupation of the tracks, in the line of his duty, extended only to crossing them with his mail bag, delivering it, and returning to the outside of the roadbed. If the injury had happened in these few seconds, it could properly be said, he was then on the tracks in the performance of his duty, and defendant would have been answerable for the negligence which caused the injury. But when injured, he was voluntarily between the rails, waiting for the train; the waiting room and platform were places of safety; where he waited was not. Obviously, neither necessity nor duty required him to be there. From all the admitted facts, our conclusions are directly the opposite of those arrived at by the learned Judge of the Court below. We think contributory negligence on the part of deceased, is a necessary conclusion from the undisputed facts, and that a jury should be permitted to draw no other.

The only evidence, in view of the conduct of the deceased, that would have made defendant answerable in damages, would have been wanton injury; there was no testimony pointing to such a fact.

The defendant's second point should have been affirmed: the judgment is reversed.

STERRETT, C. J., dissented on the ground that the question of contributory negligence was for the jury.

S. H. T.

Jan. '95, 180. April 11, 1895.

Tietz v. Philadelphia Traction Co.

Trespass—Damages—Negligence — Proximate Cause—Charge of Court.

In an action for damages incurred by reason of defendant's negligence, brought by one who had previously met with a severe accident, it is a question of fact for the jury whether the injuries complained of were caused alone by defendant's negligence or were attributable to his former accident.

The charge of the trial Judge is inadequate when it does not fairly present the whole case to the jury on the facts. It is also inadequate when it fails to furnish the jury with a clear statement of the rules of law applicable to the questions involved.

Where the jury have disregarded the method of arriving at the damages pointed out by the Court and rendered a verdict in excess of that which, had they followed their instructions, they would have found, on a motion to set it aside it is better practice when the Court denies the motion and enters judgment on the verdict as it stands, that reason for the judgment be filed by the Court.

Appeal of the Philadelphia Traction Company, from the judgment of the Common Pleas No. 3, of Philadelphia County, entered on a verdict rendered in an action of trespass, wherein appellant was defendant and Adam C. Tietz was plaintiff.

The facts of the case are fully set forth in the opinion of the Court.

The assignments of error were all as to the charge of the Court and are set forth in the opinion of the Court, *infra*.

Thomas Leaming and *John G. Johnson*, for appellant.

The learned Court erred in that the charge as a whole was not a fair and adequate presentation of the case; especially in that it failed to refer-

Digitized by Google

to the contradiction by defendant's witnesses of plaintiff's evidence as to the trolley occurrence and the fall from the mill, but stated the evidence of the plaintiff upon these points as though uncontradicted.

Reichenbach *v.* Ruddach, 127 Pa. 564.

If a Judge undertakes to marshal the testimony, it is his duty to do it fairly.

Herstine *v.* Lehigh, etc., R. R., 151 Pa. 244.
Penna. Canal Co. *v.* Harris, 101 Id. 92.

It was error to charge that, "As to the question of damages, if you find for the plaintiff; then he has had pain and suffering, he has had a permanent condition of ill health, a loss of many of the delights of life, and certainly has been suffering from most uncomfortable symptoms. In addition to that, there has been a great loss of earning power. You have not the right to capitalize his earning power at a sum which would yield the amount he would have earned, if invested, say at six per cent., during his life, for when he dies, no matter what his earning power would have been, it would have come to an end. You must fix a sum which would fairly compensate him for the annual income which would have accrued to him as long as he lived. He is living on something which, in the nature of things, must end some time. Therefore, you cannot give him a sum which, if placed at interest, would bring him in what he would earn yearly. The other elements of pain and suffering in the past and pain and suffering in the future, are matters which you can take into consideration in addition to the loss of earning power.

"If you find for the plaintiff, you will find your damages on the basis I have given. If you find for the defendant, of course, no question of damages arises."

Dooner *v.* D. & H. Canal Co., 164 Pa. 17.

"The evidence if stated at all, should be stated accurately, as well that which makes in favor of a party as that which makes against him; deductions and theories not warranted by the evidence should be studiously avoided. . . . . We have no doubt the learned Judge intended to do exact justice . . . . but . . . . deductions and theories are drawn, which, if not wholly unsupported, should have been left for the jury."

Burke *v.* Maxwell, 81 Pa. 152.

A. S. L. Shields, for appellee.

July 18, 1895. WILLIAMS, J. This case is in some respects a remarkable one. The plaintiff is a journeyman tinner who worked at roofing and cornice work. He earned when at work two dollars and a half per day or fifteen dollars per week. In August, 1892, while at work upon the roof of a two-story building he fell to the ground, striking upon the brick pavement in the back yard of an adjoining property. When his fellow workmen reached him he was lying where he struck and was unable to move or speak. He was carried from the yard on a litter and taken to a hospital. Here it was found that both bones of one leg were broken and the bones about the ankle joint. He was also bruised about the head and body. When able to speak he complained of numbness or loss of sensation in the injured leg and in the back. He was also afflicted for some weeks with retention of urine, and the regular use of a catheter became necessary. At the end of forty-four days he was able to move about with the aid of two crutches and was discharged from the hospital in this condition. He continued to improve slowly for some three months and was able to lay aside his crutches.

At this time, and before he had resumed work of any sort he became a passenger on one of the defendant's street cars, and while upon the car a collision occurred. The jar occasioned by it did not jostle any other passenger from his position, but the plaintiff, who was standing on the rear platform, was thrown forward against the glass window in front of him and the skin was broken along the ridge of his nose by contact with the glass. No other injury was visible, or was complained of at the time. The plaintiff left the car and walked back to his home, a distance of half a mile or more.

From the time of this accident he says he was confined to his bed for three weeks, when he began to improve, and thereafter continued to gain slowly until he began work as a canvassing agent for a laundry, going about with a horse and wagon collecting articles, taking them to the laundry, and returning them again to their owners. This business he was still engaged in at the time of the trial. He alleged, however, that he was disabled for work at his trade because of a severe injury to his spine resulting from the jar suffered while on the street car, and that his earning power was largely and permanently impaired thereby.

The defendant did not deny that the plaintiff's spine was in a diseased condition, but alleged that it was due to the injury received at the time of his fall, which was an adequate cause to account for it and which, it was argued, did in fact produce the condition from which the plaintiff was suffering. It was further contended, that the jar resulting from the collision was not an adequate cause, inasmuch as it was not severe enough to jostle any other person from his position in the car, whether such person was seated or standing.

Digitized by Google

It is very plain therefore that the great question of fact for the jury was whether the spinal disease from which the plaintiff was suffering at the trial was occasioned by his fall from the roof of a two-story building to a brick pavement below, or by the jolt received while on the street car of the defendant company. If it was found to be the result of the fall there was the further question as to what injury had been suffered as the result of the jolt by the cutting of the face, or other consequence of the plaintiff's loss of his equilibrium.

The first assignment of error complains that the charge of the learned Judge did not properly submit these questions, but that in its treatment of them it was inadequate and unfair. We do not understand that partiality or intentional unfairness is charged, but that the inadequacy of the charge was such as to work unfairness to the defendant. Turning to the charge we find that the learned Judge begins by saying, "I think we are all tired, jury and Court, and counsel, and all." Continuing he said, "I have not the time to go through all of the facts that should be considered," but added, "I can give you some notion of them." He then directed the attention of the jury to the diseased condition of the plaintiff, stated that the negligence of the defendant in the management of the car was "unquestioned," and told them there was no contributory negligence on the part of the plaintiff. He then stated the question to be "How far did the defendant injure the plaintiff?" To guide them in determining this question he referred briefly to the medical testimony relating to the character of the plaintiff's disease and its probable cause, and told them that from this testimony the question was raised, "how far the defendant would be liable," on the supposition that certain facts should be found by the jury. These are referred to in the third specification of error. They are these, "Supposing his spine was originally injured (by the fall), and supposing the retention of the urine passed away and was not followed by incontinence of urine, and supposing he was getting better of the concussion of the spine (occasioned by the fall), if the second accident (the jolt on the car), even though it did not cause the present symptoms, revived a disease . . . . which might or might not have developed without the accident (the jolt)." If these assumed facts were found they were told they might hold the defendant liable for the results of a disease it did not cause and which might have assumed the same proportions if the accident on the car had never happened. But we will use the words of the charge upon this point. They are, "If on the other hand the first accident laid the foundations for it" (plaintiff's present condition), "and he was getting better, and the second accident revived the disease, which, perhaps, afterwards would not have been revived" (and perhaps would have been), "then you can ascribe the condition to the second accident."

The learned Judge then referred to the position taken by the defendant that the accident on the car was not violent enough to produce any serious injury, and dealt summarily with it in this fashion. "It may be," said he, "that what would not have affected a man in sound health did affect him. Of course men in a weak condition of health have rights the same as those in a sound condition of health." With this remark this line of defence was dismissed from consideration.

What had been in fact submitted to the jury, except the amount of the damages, it would be difficult to see. In the language of the assignment of error this charge was inadequate; so inadequate as to be in its effect upon the jury misleading, and in its effect upon the defence unfair. The result was a verdict of little less than twenty-seven thousand dollars. The learned Judge had said to the jury upon the subject of damages, "You have no right to capitalize his earning power at a sum which would yield the amount he would have earned, say at six per cent. during his life, for when he dies, no matter what his earning power would have been, it would have come to an end." If the loss in earning power be what the plaintiff claims, thirteen dollars per week, and no allowance be made for vacations, sickness, or want of work, but every day in the year be counted, his total loss of earning power might be six hundred and seventy-six dollars per year. The amount of the verdict put at interest at six per cent. would yield an income of sixteen hundred and twenty dollars per year. The jury did just what the learned Judge told them they must not do. They capitalized the plaintiff's loss of earning power. They emphasized their disregard of the instructions of the Court by nearly trebling the sum so arrived at. The verdict should have been promptly set aside for this reason alone. When a motion was made to set it aside, the learned Judge, for some reason that we cannot discover, refused it, and entered judgment on the verdict without abatement or modification. This is not assignable error, but in view of the explicit direction to the jury as to their duty in the premises, it deserves mention as one of the noticeable things upon this record. We should have been gratified, and perhaps helped in the disposition of this case, if the learned Judge had placed his reasons for sustaining a verdict, rendered in flat violation of his instructions, in some substantial form on the record. But we sustain the first assignment of error. The charge

Digitized by Google

was inadequate. It contained no clear statement of the questions involved and no adequate presentation of either of them. The second, third and fourth assignments are also sustained and for the same reason. The treatment of the subjects referred to therein is wanting in clearness and fulness.

The length of the trial and the fatigue incident to it are no doubt responsible for the haste and inadequacy of the charge, but they cannot remove the well-grounded objections urged against it in this Court. It is the fact of inadequacy from which the defendant suffers, and of which we are bound to take notice.

The judgment is reversed and a venire facias de novo is awarded.

DEAN, J., concurring. I concur in the judgment in this case but do not concur in the reasons therefor. They do not, in my opinion, keep sufficiently in view the character of the evidence adduced on both sides at the trial, but strike me as resting, in the main, on what is assumed by this Court to be an excessive verdict.

The function of determining the truth from contradictory evidence in this Commonwealth is confided to the jury. As long as our Constitution declares that trial by jury shall remain as heretofore, the stability and permanency of our judicial system will be best served, if all those concerned in its administration keep strictly within the lines laid down by the fundamental law.

Here it was in effect conceded that plaintiff at time of trial was a physical wreck beyond hope of repair. It was also conceded that about five months before the car accident he had fallen from a building and sustained very serious injury; further, it was scarcely denied that at this time he had apparently, in good degree, recovered from the effects of the first injury and was again earning a livelihood.

At the trial, plaintiff had offered evidence tending to show: 1. Negligence on part of defendant resulting in personal injury. 2. That recovery from his first injury had been arrested thereby, and permanent disability induced.

The trial was long and the contradictory testimony abundant. The questions from it for the jury to answer were: Had defendant by negligence injured plaintiff? If so, to what extent? Was the first injury permanent or only temporary and he on the road to recovery at the time of the second one? If even his first injury was permanent, was it aggravated by the second? If not permanent had it been made so by the second? The conflicting evidence bore on all these questions. The importance of the case suggested a full and clear exposition of the law applicable to it; it was the manifest duty of the Judge to give it, and no weariness brought on by a long and vexatious trial, or aversion to the drudging labor necessary to the elimination of confusing and irrelevant details, from that which bore directly on the important issue, could absolve him from this duty. This was not performed, and in this sense the charge was inadequate.

It was not such a charge as in a case of this gravity, both parties had the right not only to expect but to demand. Therefore there was error, not in commission, for there is nothing fairly objectionable in what was said, but omission. I will not undertake to say the jury erred in their verdict, for I do not know. I have no more right to tell them what was the truth from this testimony than they have to tell me what is the law applicable to it. I do know, however, they did not have from the Court the full and clear statement of the law applicable to the evidence, which should precede intelligent deliberation and correct conclusion. A jury of the very best informed laymen are entitled to this much aid from the Court. These, very briefly, are my reasons for sending the case back for retrial; not because the jury certainly erred, but because they had not all the light they ought to have had from him whose duty it was to carry the lantern, and therefore, being left in the dark, they may have stumbled. W. D. N.

Jan. '95, 210. April 25, 1895.

Gettysburg National Bank v. H. C. Chisolm.

Negotiable paper—Alteration—Forgery—Innocent holder for value.

Any alteration of negotiable paper which increases the liability of the maker without his knowledge, is a forgery. If the alteration is apparent on the face of the note it is notice to an endorsee and the latter is not an innocent holder for value.

B. gave a note to C. who had the same discounted by A. In a suit by A. on this note, B. testified that the words "with interest at 6 per cent." were interlined after he had signed it and without his knowledge:

Held, 1. That the interlineation amounted to a forgery.

2. That A. was not an innocent holder for value, because the interlineation was apparent upon the face of the note.

3. That A. could not disregard the interlineation and recover the face value of the note without the 6 per cent. interest.

Appeal of H. C. Chisolm, defendant, from the judgment of the Common Pleas of Huntingdon County.

Digitized by Google

On the trial, before FURST, P. J., the plaintiff offered in evidence a note of H. C. Chisolm, to order of E. Bennett & Son, for $66.66 with interest at 6 per cent., duly endorsed by E. Bennett & Son. The admission of this note in evidence was objected to, "because it bears upon its face evidence of a material alteration in that the words 'with interest at six per cent.' are written in a different handwriting from that of the writing in the body of the note, and different from that of the maker, H. C. Chisolm, and interlined. And until the plaintiff shows affirmatively that this alteration was made with the knowledge and consent of the defendant, the note is inadmissible."

Note admitted. (First assignment of error.)

Plaintiff's cashier testified that they had discovered the note along with a number of others brought them by Caine, who was an agent of Bennett & Son, that he believed the body of the note and the words "with interest at six per cent." were all in Caine's handwriting. Defendant testified that the words "with interest at six per cent." were interlined after he had signed the note.

Counsel for plaintiff then asked leave to file plaintiff's statement declaring for the principal of the note but not for the interest.

Objected to because the alteration vitiated the note and there could be no recovery upon it. Objection overruled and amendment admitted. The Court directed the jury to render a verdict for the amount of the note and costs of protest.

Verdict and judgment accordingly.

George B. Orlady, (*H. H. Waite* with him), for appellant.

John M. Bailey, for appellee.

July 18, 1895. GREEN, J. It was an entirely undisputed fact in this case that the defendant's obligation in suit, was altered, after it left him, and without his knowledge or consent. The alteration was made by a visible interlineation of the words "with interest at six per cent." That this alteration was not merely a fraud, but was also a criminal forgery of the instrument is manifest upon the present state of the testimony. From the evidence given on the trial it appears that the alteration was made by the payees' agent, and as the payees are chargeable with knowledge of the state of the instrument when it came to them, and also when it was used by them in bank, they must accept responsibility for the alteration. So far as the legal effect of the alteration is concerned it is quite as important as if the note had been changed from sixty-six dollars to sixty-six hundred dollars. It is as much an alteration of the defendant's contract in the one case as it would have been in the other, and the alteration must be regarded as being made by the payees. There is no room for an inference, and there is no proof in the cause, that the alteration was made innocently. It was certainly done for the purpose of increasing the liability of the defendant, and that alone stamps the transaction with fraud and with guilt. It is not disputed, indeed is conceded, that there could be no recovery on this instrument by the payees. It is urged, however, that the plaintiff, being an innocent holder for value, can recover notwithstanding the alteration, because they propose to recover only the amount of the note as it was before the alteration. If such were the law, forgeries by alteration would be protected by the law. The fraudulent payee would run no risk of loss because he would only have to transfer the note to an endorsee who might recover the original amount of the note by simply proving that he was innocent of the fraud. But the law is not so charitable to this class of persons. So far as the endorsee is concerned in this case, the note was not innocently acquired, because the interlineation was apparent on the face of the note, and was notice sufficient to put the plaintiff upon inquiry. The words "with interest at 6 per cent." do not occupy the whole line, but only a little more than half of it. These words look as if they were interlined and in point of fact they were so.

In Simpson *v.* Stackhouse, 9 Pa. 186, the added words were "Payable at the Bank of Pittsburgh," but they were written at the end of the instrument, and the only circumstance upon which we held the plaintiff, the endorsee, responsible for the alteration was that the added words were in a different handwriting from the rest of the instrument, which was written by the defendant. GIBSON, C. J., said in the opinion, "The principle of the English cases is that an alteration so far apparent on the face of a bill or note as to raise a suspicion of its purity, makes it incumbent on the plaintiff to prove that it is still available, and that it is not incumbent on the defendant to disprove it. . . . . He who takes a blemished bill or note takes it with its imperfections on its head. He becomes sponsor for them and though he may act honestly he acts negligently. . . . . Mr. Chitty says in his Treatise on Bills, p. 213, that a drawee ought not to accept a bill which has the least *appearance* of alteration, and it was not disputed at the trial that this note had that appearance or that the alteration was in a material part of it."

In Kennedy *v.* Bank, 18 Pa. 347, the action was brought by a bank, as holder, against the endorsee, and it appeared that the date of the note had been altered from the 12th to the 13th of August. It was held that this alteration vitiated the note although the bank officers purged themselves of all knowledge of the alteration.

Digitized by Google

We decided that it was not sufficient for the holder to show that the date was not altered *after* he received it; in order to recover, it was necessary for him to show that the alteration existed when the defendant endorsed it, or that he assented to the alteration.

In the case of Paine *v.* Edsell, 19 Pa. 178, the action was brought by an innocent holder against the endorsee and it was alleged the date had been altered. The Court below admitted the note in evidence saying, "But this note presents no such marks of alteration as make it necessary for the plaintiff to offer explanatory proofs. The date is disfigured by a blot, on which one of the figures is made, and very few written instruments are free from similar defects." But BLACK, C. J., said, "In Simpson *v.* Stackhouse, 9 Barr. 186, it is decided on principles perfectly satisfactory, that an apparent alteration is a material part of a negotiable instrument avoids it, unless it be proved that such alteration was lawfully made, and the burden of proving how it was made is on the holder. That the note in question was altered in its date can be seen at a glance, and, inasmuch as no evidence was given to explain it the jury should have been instructed that the plaintiff was not entitled to recover."

This note, also, was in the hands of an endorsee of the payee, but that circumstance did not help his right of recovery. As it was not proved, and probably is not possible to prove, in the case at bar, that the alteration was lawfully made, it is difficult to see how, under the foregoing decisions, there can be any recovery.

In Neff *v.* Horner, 63 Pa. 327, the instrument upon which suit was brought was a promissory note in form, but the parties signed it with seals, making it substantially a bond. The parties signing it were a principal debtor and four sureties. When the paper was brought to the payee he declined to receive it unless the words, "interest semi-annually," were added. The principal debtor then added at the end of the instrument the words, "interest to be paid semi-annually," without obtaining the consent of the sureties. We held the instrument avoided by the alteration. AGNEW, J., said, "It seems to be settled that a voluntary alteration of a bond, note or other instrument under seal, in a material part, to the prejudice of the obligor, or maker, avoids it, unless done with the assent of the parties to be affected by it, (citing numerous authorities.) . . . . In respect to bills, notes or other commercial paper, the rule is even more stringent, the law casting on the holder, the burthen of disproving any apparent material alteration on the face of the paper." We held also that there could be no recovery of the principal without the interest. The Court below had held that this could be done but in this respect we reversed the judgment saying, "The note was, therefore, avoided as to the sureties, and the Court erred in holding that the plaintiff could recover the principal from all the parties, disregarding his claim for the interest. It is argued that a recovery of the principal sum does no harm, for to that extent the sureties bound themselves. But the conclusive answer is that stated by Mr. Greenleaf, *supra*, sec. 565. The ground of the rule is public policy to insure the protection of the instrument from fraud and substitution. The writing goes into the hands of the party who claims its benefit, and the purpose is to take away the motive for alteration, by forfeiting the instrument on discovery of the fraud. When the sureties signed it they had a right to have it delivered unaltered to the plaintiff. He was bound to know that the alteration was rightfully done, and that the penalty of his negligence, or his wrongful act, was the loss of the security."

A similar attempt to recover the principal without the interest was made, on the trial, in Fulmer *v.* Seitz, 68 Pa. 237, but we declined to permit it. The alteration there, as here, was of a promissory note to which the words "interest payable semi-annually," were added by the principal debtor at the end of the note. The alteration was made by the payee in the presence, and with the consent of the principal debtor. The suit was brought to recover the whole amount of principal and interest, and the note was signed directly by all the parties, three of whom were sureties. On the trial the plaintiff made application to strike out the added words and recover only the principal sum. This was refused by the Court below and sustained by this Court. AGNEW, J., said, "Failing to show his right to recover against them, because of his failure to prove their assent to the alteration, he fell directly within the rule of policy which forbids the recovery of anything upon the altered instrument. . . . . One who makes a voluntary and unauthorized alteration of a written contract, and insists upon it by going to trial to recover upon the altered state of the instrument, has no *locus pœnitentiæ*, which, on his failure to establish his right to recover, will enable him to undo the wrong at the trial, and to stand as one who has made an innocent mistake, and never has insisted upon his right to enforce it."

In the present case the alteration was most probably made by an agent of the payee, and it was entirely without the knowledge and consent of the defendant who was the maker of the note. Of course the payee could not recover on the note for any amount, because it was an altered instrument, and is avoided altogether by public policy. Certainly he could not restore life to it by passing it over to an endorsee.

Digitized by Google

In Hartley & Co. *v.* Corboy, 150 Pa. 23, we reviewed the authorities upon this subject, and it is not necessary to do so again. There also an attempt was made to recover on the original state of the note before the alteration was made, and the Court allowed it to be done, but we reversed the judgment without a venire, holding there could be no recovery of anything. We said, "It matters not the least whether the alteration was made innocently, or in the belief that such a change could be lawfully made without the consent of the endorser. It is against public policy to permit such things to be done."

In Hill *v.* Cooley, 46 Pa. 259, the action was by an endorsee of a note against the maker, and the alteration consisted in the addition of the words, "Payable at N. Holmes & Son," introduced between the end of the note and the signature of the maker. The Court below held that the alteration was apparent, and charged the endorsee with the duty of explaining it by proof that the maker consented to it. In the absence of such proof it was refused admission in evidence and this Court sustained the judgment. WOODWARD, J., said, "The words, 'Payable at N. Holmes & Son,' were alleged to have been added to the note after it was signed and appearances favored the allegation. They were admitted to be in the handwriting of one of the payees who wrote the body of the note, and they certainly look as if added after the signature. . . . All the authorities cited in argument bear against the plaintiff in error, while Simpson *v.* Stackhouse, 9 Barr. 186, is conclusive in favor of the ruling below. According to the doctrine of that case the endorsee who sues this note, took it with its imperfections on its head, and was bound to come into Court prepared to explain them."

The case of Kountz *v.* Kennedy, 63 Pa. 187, has no application, as was well shown by AGNEW, J., in Fulmer *v.* Seitz. In this case the action was originally brought before a magistrate and the whole amount of principal and interest was claimed and recovered. The transcript of the justice shows this, and, by rule of Court, the transcript takes the place of the declaration, and therefore supports the allegation that the plaintiff sought to recover interest on the trial, until they asked leave to file an amended statement claiming only the principal without the interest. This was allowed by the Court below, and in this, as we think, there was error. There is no merit in the objection that the pleas were not verified by affidavit. The note in question being before the Court, and being shown by undisputed testimony to have been altered without the defendant's consent, and there being no evidence to explain the alteration, which was in a material part, or to show that it was lawfully made, was void as against the defendant, and no recovery could be had upon it.

Judgment reversed.

MITCHELL, J. The alteration being in the same hand and ink as the rest of the note, the question of when it was made should go to the jury. I would therefore award a venire de novo.

W. M. S., Jr.

Jan. '95, 167. April 1, 1895.

Hopkins, Receiver, v. O'Kane.

Stock transactions—Not necessarily gambling—Margins.

Purchases and sales of stock are not necessarily gambling transactions, though made partly or wholly on credit

"Margin" is security, nothing more, and the only difference between stock transactions and transactions in other commodities is that stocks are more commonly made the vehicle of gambling speculation, and Courts are therefore disposed to look more closely into these to ascertain their true character.

Peters *v.* Grim, 149 Pa. 163, referred to.

Appeal of Arthur O'Kane, defendant, from the judgment of the Common Pleas No. 1, of Philadelphia County, discharging a rule to open judgment entered upon defendant's note.

The judgment note in this case was given by the defendant to Laughlin & McManus, stock brokers, to secure margin for certain purchases of stock made by them for defendant.

The plaintiff is the receiver of Laughlin & McManus.

William S. Stenger, (*William H. Shoemaker* with him), for appellant.

Transactions in stocks by way of margins, settlement of differences and payment of gains or losses, without intending to deliver the stocks, are mere wagers and void.

Fareira *v.* Gabell, 89 Pa. 89.
Dickson's Exr. *v.* Thomas, 97 Id. 278.
Ruchizky *v.* DeHaven, 97 Id. 202.
North *v.* Phillips, 89 Id. 250.
Waugh *v.* Beck, 114 Id. 427.

Notes and bonds given to a broker to cover losses incurred in stock gambling transactions are void.

Harper *v.* Young, 112 Pa. 419.
Griffiths *v.* Sears, 112 Id. 523.
Griffith's Appeal, 16 WEEKLY NOTES, 249.
Fareira *v.* Gabell, 89 Pa. 89.
Kirkpatrick *v.* Bonsall, 72 Id. 160.

Digitized by Google

Peters *v.* Grim, 149 Id. 163.
Gaw *v.* Bennett, 153 Id. 256.

In the account furnished by appellee, there is nothing to show the transactions of appellant with the firm of Laughlin & McManus from November 1, 1892, to January, 1893, although appellant deposited with the firm $5,562 for margins during that period, and never drew any money from them or received an account.

Thomas R. Elcock, (*Bernard Gilpin* with him), for appellee.

The question whether or not a contract is a gambling one is governed entirely by the intention of the parties to the contract, and their intention must be gathered from the evidence in each particular case.

Maxton *v.* Gheen, 75 Pa. 166.
Smith *v.* Bouvier, 70 Id. 325.
Peters *v.* Grim, 149 Id. 163.

Assuming that these were gambling transactions, it does not help O'Kane's case, for, as between him and Laughlin & McManus, the agreement to confess judgment was an executed contract, the note being to cover a past transaction, and for an amount fully due.

Smith *v.* Kammerer, 152 Pa. 98.

The agreement to enter judgment having been fully executed the Court below was right in refusing to open the judgment.

Whitmire *v.* Montgomery, 165 Pa. 253.

Of the cases cited by counsel for appellant, Kirkpatrick *v.* Bonsall, 72 Pa. 155, decides that you cannot recover on an executory contract where the transaction is a gambling one; Fareira *v.* Gabell, 89 Pa. 89, is to the same effect; and none of the other cases cited by appellant apply.

July 18, 1895. MITCHELL, J. There is nothing in this case which would justify disturbing the judgment. It ought not to be necessary to say again after Peters *v.* Grim, 149 Pa. 163, and other cases, that a purchase of stocks on margin is not necessarily a gambling transaction. Stocks may be bought on credit, just as flour or sugar or anything else, and the credit may be for the whole price or for a part of it, and with security or without it. "Margin" is security, nothing more, and the only difference between stocks and other commodities is that as stocks are more commonly made the vehicle of gambling speculation than some other things, Courts are disposed to look more closely into stock transactions to ascertain their true character. If they are real purchases and sales, they are not gambling though they are done partly or wholly on credit.

The appellant himself testified that the first transaction involved in this case was his purchase of two hundred shares of Reading. "I bought them outright," and paid for them. Shortly afterwards he sold them, and on his order the brokers bought Traction stock, and retained the proceeds of the Reading as part payment for it. The subsequent transactions were of the same character, actual purchases and sales in which the stocks bought were received by the brokers for the defendant, and those sold delivered by them for him to the purchasers. There was all the time on the brokers' book a standing credit to appellant of the money received on his account from the sale of the Reading stock, and the subsequent debits and credits for the later purchases and sales. The account closed unfortunately for appellant with a balance against him, but there is no allegation, certainly no evidence, that it was not correct.

Judgment affirmed.

W. C. S.

Jan. '95, 154. February 28, 1895.

Boyle v. Hamburg-Bremen Fire Insurance Co.

Fire insurance — Proof of loss — Appraisers — Evidence.

Where a policy of insurance against loss by fire requires that the insured shall make a complete inventory of personal property damaged by fire "stating the quantity and cost of each article and the amount claimed thereon," it is a substantial compliance to furnish an inventory of the entire stock of goods, though, some items may be of a collective character. The object of the stipulation is to secure a full statement of the loss claimed and that the company may have the opportunity to test its correctness, and is not to be construed most strictly against the insured.

Where the policy provides that where an agreement between the insured and the company on the question of loss cannot be reached, an appraiser by each shall be chosen, who shall elect an umpire, it must be shown before either can insist on selecting the appraisers that an actual effort has been made to agree as to the amount of loss.

Snodgrass *v.* Gavit, 28 Pa. 221, followed; German-American Ins. Co. *v.* Hocking, 115 Id. 398, and Commercial Union Ins. Co. *v.* Same, Id. 407, distinguished.

Appeal of the Hamburg-Bremen Fire Insurance Company, from the judgment of the Common Pleas of Lackawanna County, entered on a verdict in an action in assumpsit wherein John D. Boyle's Sons were plaintiffs, and appellant defendant.

This action was brought by John D. Boyle's Sons upon a policy of fire insurance issued on the 14th day of November, 1890, by the Hamburg-

Digitized by Google

Bremen Fire Insurance Company, upon the stock of goods contained in a brick store in Dunmore, Lackawanna County, for one year.

On the 2d day of November, 1891, this was renewed for one year from the 14th day of November, 1891.

On the 24th day of November, 1891, a fire took place on the opposite side of the street. The heat broke the show window, some smoke was blown in the store and the casings and shutters of the windows were scorched and charred, and some holes burned in them and also in a side door. Water was thrown in the second story, which plaintiffs claimed came through the floor, and the damage claimed for was from heat and smoke and water. The policy required the insured to separate the damaged and undamaged property, to make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon, and to furnish a statement of the cash value of each item and the amount of loss thereon. The plaintiffs furnished a statement after the fire amounting to $10,611.60, of which $7,320 was made up of "lots" of goods valued at large amounts running as high as $600. There was no amount claimed on each item, nor the value of each item given. This statement was objected to by defendants as not being a compliance with the terms of the policy; the plaintiffs refused to furnish any other.

The plaintiffs were requested to have appraisers chosen under the terms of the policy to determine the amount of the loss; this they refused to do. After sixty days plaintiffs brought suit, and upon trial the Court accepted the proofs of loss, and a verdict was found for plaintiffs. The Court was asked to take the case away from the jury because no sufficient proofs of loss had been presented as required by the policy, and that no suit could be maintained until the amount of loss had been determined by appraisers selected under the terms of the policy.

The assignments of error were, that the Court refused to charge that the selection of the appraisers was a necessary precedent to a suit and also in declining to charge that by the terms of the policy an itemized inventory should have been furnished to appellant.

W. H. Jessup, (with him *Horace E. Hand* and *W. H. Jessup, Jr.*), for appellant.

Plaintiff was bound to submit an inventory with his proof of loss in exact accordance with the terms of the policy.

Davis Shoe Co. *v.* Ins. Co., 138 Pa. 73.
Whitmore *v.* Ins. Co., 148 Id. 405.

"The result of the decisions may therefore be formulated in the following rule: If the insured in good faith and within the stipulated time does what he plainly intends as a compliance with the requirements of his policy, good faith equally requires that the company shall promptly notify him of their objections, so as to give him an opportunity to obviate them; and mere silence may so mislead him, to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel. But if without valid reason he fails to comply with the requirements of his policy at all, or to do so within the stipulated time, there the liability of the company is discharged; and mere silence or investigation or even negotiation will not, in the words of SHARSWOOD, J., in Beatty *v.* Ins. Co., 'revivify the contract.'"

Gould *v.* Ins. Co., 134 Pa. 570-587.

This last case is followed in—

Welsh *v.* Assurance Corp., 151 Pa. 607.

The plaintiffs should have consented to the selection of appraisers.

Monongahela Nav. Co. *v.* Fenlon, 4 W. & S. 205.
Conner *v.* Simpson, 104 Pa. 440.

The case is not within the rule which nullifies contracts ousting the Courts of their jurisdiction, but is within another rule equally well established by authority and founded in good reason, that a person may covenant that no right of action shall accrue until a third person has determined any differences that may arise between the parties to the covenant or determine the measure of the liability of the covenantor and the amount to which the covenantee shall be entitled. The decisions of the Courts of this State are to this effect, and are authoritative and would be obligatory upon us, even if they were not as well grounded in principle as they are.

The clause that a reference to arbitration may be made a condition precedent to a right to bring an action has been held to be law in England.

Braunstein *v.* Acc. Death Ins. Co., 101 C. L. Rep. 785.

In New York—

Seward *v.* Rochester, 109 N. Y. 164.

In Connecticut—

Hall *v.* Norwalk Fire Ins. Co., 57 Conn. 105.

In Massachusetts—

Reed *v.* Washington Ins. Co., 138 Mass. 572.

In New Jersey—

Wolff *v.* Liverpool, London & Globe Ins. Co., 21 Vroom, 453.

E. N. Willard, (*Warren* and *Knapp* with him), for appellees.

July 18, 1895. WILLIAMS, J. The two principal questions in this case are, first, were the proofs of loss furnished by the insured a substantial compliance with the contract? and second, were the actions prematurely brought in view

Digitized by Google

of what is called the arbitration clause in the policy? Both questions depend upon the proper construction of the contract of insurance.

The contract contains the undertaking of the company to insure the general stock of merchandise of John D. Boyle's Sons "against all direct loss or damage by fire," to the extent of twenty-five hundred dollars, in consideration of the payment of a cash premium of twenty-five dollars. Arranged around this contract is a line of defensive "stipulations, exceptions, conditions and provisions." Some of these are not numbered, but with others numbered from 1 to 112 inclusive, they stand bristling like armed sentinels around the contract and the liability of the company thereunder, ready to impale even an honest claimant on a bare technicality.

While this policy was in force a fire broke out across the street from the store of the insured. Before it was extinguished the windows, including the show window, in the Boyle's Sons store were broken, and as they allege a large amount of water and smoke found their way into the store, the effect of which was a general deterioration in value of the stock. No article was consumed, but the loss claimed for was a percentage of depreciation on all the goods by reason of the effect of the water and smoke upon their quality and salability.

This is the character of the loss for which a recovery was had in the Court below. Were the proofs of loss sufficient? No. 67 of the stipulations surrounding the policy requires, "If fire occur the insured shall give immediate notice of any loss thereby, in writing to the company." No complaint is made of want of promptness in giving notice. No. 68 makes it the duty of the insured to "forthwith separate the damaged and undamaged personal property and put it in the best possible order." No. 69 then requires that the insured shall proceed "to make a complete inventory of the same stating the quantity and cost of each article and the amount claimed thereon." The plaintiff undertook after the fire to prepare proofs of loss. These are printed in the paper books of the appellant and cover about ten printed pages. They purport to contain an inventory of all the goods in the store at the time of the fire, and their value. At the end of the inventory the plaintiffs state their claim to be for depreciation as follows:

33⅓ p. c. on dry goods and underwear, etc., (Invent. $6,061.60)	$2,020	53
25 p. c. on furniture and fixtures, (Invent. $650.00)	162	50
15 p. c. on boots, shoes and rubbers, ($1,050)	157	50
15 p. c. on groceries, spices, etc, ($2,850)	427	50
Total loss,	$2,768	03

In this inventory are found some items of a collective character, such as "a lot of goods in the show window," "contents of a small show case," "lot of shirt bosoms, handkerchiefs, fly netting, etc." The point taken is that No. 69 requires each article to be given, "its quantity and cost, and the amount claimed thereon" separately. This stipulation is not to be construed most strictly against the insured. Its object is to secure a full statement of the loss he claims, so that the company may have notice, and the necessary opportunity to test its correctness.

We quite agree with the learned trial Judge that the proofs of loss afforded a sufficient notice of the character and amount of the plaintiff's claim. If it had seemed as to any particular lot or class of goods to be wanting in clearness or precision the attention of the insured should have been drawn to it and such further information asked for as was fairly necessary to an ascertainment of the loss. The law does not require the performance of useless things, or favor the arbitrary imposition of useless burdens. Substantial performance is enough.

We come now to the second question. Stipulations 86 to 91 inclusive provide that if the parties to the contract can not agree upon the amount of the loss, it shall be ascertained by two competent and disinterested appraisers. To make it certain that they shall be disinterested each party shall choose one, and the two so selected shall proceed to choose a "competent and disinterested umpire." The two appraisers are then to appraise the loss and if they do not agree their difference is to be submitted to the umpire, who determines in the end the amount of the damages to which the insured is entitled. Now it is alleged by way of defence to this action that it was brought without such preliminary adjustment of the loss by appraisers and that there should be no recovery for that reason. It will be noticed that the contract provides for an adjustment by the parties to it in the first instance. Stipulation No. 2 provides, speaking of the ascertainment of the amount of a loss, "said ascertainment or estimate shall be made by the insured and this company." No. 3 then follows with the declaration that if the parties "differ so that an agreement upon the loss is not reached, the subject shall then go to the appraisers as hereinafter provided," referring undoubtedly to the provisions quoted above as No. 86 to 91 inclusive. In No. 86 it is provided that "in the event of disagreement as to the amount of the loss the same shall, as above provided be ascertained by two competent and disinterested appraisers." This contemplates an actual effort to agree. When this effort fails, and not until then, either party possesses the right to say "we differ, and our points of difference must be re-

Digitized by Google

ferred to arbitrament under the terms of the policy." The insurer has no more right to disregard the first method named in the contract than the insured has to disregard the second. Neither can insist on the second who has not shown himself ready and willing to enter upon the first, because these remedies are not optional to either. They are successive, unless both agree to the contrary. This proposition fairly follows from Snodgrass *v.* Gavit, 28 Pa. 221.

If the fact was, as the plaintiffs alleged, that the company after receiving the proofs of loss made no effort to agree with the plaintiffs upon the amount of their loss, but gave notice that a difference had arisen and demanded the appointment of appraisers in the first instance, its position was unwarranted, and it has no right to complain that its demand was disregarded and that the plaintiffs resorted at once to an action. This view of the question renders a discussion of the revocability of the arbitration clause unnecessary, as the question plays no part in the determination of this case.

The assignments of error Nos. 1, 2, 5, 6, 7 and 9 are overruled. The plaintiffs did not allege the consumption by fire either in whole or in part of any article of merchandise, but a percentage of depreciation on the entire stock resulting from its exposure to water and smoke. The questions to be settled were, therefore, what was the entire stock worth? and what was the percentage of depreciation suffered? The 3rd and 4th assignments are overruled. The points referred to in these assignments should have been affirmed on a different state of the evidence, but on the proofs in this case we can not say it was error to refuse them. The reasons for this conclusion have been already given. The cases of German-American Insurance Company *v.* Hocking, 115 Pa. 398, and Commercial Union Assurance Company *v.* Hocking, 115 Pa. 407, are not in point. In each of those cases the same question was met. The policy sued on gave the company sixty days after receiving proofs of loss to determine whether to rebuild or to pay the loss.

The suits were brought before the expiration of the time limited. For this reason the actions were prematurely brought. The eighth assignment is also overruled. The proofs of loss had been put in evidence generally before this offer was made, and the learned Judge rightly held that they could be used for any legitimate purpose by either party without putting them in evidence again. Whether the offer had been admitted or refused no error requiring the reversal of this judgment would have been committed thereby.

The judgment is affirmed.

W. D. N.

Jan. '95, 305. May 21, 1895.

Commonwealth ex rel. City of Lancaster v. Martin, Treasurer.

County treasurer—Liquor license fees—Act of June 9, 1891, P. L. 248.

"The balance," under the Act of 1891, providing for the payment of liquor licenses, is not county money in any sense, and the county commissioners have no control over it. They cannot modify or abrogate in any degree the duties of the county treasurer as the statutory receiver of the license money; nor is their order or warrant an indispensable voucher for him. He may, upon settlement of his accounts with the county auditors, make proof in any competent way of the payment of the money he holds for others by the receipts, properly executed, of those entitled to receive the money.

The county has no interest in any part of the license money except that part which the statute directs shall be for its use.

Appeal of the City of Lancaster, from the decree and judgment of the Common Pleas of Lancaster County, in an application for a mandamus to compel the payment by the county treasurer to the City of Lancaster of its share of the liquor license money received by him for the use of said city.

S. S. Martin, the defendant, is, and was at the time of beginning and during the continuance of this suit, treasurer of the county of Lancaster, and received from the persons, to whom liquor licenses were granted, various moneys, of which, under the provisions of the laws regulating the sale of liquors and the granting of licenses to such persons, $32,400 was payable to the treasurer of the city of Lancaster.

Prior to the receipt of these moneys from the licensees of the Court, there had been recovered by the county of Lancaster against the city of Lancaster a judgment in the Court of Common Pleas of Lebanon county, December term, 1891, No. 170, for $74,584.34 with costs, no part of which judgment had been paid by the city of Lancaster at the time said license moneys claimed by the city were paid in to the county treasurer. The city of Lancaster demanded of the defendant, the county treasurer, the payment to it of its share of said license moneys. The commissioners of Lancaster county notified the county treasurer not to pay said moneys to the city, but to retain them on account of the judgment which the county had recovered. Whereupon the authorities of the city applied for mandamus to compel the county treasurer to pay over to the city its share of these license moneys, and the Court granted a writ of mandamus in the alternative. The county commissioners asked and were granted leave to intervene, and the subsequent proceedings were

Digitized by Google

carried on by the county commissioners, the county treasurer assuming the position of stakeholder. The question is, whether or not the county treasurer received the license moneys in such relation that he had a right to retain the moneys directed by law to go to the city, for or on account of a judgment owing by the city to the county. Upon the answer filed by the county treasurer the Court held that the county treasurer received the money for the use of the county, subject to distribution as directed by law, and that it became the duty of the county commissioners to distribute the moneys paid to him for licenses as the law directs and to draw their warrants on the county treasurer in favor of the parties entitled to share in the distribution for their respective proportions; that, therefore, the county having a judgment against the city, they were entitled to retain these moneys on account of the judgment against the city. Judgment was entered for the respondent, with costs, whereupon this appeal was taken.

John E. Snyder and *W. T. Brown*, (*W. U. Hensel*, *J. W. Brown*, city solicitor, and *J. Hay Brown* with them), for appellant.

The main question for the determination of the Court in this case, arising out of the opinion of the Court which entered judgment below, is whether the license moneys received by the person holding the office of treasurer of a county are received by him primarily for the county wholly or for the county and the respective city, borough or township which, under the Act of 1887, it was directed shall share these moneys. Under the provisions of this Act the treasurer of Lancaster county in the year 1894 received $40,500 from 81 licenses, of which amount $8,100, $100 out of each license, was paid to him "for the use of the county," and the balance, to wit, $32,400, was originally received by him, but as we contend, under the plain direction of the above law "should be paid to the treasurer of the respective cities"—in this case, Lancaster city—for its "respective use." The Act of 1891 was a supplement to the Act of May 18, 1887.

From the text of the above two Acts it will be plainly seen that if they are literally construed and strictly complied with, the person to whom the Court grants a license cannot get it without paying four-fifths of the license fee to the treasurer of the respective cities, boroughs and townships entitled thereto, and one-fifth to the treasurer of the respective counties for the use of the counties, or in the case of a city, $100 to the county, and the balance to the city treasurer.

Philadelphia *v.* Martin, 125 Pa. 583.

In Commonwealth *v.* Durkin, 109 Pa. 138, the Court held that a city treasurer might have imposed upon him certain duties relating to the city and certain other duties by the State and for the State, which were no part of his duties as treasurer of the city, and with respect to which the city was not concerned.

At the time of the passage of the so-called "Brooks High License Law" of 1887, and prior thereto, the liquor license moneys were payable to the various county treasurers for the use of the Commonwealth. The counties and county treasurers had no concern with them.

It never contemplated that there should go into the county treasury any larger proportion of these moneys than was assigned to the counties for their respective use. The direction of the law is, that after the counties receive the sum of one hundred dollars, or in certain cases one-fifth, "the balance shall be paid to the treasurer of the respective cities, boroughs and townships for their respective use." The person thus designated being a public functionary, and his act being a ministerial act, and he himself admitting in this case that he has no purpose to retain these moneys, and that he "is willing to abide by the decree of the Court" in the issue raised between the city and county, he was certainly in a position to properly be made the subject of a mandamus proceeding.

Commonwealth *v.* Commissioners of Allegheny County, 32 Pa. 223.
Griffith *v.* Cochran, 5 Binn. 103.
Commonwealth *v.* Cochran, 1 S. & R. 473.
Commonwealth *v.* Johnson, 2 Binn. 275.

These moneys form a part of the revenues of the city of Lancaster, necessary for carrying on its municipal operations and works, which is required of it for the good of the public and the maintenance of its public functions. Being such, they cannot be withheld or seized in any manner, by any person or for any purpose.

1 Dillon on Municipal Corporations, section 100.

There can be no claim or defalcation or set-off made against the revenues of any government, state or municipal.

2 Dillon on Municipal Corporations, sec. 810.
City of Pittsburgh *v.* McKnight, 91 Pa. 202.
City of Pittsburgh *v.* Harrison, Id. 211.

A municipal corporation cannot be made a garnishee, nor can public moneys held by any one in an official capacity be made the subject of attachments.

City of Erie *v.* Knapp, 29 Pa. 173.
Bulkley *v.* Eckert, 3 Id. 368.

W. F. Beyer and *A. F. Hostetter*, (with them *Thomas Whitson* and *George A. Lane*), for appellees.

The appellants contend that these moneys were properly paid by the applicants to S. S. Martin, but were not paid to him in his official capacity

Digitized by Google

as county treasurer, but as in some sense an agent or functionary for the city. Under the Act of 1891 the State no longer shares in the distribution of the license fees, the whole being remitted to the counties, cities, boroughs and townships. Whenever the State has made it the duty of county treasurers to collect money for its treasury, it has also in every case provided by appropriate legislation for reports to its own officers from the persons issuing the licenses or making the assessments, in such way that its officials are enabled by independent information to test the accuracy of the returns made by the county treasurers.

Act of May 16, 1861, sec. 2, P. L. 708.
Act of April 16, 1845, sec. 8, P. L. 533.

Although the State received part of the license moneys under the Act of 1887, no such provision appears in it, and none either in it or the Act of 1891 with reference to the other municipalities sharing these moneys.

We contend that the plain and reasonable intention of the Legislature in the Act of 1891, clearly expressed, was:—

(1). To fix the amount of license to be paid by applicants in cities, boroughs and townships respectively; (2). To direct that all applicants for license should in the first instance pay the whole fee into the treasury of the county, whose Courts and officers grant and deliver the licenses; and (3), that the other parties entitled to share then look to the county, and that it through its treasurer make distribution, paying to the cities, boroughs and townships their respective portions. This construction gives the whole Act a harmonious and reasonable effect, which is consistent with the uniform policy of legislation on similar subjects in this State, and which gives each party in interest complete protection at every point.

Under the Acts of June 1, 1889, P. L. 426, and of April 29, 1844, the Courts have held that the State can recover from the county by suit.

County of Schuylkill *v.* The Com., 36 Pa. 524.
Com. *v.* Philadelphia, 157 Id. 543.

Mandamus was refused to settle the validity of election, because there were contested facts which should be tried by jury.

Com. *v.* Commissioners, 5 Rawle, 75.
Com. *v.* Dickinson, 83 Pa. 460.

July 18, 1895. WILLIAMS, J. The duties imposed upon county treasurers by the license law of the Commonwealth are additional and special.

The price of the license is received for such uses and purposes as the law provides. If it is received for the use of the county it becomes a part of the money of the county in the hands of the treasurer, and is paid out on the orders or warrants of the county commissioners. If it is received for the use of the State it is the money of the State, for which the receiving officer is primarily liable. If it is received for the use of a city, borough, township or school district, it is the money of the municipality entitled to receive it for its own use, and it is the duty of the receiving officer to pay to the owner. Such moneys do not become county moneys, because they are in the custody of the county treasurer, nor is the custody of the treasurer necessarily that of the county.

In the case now before us, the Act of June 9, 1891, P. L. 248, provides, *inter alia*, as follows: "In cities the sum of one hundred dollars, in boroughs and townships one-fifth of the amount of license, shall be paid to the treasurers of the respective counties for the use of the counties, and the balance shall be paid to the treasurer of the respective cities, boroughs and townships for their respective use." If this Act stood alone a payment by the person to whom the license was granted, to the treasurers of the respective county, city, borough and township entitled to a share of the license money, or so much thereof as each was entitled to receive, would have been a good payment. But the Act of May 18, 1887, and several earlier statutes, had made the county treasurer the proper person to receive the price of the license, whoever might be entitled to the ultimate benefit of it.

Assuming, as I think we must, the continuing force of these earlier statutes, as far as this subject is concerned, the payment of the price of their licenses was properly made by those to whom licenses to sell liquors were granted in Lancaster county to the county treasurer as the designated receiver. The duty which, but for these earlier statutes would have fallen on the applicant, must now fall upon the holder of the money; and it becomes his duty to carry out the mandate of the Act of 1891 that "the balance shall be paid to the treasurer of the respective cities, boroughs, and townships, for their respective use."

The balance is not county money in any sense. The county commissioners have no control over it. They can not abrogate or modify in any degree the duties of the county treasurer as the statutory receiver of the license money; nor is their order or warrant an indispensable voucher for him. He may upon the settlement of his accounts with the county auditors make proof in any competent way of the payment of the money he holds for others by the receipts, properly executed, of those entitled to receive the money.

The mistake of the learned Judge of the Court below was in treating the license fees as indistin-

Digitized by Google

guishable from other county moneys. He states his own view of the situation thus, "The county treasurer, having paid the money into the county treasury for the use of the county, was no longer liable to a suit at law or subject to a writ of mandamus therefor, or on account thereof." But the county treasurer had power to pay into the county treasury, for the use of the county, only one hundred dollars out of the price of each license.

As to the other four hundred dollars the statutory direction was, "the balance shall be paid to the treasurer of the respective cities, boroughs, and townships for their respective use." The county has no interest in any part of the license money except that part which the statute directs shall be for its use. The treasurer has no power to pay it into the county treasury for the use of the county, but is bound to credit it to the account of the owner, and pay it to the proper treasurer. This duty is imposed not on the county, but on the county treasurer. He is the party primarily liable therefor, and he is necessarily subject to a mandamus to quicken, or to compel appropriate official action in relation thereto.

The county might be ultimately liable as the surety of its officer, and might be allowed to intervene whenever upon equitable principles a surety would be allowed to do so; but a surety under such circumstances must rest upon the equities of his principal and not upon some independent cause of action of his own.

In this case we cannot see upon what theory the county was allowed to intervene, except the mistaken one that the money had been paid by the treasurer "into the county treasury for the use of the county," so that it could only be withdrawn upon the warrant of the county commissioners; and that in consequence of such payment the treasurer "was no longer liable to a suit at law or subject to a writ or mandamus therefor, or on account thereof." As this theory can not be sustained for the reasons already given, and as the county as the surety of its officer is asserting no equity growing out of that relation, no right to intervene is apparent, and the order of December 13, 1894, permitting the county to come in and answer, and thereafter to conduct the proceeding on behalf of the defendant, is reversed.

The answer of the defendant Martin sets up the same line of defence as that followed by the county, with the additional averment that the county commissioners had notified and required him to withhold the money claimed by the city because the county held a judgment against the city to which it proposed to appropriate the money in his hands. They might with equal propriety attempt to seize the moneys of any other debtor of the county in the hands of some third person by a simple notice not to pay over. They have no lien on the money because of the relation of debtor and creditor; they acquire no lien by their notice; their notice is therefore no defence to the person who holds their debtor's money, when he is called upon to pay it over to whom it belongs. That is the situation here. It follows that the demurrer should have been sustained and a writ of mandamus awarded. The judgment overruling the demurrer and permitting the defendant to go without day is now reversed, and judgment is entered on the demurrer in favor of the plaintiff.

The record is remitted and a procedendo awarded. W. C. S.

Jan. '95, 101. April 12, 1895.

City of Philadelphia v. Keystone Battery A.

Charities—National Guard—Property held for armory purposes—Act of June 4, 1879, P. L. 90.

A military organization maintained by State appropriations and public subscriptions, whose only object is the gratuitous service of the public, without any profit or expectation of gain, is a purely public charity.

The armory building of such an organization and the lot upon which it is located being owned by the organization, is public property and exempt from taxation.

Such an organization, having purchased a lot and begun the erection of an armory, found the lot unsuitable for its purposes, and proceeded to secure a more suitable site:

Held, that during the interval between the abandonment of the first building and the sale of its site, the latter was not subject to taxation.

The Act of June 4, 1879, P. L. 90, which exempts the building of a charitable organization, which is incomplete or in course of construction, is entirely applicable to such a case.

Appeal of the City of Philadelphia from judgment of the Common Pleas No. 2, of the County of Philadelphia, on a proceeding by municipal lien for the collection of taxes upon premises of Keystone Battery A, National Guard of Pennsylvania, defendant.

The Court, PENNYPACKER, J., directed a verdict for the defendant.

The facts are stated in the opinion of the Supreme Court.

The plaintiff appealed, assigning as error, the action of the Court in directing a verdict, and entry of judgment thereon, and the failure to direct a verdict for the amount of the taxes claimed.

Digitized by Google

Chester N. Farr, Jr., assistant city solicitor, (*E. Spencer Miller*, assistant city solicitor, and *John L. Kinsey*, city solicitor, with him), for appellants.

The source or the destination of the funds represented by the property cannot entitle it to exemption, if the use be not such as is contemplated by the Constitution of 1874, or the exempting statutes passed in pursuance of it.

Philadelphia *v.* Barber, 160 Pa. 123.
Philadelphia *v.* Mercantile Library Co., 161 Id. 155.
Philadelphia *v.* American S. S. Union, 161 Id. 307.

Ownership by a charitable organization and application of all proceeds to charitable purposes afford not the slightest claim to privilege from the general burden of taxation. The *use* and not the ownership is decisive.

Philadelphia *v.* Pennsylvania Hospital, 134 Pa. 172.

The function of the Act of June 4, 1879, P. L. 90, was merely to mitigate the severity of the Act of 1874, by extending its application to charitable establishments which are in actual course of erection.

We submit that the terms of this statute, however narrowly interpreted, are of doubtful constitutionality. Certainly the Act cannot, with due regard for the constitutional restriction, be strained to afford exemption of property containing only foundation walls, which, by reason of obstructions and uncertainty, are left untouched for two years and finally abandoned so so far as the proposed charitable use is concerned.

It is very questionable whether the Keystone Battery is a public organization.

Market Co. *v.* P. & R. Terminal R. R. Co., 142 Pa. 580.
McLeod *v.* Central Normal School Association, 152 Id. 575.

J. Martin Rommel, for appellee.

It was the common law of England, and has been followed in this country, that public property is exempt from taxation, and no constitutional or statutory provision is necessary to accomplish that purpose.

Desty on Taxation, p. 34.
Cooley on Taxation, p. 131, and cases cited.
People *v.* McCreery, 34 Cal. 432.
Trustees *v.* Trenton, 30 N. J. Eq. 667.
People *v.* Salomon, 51 Ill. 37.
Directors of the Poor *v.* School Directors, 42 Pa. 25.
Tener *v.* National Guard, 13 WEEKLY NOTES, 310.

The defendant is exempt as a purely public charity. The ground in question and the building, so far as it was erected, were paid for by public subscriptions. The militia organization is maintained by State appropriation and public subscriptions. There is no profit connected with it in any way, and it is conducted solely for the benefit of the public, although, incidentally, instruction is imparted to its members.

July 18, 1895. GREEN, J. We think it cannot be questioned, indeed it is not, that the Keystone Battery is a purely public charity. It is a military organization maintained by State appropriations and public subscriptions, and its only object is the gratuitous service of the public without any profit or expectation of gain. The lot in question was purchased for the purpose of erecting thereon an armory building for the use of the Battery, and was of course public property. If the building had been completed and used for its intended purpose, it is not contended that it would have been liable to taxation. But the building was only commenced, and then abandoned on account of an objectionable location, and the appellee then sought, and finally obtained, another lot upon which they afterwards erected a complete armory building. The first lot was finally sold, and the proceeds were used in the purchase of the new lot and the erection of the new armory. It is argued for the appellant that during the interval between the abandonment of the first building and the erection of the new one, the first lot and partly constructed building were subject to taxation.

But the Act of June 4, 1879, P. L. 90, provides, "That nothing in the Act to which this is a supplement (Act of 1874) shall be taken as implying that any building, though incomplete or in course of construction, shall be subject to taxation where said building was intended under provision of said Act to be exempt from taxation when completed."

It seems very clear to us that this Act is entirely applicable to the present case even if the property would be taxable without it, which is very doubtful. There was nothing in the evidence to show that the lot was held for investment purposes or for any purpose of profit. It was manifestly held only until it could be sold, and it was sold as soon as a purchaser could be obtained, and the proceeds used for the erection of the new building.

Judgment affirmed.

J. D. B., JR.

[*Cf.* Philadelphia *v.* Jewish Hospital, 148 Pa. 454.]

Digitized by Google

Oct. '94, 28. November 5, 1894.

Howell et al. v. Mellon et al.

Ejectment—Conversion — Parol conveyance—Parol partition—Evidence—Charge.

Where a testator effects a conversion it is competent for the devisees to relieve against the conversion by agreement and restore the property to its original character as real estate.

In an action of ejectment where the title of defendants has not been assailed for forty years, they are not called upon to defend their title until plaintiffs have made out a title in themselves that is good *prima facie*.

If the evidence of a parol partition of land depends upon the declarations of the parties to third persons in the course of conversations, these declarations must be specific and definite as to the contract and its terms.

Where the Court presents facts that are relied on by plaintiff to establish his case, it is error not to call the attention of the jury to those presented by the defendant in reply thereto.

Appeal of Thomas Mellon, W. L. Scott, and the Youghiogeny River Coal Company, from the judgment of the Common Pleas No. 2, of Allegheny County, entered on a verdict in an action of ejectment, wherein Llewellyn Howell, Philip Howell, Urias Mathias, husband of Margaret Mathias, deceased, Bertha Mathias, of lawful age, William H. Mathias, Frank S. Mathias, minors, and having Philip Howell as their guardian, all three being children and heirs of Margaret Mathias, who died since suit brought, Adley C. Howell, Martha Howell, Samuel W. Howell, and Francis L. Howell, were plaintiffs, and the appellants were defendants.

The facts of this case are sufficiently set forth in the opinion of the Court, *infra*.

The Court below, (EWING, J.,) charged the jury, *inter alia*, as follows:—

"The plaintiffs allege that Llewellyn, John and Philip, bought the interest of their sisters and the other brothers, James and Andrew, that is, all their interest in the land. Now, as I have said to you, it was not necessary that this should be in writing. They allege in addition, that after that was done, the mother still being living, they all consented by arrangement among them, and a partition of this land was made among themselves and to some extent partition fences made, and that Philip and John took their share together and treated it separately as their own, from that time until Llewellyn's death, and Llewellyn took his share of the land separately. Now, if they did that, if they were in possession, if they had bought out the others, whether by writing or verbally, and paid, or bargained for it, they being the sole parties interested in the land, at least in the remainder, with the consent of their mother, and I think even without her consent, could make a partition, and if they formally and absolutely divided it, then from that time it ceased to be personal property and became land as to them; to make that parol partition good they must have actually made it, agreed on the division line, and occupied it as such, and recognized the respective titles in severalty in each other. If that were once done then the title would become good in each of them severally, and it would not be divested by any attempt of some of these parties afterwards, who had sold out their interest as personalty, to claim that because there was land and the transfer was not in writing it was not good, and to repudiate it. If any one sold his interest to these parties, or any of them, he could not afterwards convey a title, because he had none to convey. And if the three being owners of all the interests, made a division among themselves and entered into possession and occupied it as such, one or two of them could not afterwards repudiate and claim that he owned the whole of it." (Thirty-fourth assignment of error.)

And declined to charge as follows:—

"It was not shown when and how and where the division line was located with sufficient certainty, and by whose authority, or that it was not merely to designate that part which the widow permitted John to occupy, from the part which she retained to herself and Llewellyn and Philip, who continued with her, nor is it shown that, before it was made, all the heirs had consented to look to the land as such, and waive a sale, and besides, there was no continuous fence or other prominent landmarks on the ground to attract attention to the alleged line when Mellon purchased in 1863, and he had no notice or intimation of such a line till a year or more afterwards." (Twenty-fourth assignment of error.)

"Fraud is not alleged, or presumable, without more or better evidence to raise a presumption of conspiracy between John and his five brothers and sisters to defraud his children out of a contingent remainder in the land in dispute; or to enable him to defraud purchasers, and still preserve the contingent remainder to his children. The five deeds to him are therefore unimpeached, and his honesty remains intact; and it must be inferred that Llewellyn's interest beyond his one-eighth was insignificant or forfeited, by reason of non-payment or compliance with the conditions of the parol executory agreement under which he claimed; or was cancelled by some settlement or arrangement of him and John, between the date of Llewellyn's will and time of his death." (Twenty-seventh assignment of error.)

"Then, on the hypothesis of the compromise verdict in the last of the three ejectment cases of Andrew and James against John in 1857, viz:

Digitized by Google

that the mother had permitted Llewellyn and John, under an understanding between them, and between them and some or all of the brothers and sisters, to divide the place, subject to the rights of such of the others as had not given their consent, and with the purpose or intent of paying for and acquiring the shares or interests of the others, as they could afterwards; then, to instruct the jury to bring in a conditional verdict for so much as John had advanced beyond his proportion in paying off the others in Llewellyn's lifetime, together with what he advanced and the expenses he incurred after Llewellyn's death in paying for and acquiring title to shares after Llewellyn's death, with interest thereon from the dates of such payments and expenditures." (Twenty-eighth assignment of error.)

W. B. Rodgers and *J. McF. Rodgers*, (with them *P. C. Knox* and *James H. Reed*), for appellants.

"The right of election must be actually and unequivocally exercised, and the onus of showing the act of election lies on the party alleging it."

Miller *v.* Meetch, 8 Pa. 425.

The election may take place either by express declaration or by some act, indicating a preference to enjoy the land in its natural state. The act, however, must be clear and unequivocal, and of such a character as to leave no reasonable doubt of the intent. No inference, for example, can be drawn from mere lapse of time. Nor can a reconversion take place as a general rule, unless all the parties in interest unite to elect.

Bispham's Equity, sec. 323.
Reno *v.* Moss, 120 Pa. 49.

"The parties interested in the fund may elect to accept the land unconverted, and if they do so, will immediately acquire an estate therein. But this must be by some unequivocal act, and, when there are more than one entitled, all of them must join in the act of election, otherwise it is nugatory."

Willing *v.* Peters, 7 Pa. 289.

"An election to take land, ordered to be sold, as land, must be by an unequivocal act, and all interested must join in it."

Evans's Appeal, 63 Pa. 183.
Beatty *v.* Byers, 18 Id. 105.

Appellants' title is unassailable. In McElfatrick *v.* Hicks, 21 Pa. 402, it was said: "Nothing can be more plain than that the declarations of a grantor are not evidence of fraud, as against an honest purchaser for an adequate consideration, even when made before the execution of the contract, and it would be more absurd, if possible, to allow declarations made after the title had passed to affect its validity."

Unangst *v.* Goodyear, 141 Pa. 127.
Tisch *v.* Utz, 142 Id. 186.

"Neither vague reports of strangers, nor information given by a person not interested, respecting a defect of title, will affect a purchaser without notice."

Kerns *v.* Swope, 2 Watts, 75.
Rhines *v.* Baird, 41 Pa. 265.
Twitchell *v.* McMurtrie, 77 Id. 387.
Bassett *v.* Nosworthy, 2 Lead. Cas. Eq. 47.
Hottenstein *v.* Lerch, 104 Pa. 454.
Bryan's Appeal, 101 Id. 394.

We excepted to the whole charge as one-sided and argumentative; and on that point refer to the following expressions of opinion by this Court:—

"The *resume* should be as full on one side as on the other."

Gehman *v.* Erdman, 105 Pa. 371.

"Things of which there is no evidence should not be blended with that of which there is evidence."

Railway Company *v.* Schuster, 113 Pa. 412.

"Where the Court neglects to explain the precise question at issue, and calls attention to the evidence of one side only, the judgment will be reversed."

Reber *v.* Herring, 115 Pa. 599.

"As a general rule the Judge ought not to express an opinion upon the facts; but if he do so, leaving the whole case to the jury, it is not ground of reversal, unless calculated to mislead."

Leibig *v.* Steiner, 94 Pa. 466.

"Though the law be stated correctly, yet if the Court comments upon the law as to practically take away the effect of the statement, and influence them into disregarding it, it is error."

McFadden *v.* Reynolds, 20 WEEKLY NOTES, 312.

In a case of this kind, "the law should be stated so clearly and unequivocally as to leave the jury no avenue of escape from their sworn duty."

Quinby *v.* Railway Co., 2 Del. 285.

Boyd Crumrine, (with him *J. P. Patterson* and *D. F. Patterson*), for appellees.

The defendants stand in the shoes of John Howell. The doctrine of protection to a *bona fide* purchaser, for value and without notice, is applicable only in favor of the purchaser of a legal title perfect on its face, and it is then that the purchaser is protected against equities of which he has had no notice.

Digitized by Google

Am. Note to Bassett *v.* Nosworthy, 2 W. & T. Lead. Cas. Eq., Ed. 1877, 65.
Ruckanan *v.* Decker, 8 C. E. Green, 283.
Read *v.* Dickey, 2 Watts, 465.
Chew *v.* Barnet, 11 S. & R. 392.

In purchasing John Howell's title in 1863, whatever was its nature, Thomas Mellon was affected by constructive notice of all facts shown by public records in the line of the title, as well as of all facts as to which those records should put him upon an inquiry that, to an ordinarily fair and prudent man acting cautiously, should lead to knowledge.

Knapp *v.* Bailey, 79 Me. 195.
Pringle *v.* Pringle, 5 Sandford, 157.

The evidence adduced by the plaintiffs below was entirely submissible and sufficient to establish the purchase by Llewellyn, Jr., John and Philip, of the interests of the other "heirs," and the parol petition subsequently made by them.

Possession is an evidence of ownership, even of chattels.

Entriken *v.* Brown, 32 Pa. 364.
Robinson *v.* Hodgson, 73 Id. 202.
Coxe *v.* Deringer, 78 Id. 289.

And death does not terminate such presumption.

Whart. Ev., sec. 1332.
Jones *v.* Bland, 112 Pa. 177.
Carter *v.* Tinicum Fishing Co., 77 Id. 315.

Evidence, sufficient to establish a parol sale of land, is not required to prove a parol partition; it is not for the Court but for the jury, as in other cases.

McKnight *v.* Bell, 135 Pa. 370.

Upon several grounds, on our evidence properly submitted, John Howell was conclusively estopped from setting up any title to the land in dispute, and by his estoppel the defendants here are bound.

In Pennsylvania equitable principles are enforced in all common law actions, and especially in ejectment.

Peebles *v.* Reading, 8 S. & R. 491.

"In addition to estoppels by deed, there are two classes of admissions which fall under this head of conclusive presumptions of law; namely, *solemn admissions*, or admissions *in judicio*, which have been made in the course of judicial proceedings, either expressly and as a substitute for proof of the fact, or tacitly by pleading; and *unsolemn admissions*, extra *judicium*, which have been acted upon, or have been made to influence the conduct of others, or to derive some advantage to the party, and which cannot afterwards be denied without a breach of good faith."

1 Greenl. Ev., sec. 27.

The first of the above-described estoppels may be called estoppels by record. Such was the compromise verdict taken in the ejectment of 1856 against John Howell.

Miller *v.* Springer, 70 Pa. 269; 88 Id. 203.
Duffey *v.* Presbyterian Church, 48 Id. 46.
Cummings' Estate, 153 Id. 399.

Another of the kinds of estoppel, mentioned by Greenleaf, *supra*, p. 36, are those by "unsolemn admissions, extra *judicium*," etc., or estoppels in *pais* by acts and conduct.

One who, by positive acts, induces another to purchase land of which he himself is the true owner, is thereafter estopped from setting up his title against the purchaser, although at the time of the inducement he acted in good faith and in ignorance of his own rights.

Miller's App., 84 Pa. 391.
Putnam *v.* Tyler, 117 Id. 570.

July 18, 1895. WILLIAMS, J. This is an important case, whether regard be had to the value of the property in controversy, or to the questions involved. The assignments of error are thirty-six in number and cover thirty-five pages of the appellants' paper book. The printed briefs aggregate about two hundred pages more. It is by no means easy to arrange and condense the facts and the questions presented by them so as to bring a discussion of them within reasonable limits.

Nearly seventy years before this suit was brought Llewellyn Howell, Sr., who owned the farm, of which the land in controversy was part, died testate. He left a widow and nine children to survive him. He gave the use of his farm to his widow until the youngest child should come of age, and directed that it should then be sold. One-third of the purchase money was to be invested for the use of the widow during life and the other two-thirds to be divided among the children. He gave to his widow, however, the right to elect whether the sale should take place at the time designated by him, or not until her own death. She elected that it should remain unsold. She survived her husband about thirty years, dying in February, 1853.

The plaintiffs are the children of John Howell, one of the sons of Llewellyn Howell, Sr., but they claim title as the devisees of Llewellyn, Jr., who was another of the sons of Llewellyn, Sr. To support their title they rely upon parol sales alleged to have been made in 1836 and 1837 by the children of the elder Howell to their three brothers, John, Llewellyn, Jr. and Philip; and a subsequent parol partition between the purchasers by which the land now in controversy became the property of Llewellyn, Jr.

The defendants claim under John Howell, the father of the plaintiffs, who claimed to be the

Digitized by Google

owner of seven-eighths of the land as heir at law and as the vendee of six other heirs at law of his father, from whom he held conveyances of their title.

It is conceded on all sides that the will of Llewellyn Howell, Sr., converted his farm into personalty; and that the share of each of his children was not land but a sum of money out of the proceeds of the sale which his executors were directed to make. But it was competent for the devisees to relieve against this conversion by agreement, and restore the property to its original character as real estate. The plaintiffs allege that this was done at the time the parol sales under which they claim were effected, and the parol partition made between the purchasers. The defendants insist that no parol sales were in fact consummated, and allege that the re-conversion took place when the several heirs at law conveyed to John Howell, their grantor. There is, therefore, no allegation that the interest or title of either party is now personal, and no denial that for at least thirty years it has been restored to its original character as land.

This is an equitable ejectment. The plaintiffs are asserting a title that rests on the alleged parol contracts of sale and the alleged subsequent parol contract for partition. They are out of possession, and for about forty years the defendants have been in possession claiming title. The plaintiffs must recover, if they recover at all, upon the strength of their own title, for the defendants may stand upon their possession until a valid title is established in the plaintiffs. *Potior est conditio defendentis* is a maxim of equity as well as of law and the defendants are not called upon to defend their possession until the plaintiffs establish a title that is good, *prima facie*, to the land in controversy. Was such a title shown or was the evidence in support of it submitted to the jury under suitable instructions?

The title set up was as to one share, or an equal undivided eighth part, the title of Llewellyn Howell, Jr., under his father's will; and as to the other seven-eighths it was the title of his brothers and sisters under the same will which it was alleged he held. The title of two of his sisters appears to have been conveyed by deed to him and his brothers Philip and John as tenants in common. These deeds were found in the possession of John, and no reason for disregarding them has been shown. So far as the evidence indicates they were valid conveyances, and they left nothing in the respective grantors to pass by their subsequent deeds to John. Llewellyn, Jr., appears, therefore, to have held at least his own share and an undivided one-third of the two shares of his sisters, Sarah and Martha. The shares of James and Andrew and of Esther and Mary it is alleged were bought by the three brothers, John, Llewellyn, Jr. and Philip, as tenants in common; and the interest of John and Philip in the land in controversy, it is claimed, passed to Llewellyn, Jr., by a parol contract for partition which was executed by the running and marking of a division line on the ground, and by a continued use or possession in accordance therewith extending up to the death of Llewellyn, Jr., in 1851. It will thus be seen that as to four shares the title of Llewellyn, Jr., rested on separate parol sales; and as to the shares of John and Philip as devisees, and as tenants in common of the shares acquired by purchase, it rested on a parol partition.

I am unable to discover the proof of a parol contract made between the three brothers and either of the other heirs for the purchase of his or her share at an agreed price. The existence of such contracts must be gathered, so far as the proofs before us show, from the declarations of the parties made to strangers in the course of conversations of which we have but a fragment before us. These declarations are general and indefinite in their character and do not show any of the terms of either of the alleged contracts. Thus one witness says he heard John and Llewellyn, Jr., say they had bought out their brothers and sisters. The same witness says that as late as 1848, some ten years after the alleged partition was had, he heard Llewellyn, Jr., say that he would be able to pay off the heirs out of the proceeds of the timber on the land. Another witness says that in 1840, Llewellyn told him they had bought out the other heirs, had paid part of the purchase money and were going to pay the balance. Still another says that John and Llewellyn told him they had bought out four of the heirs.

The proofs of the parol partition are equally wanting in definiteness and certainty. There is no proof of an agreement to divide what they had before held in common. There is no proof of the actual running of a partition line on the ground by the parties. The existence of the line and its purpose must be gathered from the declarations of the parties to persons in their employ and to their neighbors. Thus Mr. Ball testifies that John and Llewellyn showed him a fence and told him it was the dividing line. McFadden says there was no fence right on the line but within "maybe ten rods and some places not so far. It run down to what was called the Murphy line. It didn't follow the line right through." Dougherty says he worked up to a fence they called the division line, and that he understood Llewellyn had the north side of it and John the south side. In answer to the question "did they state to you when or how they divided it" (the farm)? he said "Not to my recollection."

The fact that two brick houses were built upon

Digitized by Google

the land was greatly relied on as showing that a partition had been made; but these houses were built of brick made by John and Llewellyn in common, and, during the life time of the mother. Llewellyn and his mother lived in one. John and his family lived in the other. Under what arrangement with their mother, the life tenant, or with each other, the occupancy of the farm was divided or the houses built the evidence is silent.

This was the case of the plaintiff. We do not say it should not have gone to the jury, but we do say that if submitted to the jury it should have been done with care and with very definite instructions as to what it was necessary the jury should find in order to sustain the plaintiff's title.

But there was pertinent and important evidence on the part of the defendants that was entitled to the like careful treatment. As to the parol sales it is clear that each of the alleged vendors took a different view of the effect of the negotiations between themselves and Llewellyn from that which he entertained. They have, each of them, made a sale to John since Llewellyn's death and executed a deed to him for the respective shares held by them. They disavow and repudiate the sale alleged to have been made by them by parol, and assert their ownership after Llewellyn's death and probate of his will. His two alleged co-tenants repudiate the purchases in common, and the subsequent parol partition set up by the plaintiffs. Llewellyn died in January, 1851. The sale by John to Mellon did not take place until the 25th of August, 1863.

The third action of ejectment brought by James and Andrew against John terminated in a verdict in favor of James for fifty acres in the extreme north end of the original farm in 1857. Since that time at least John has been in the undisputed occupancy of all the rest of the land occupied by Llewellyn and his mother, including the land now in controversy. That he had been in the exclusive occupancy from the time of Llewellyn's death subject only to the life estate of his mother is fairly inferable from the fact that the first action of ejectment brought by James and Andrew was begun in June, 1852. The mother was still living in the house which Llewellyn had occupied with her from the time of its erection and was made a co-defendant with John and Philip in the action. These significant circumstances should have been set over against the indefinite declarations relied on by the plaintiffs to prove the several parol sales, and the parol partition on which their title to most of the land claimed depended. The attention of the jury, having been drawn by the learned Judge to the proofs on the part of the plaintiffs, should have been drawn to the evidence in reply thereto by the defendants, and they should have been directed to consider it in determining the weight to be given to the testimony of the aged witnesses who undertook to give declarations made in their hearing a half century before they were called to testify to them. The important questions for the jury were, first, does the evidence fairly show the actual making of the parol sales under which the three brothers acquired the titles of their brothers and sisters in the farm? If not, then the plaintiffs can only recover the undivided share which Llewellyn holds as heir at law of his father and one-third of the shares of his sisters Sarah and Esther.

If the jury should reach the other conclusion, that the parol sales are satisfactorily proved, then the second question relates to the parol partition. If this is not established the plaintiffs cannot recover though the jury should find for them upon the first question. But if both questions be found for the plaintiffs then they should recover in this action the land they claim. In considering the second question, the erection of the two houses does not seem to us to play any important part. One of them was built about 1837 and the other about 1839. The brick for both were prepared and burned by the family, or such of them as then lived at home with the mother, and the work upon them was done in the same manner. The houses were apparently built by a common effort and for the common benefit.

The marriage of John did not occur till three or four years later, and he continued to live with his mother till his marriage took place. He then moved into the house on the southern part of the farm which had not previously been occupied. There is nothing in all this that bears with any directness on the making of a contract for partition between John, Llewellyn and Philip as owners in common. The proofs offered to show the making of a division line separating the farm into two purparts by way of amicable partition between the three brothers is, to say the least, vague and uncertain. When the line was settled upon, for what purpose it was intended, and just where it ran, it would be difficult to determine from the evidence. The jury should have been told what facts it was necessary for them to find in order to justify them in sustaining the alleged parol partition, and their attention should have been drawn to the evidence from which these facts must be found, if found at all.

The trouble with the charge is in its manner and general effect. The learned Judge seems to have been satisfied by the evidence that the parol sales were established and the partition and the boundary line made as alleged by the plaintiffs. He instructed the jury in answer to the defendants'

Digitized by Google

third point, "If the evidence of the plaintiff is believed it is sufficient to establish a purchase by Llewellyn, John and Philip of the interests of their other brothers and sisters in the whole farm and its proceeds, and that they being owners thereof with consent and agreement of their mother made a parol partition of the land among themselves by which the share of Llewellyn Howell, Jr., was set apart by definite metes and bounds and occupied by him as such to the time of his death. It is a fact for the jury." But this left to the jury little but the question of credibility. They were told that the evidence was sufficient to establish the title of the plaintiff "if it is believed." It was the credibility of the plaintiffs' witnesses, and not the vague and uncertain character of their testimony, to which the attention of the jury was directed. Their testimony might all be true and yet the jury might not have been able to find from it the several parol contracts of sale, or that if made in terms they were ever actually carried into effect. The subsequent conduct of all the parties was inconsistent with the sales alleged, and the duty of the jury was to determine not a question of credibility merely, but a question of the weight of the evidence taken as a whole. Did it show in a satisfactory manner the making of the various parol agreements alleged? Or were the declarations proved by the witnesses consistent with the existence of negotiations that did not, except in the cases of Martha and Esther, ripen into valid agreements of sale? The assignments of error numbered 24, 27, 28 and 34 present instructions that are objectionable as presenting in too strong a light the facts relied on by the plaintiffs, without any allusion to the circumstances presented by the defendants as an answer to them. These circumstances were entitled to a careful consideration, and while remaining uncontroverted and unexplained were inconsistent with the theory of the plaintiffs, and a forcible reply to it.

In all other respects this case was tried with ability and with great clearness by the learned Judge, but the conclusion is not easily to be avoided that the charge as a whole was calculated to lead the jury to a verdict in favor of the plaintiffs by the prominence it gave to the plaintiffs' case, and by its failure to present the circumstances relied on by the defendants as an answer thereto.

The judgment is reversed and a venire facias de novo is awarded.

W. D. N.

Jan. '95, 285. March 7, 1895.

City of Reading v. O'Reilly et al.

Streets—Paving and grading of—Necessary preliminaries—Void ordinance—Act of May 1, 1876, P. L. 94.

The Act of May 1, 1876, in reference to cities not of the first class, requiring that ordinances for paving, etc., shall not be valid unless a plan, etc., be made and attached to the ordinance before its passage, means that the plan, estimates, etc., shall be made in view of the specific ordinance.

The prerequisites to the passage of an ordinance must be had with direct reference to and in the very course of the legislation itself; otherwise, the main object of the statute is not accomplished.

Whether property is urban or rural is usually a question for the jury, because it is one of fact; but where the facts are agreed upon, it becomes a question of law for the Court as in other cases.

Municipal claims for paving, etc., are *in rem*, and there is no authority for dividing up the assessment and filing a lien against the "right and title" of one joint owner.

Appeal of the City of Reading, plaintiff, from the judgment of the Common Pleas of Berks County, entered on a lien filed against Catharine Celia O'Reilly *et al.*, defendants.

The facts are stated in the opinion of the Supreme Court, *infra*.

William J. Rourke, city solicitor, for appellant.

The first ordinance introduced into councils after making a map or plan, with schedules and estimates, was select council bill No. 37, to which they were admittedly attached. This ordinance was defeated, and subsequently common council bill No. 30 was introduced and passed, and the jury by its verdict has found that the map or plan, schedule and estimates were detached from select council bill No. 37, and were attached to common council bill No. 30 before its passage, it being admitted that no map or plan, schedule and estimates were made other than those attached to select council bill No. 37. One of the questions in the Court below, therefore, was whether or not it was necessary to effect a valid ordinance, that councils should adopt a new resolution for the appointment of viewers and have a new map or plan, schedules and estimates made in order to bind abutting property owners under common council bill No. 30, and having failed to adopt the same, whether the ordinance is null and void.

The jury having found a verdict in favor of the plaintiff, establishes the fact that these papers were appended to common council bill No. 30 before its passage through councils, and is, there-

Digitized by Google

fore, final and incontrovertible. That this is the undoubted law is well established.

Oil City *v.* Morris, 1 Pennypacker, 420.
Erie City *v.* Brady, 127 Pa. 169.
Seely *v.* City of Pittsburgh, 82 Pa. 360.

From these decisions it follows that whether the view or other statutory prerequisites were in fact made, is for the jury. The facts, as they were developed in Beaumont *v.* Wilkesbarre, 142 Pa. 198, were very much like those presented in the present case, although a greater length of time elapsed between the time of complying with the provisions of Act of May 1, 1876, and the passage of the ordinance in that case, than in the case now before the Court.

Kelly *v.* City of Pittsburgh, 85 Pa. 170.
Craig *v.* City of Phila., 89 Id. 265.

The foot front rule of assessments for local improvements has been recognized as a just and equitable method both in this and other States.

Pennock *v.* Hoover, 5 Rawle, 291.
Pittsburgh *v.* Woods, 44 Pa. 113.
Magee *v.* Commonwealth, 46 Id. 358.
Schenley *v.* Allegheny, 25 Id. 128.
Stroud *v.* Phila., 61 Id. 255.
Phila. *v.* Coulston, 118 Id. 541.
2 Dillon's Mun. Corp. sec. 761.
Cooley on Taxation, 446.
Oliver *v.* Montgomery *et al.*, 42 Iowa, 36.

The lien was filed against the right, title and interest of the defendants; upon execution this is what would be sold. The purchaser would step into the shoes of the defendants, and would have his action of partition if he chose. The reasons which might be urged against our position are only such as would follow in the train of regarding the city of Reading and the defendants as joint tenants under the law, with the subsequent incidents of survivorship and non-compulsion to partition, and not as tenants in common by the statute. Being, however, tenants in common under the law, these reasons fall.

E. H. Deysher, (*O'Reilly* with him), for appellees.

We contend that every legal prerequisite of a valid ordinance which was connected with the defeated ordinance fell with it, and that in order to bind abutting property owners it was necessary to begin *de novo*. The Act of May 1, 1876, makes null and void any ordinance passed before councils have caused the city engineer to make an estimate of the total costs, etc., and the city ordinance of October 12, 1877, section 2, provides that, "Where councils may decide to grade or macadamize any avenue, street, or alley, or part thereof, or upon the petition of a majority of the real estate owners to pave the same, councils shall, by joint resolution, order the city engineer to make an estimate," etc. The cases of Oil City *v.* Morris, 1 Pennypacker, 420, and Erie City *v.* Brady, 127 Pa. 169, both decide that the estimate, map, plan by the engineer and the view by the viewers, must be made before the introduction of the ordinance authorizing the improvement and attached to it. So far as these cases are applicable they sustain the contention of the appellees.

The proceeding by "scire facias upon a claim of this kind is a proceeding *in rem*."

Junction R. R. *v.* Philadelphia, 88 Pa. 428.

Each owner has an undivided moiety in the whole; therefore, the assessment must be against the whole property, there cannot be a subdivision of interests.

Foster *et al.* *v.* Fowler *et al.*, 60 Pa. 27.
Oliver *v.* Montgomery *et al.*, 42 Iowa, 36.
Washington Ave., 69 Pa. 362.
Seely *v.* City of Pittsburgh, 82 Id. 360.
Craig *v.* City of Philadelphia, 89 Id. 265.
City of Scranton *v.* Pennsylvania Coal Co., 105 Id. 445, 449.

July 18, 1895. MITCHELL, J. The Act of May 1, 1876, P. L. 94, provides that councils of cities not of the first class "shall not pass any ordinance authorizing the grading or paving of any street . . . . before they have caused the city engineer to make an estimate of the total cost of such improvement, particularly stating the items and the cost of each, and a map or plan of all the property liable to assessment for the cost of the same, and also cause the board of viewers to view the property and make a schedule showing the total cash value of the same as nearly as can be ascertained, and the amount each property owner will be liable to pay for such improvement; which estimate, map or plan and schedule shall be attached to the ordinance before its passage and shall remain on file in the proper office for the benefit of all persons interested, "and any ordinance for paving, etc., passed before compliance with this requirement shall be void."

The select council of the city of Reading on August 9, 1886, passed an ordinance S. C. No. 37, for the grading of South street. This ordinance had the necessary plan, estimate, etc., attached, as the Act of 1876 required, but on coming up in common council, September 2, 1886, it was defeated.

On September 27, 1886, a new ordinance C. C. No. 30, was introduced into common council, and on October 11, 1886, it was passed by both chambers. This ordinance was not preceded by any action of councils causing the city engineer to make an estimate, plan, etc., in connection with it, but at some time, which the jury have found was before final passage, the plan, estimate, etc., belonging to the defeated ordinance S. C. No. 37, were detached therefrom, and attached to the new ordinance C. C. No. 30.

Digitized by Google

These facts being undisputed, the question raised by the first point reserved is whether they show a sufficient compliance with the Act of 1876 to make the second ordinance, C. C. No. 30, valid. We are clearly of opinion that they do not.

It would be sufficient objection for the purposes of this case that the attachment of the plan, etc., to the new ordinance was not done at the command, or by the authority of councils, nor so far as appears even with their knowledge as a body, though some of the members knew of it. It was the act of the city clerk of his own motion or on the suggestion of a member as to the necessity for it. This was entirely insufficient. The statute contemplates that it shall be done by councils as a body, in their legislative capacity, so that all the members shall have notice or knowledge of the facts which are made a prerequisite to their valid legislative action.

But even if the attachment of the old plan to the new ordinance had been by command of councils themselves that alone would not have been sufficient. The main object of the Act of 1876 was to compel councils when passing the ordinance to have before their immediate view the situation of the property on the street, the probable cost of the improvement, and the distribution of the burden on the lot owners who were to be called upon to pay. Incidentally also the same information was to be for the benefit of lot owners and others interested, and to this end the plan, etc., were to remain on file. But the main purpose was to serve as a check on ignorant and inconsiderate legislation, by bringing the most important relevant facts to the direct notice of the members and the body when in the act of legislating upon them. It is part of the system which is found in the constitutional provisions that the subject of bills shall be clearly expressed in their titles, and that no bill shall be revived, amended, etc., by reference to title only, but by re-enactment at length, and which is carried through nearly all of our statutes relating to municipal bodies and their legislative action. When a plan, estimate, etc., are made in view of a specific ordinance and that ordinance with its attachment fails, they all fall together. Of course we do not refer to reconsideration of votes, under the rules of the legislative body, but to new action. When such action starts it must start anew on its own basis. If a plan and estimate made for one ordinance may be taken by councils as a basis for another after two months, it may be so taken after a longer interval, and in the meanwhile there will be no certainty that the situation and value of the property may not have changed. There will be no standard but the discretion of councils, which the Act of 1876 intended to restrain within the prescribed limits. It is not meant that the report of the city engineer and others must necessarily be thrown away, and the work all done over again. If the interval is such that there is a fair presumption against any material change in the situation, councils may reasonably direct the city engineer to take up his report again and supplement it with reference to present circumstances. All that we mean to say is that the prerequisites to the passage of an ordinance, must be had with direct reference and in the very course of the legislation itself. Otherwise the main object of the statute is not accomplished.

There is nothing in the cases cited by appellant which conflicts with these views. Oil City *v.* Morris, 1 Penny. 420, decided that a view by the commission under the Act of 1872 was equivalent to one by a board of viewers under the Act of 1876, and the question whether the view was made before the passage of the ordinance was properly left to the jury. Erie *v.* Brady, 127 Pa. 169, was to the same effect that a positive averment in an affidavit of defence that no plan was made, would carry that question to the jury. Beaumont *v.* Wilkesbarre, 142 Pa. 198, was not on the same question at all. The stress of that case was on the borough Act of 1851. A proceeding for paving a street commenced in 1883, but was delayed and protracted by injunctions, protests, changes of plan, etc., until finally the plan and estimate required by the Act of 1876 were made in December, 1885, and an ordinance passed in February, 1886. The Court held the proceedings continuous, and that a notice to the lot owners in 1884, followed by hearings and remonstrances from time to time, was not too remote under the Act of 1851. The Act of 1876 was strictly complied with, and the views of RICE, P. J., quoted on pp. 216–217, are in exact accord with those we have expressed.

The whole ordinance being invalid it is not strictly necessary to consider the other points, but we are of opinion that the lien was bad in form. It is a proceeding *in rem*, and there is no authority for dividing up the assessment and filing part of it against the "right and title" of one joint owner.

The learned Judge left to the jury the question whether the land was rural, and they found it was not. But the facts having been stated in a point reserved, the Judge was of opinion as matter of law that it was. The question whether urban or rural is usually for the jury because it is one of fact. South Chester *v.* Garland, 162 Pa. 91; McKeesport *v.* Soles, 165 Pa. 628. But where the facts are agreed upon it becomes a question of law for the Court as in other cases. We cannot say that the learned Judge with his

Digitized by Google

superior knowledge of the locality was not right in his view of the point reserved, but we have here two opposite findings on the same fact. This to say the least is inconvenient practice. Either the question should have been withdrawn from the jury on the ground that the facts were agreed upon for the Court, or having been submitted to and found by the jury, the point reserved should have been considered as withdrawn, and the verdict, if against the evidence, should have been set aside, so that on a new trial, if the facts still appeared undisputed, the Court might give a binding direction.

Judgment affirmed. W. C. S.

Orphans' Court.

January, '79, 147.

Hamilton's Estate.

Practice in the Orphans' Court—Injunction—Obtained by petition, not by bill in equity.

A petition is the proper method by which to obtain an order in the nature of an injunction from the Orphans' Court, and not a bill in equity.

Upon a bill in equity in the Orphans' Court an award of distribution will not be reviewed. The proper method to obtain this is by bill of review.

Demurrer to bill in equity for an injunction.

The bill set forth that by an adjudication of the account a certain sum had been awarded to Robert Marquis de Montmort, and that his attorney-in-fact had received payment of the sum awarded. That the power of attorney had been given by the said Robert de Montmort after he had been adjudged by a proper tribunal to be a spendthrift and incapable of executing a power of attorney.

The bill prayed that the defendant, Richard L. Ashhurst, the attorney-in-fact, be restrained from paying over to the said Robert de Montmort the money in his hands as attorney-in-fact; that he pay over any such fund to the complainant; that he be restrained from demanding any securities of the said Robert, and further relief.

The complainant in the bill is R. W. Corbin, the trustee under the will.

John S. Gerhard, for plaintiff.

John G. Johnson, for defendant.

March 30, 1895. HANNA, P. J. This proceeding has been begun by a formal bill in equity, as if filed upon the equity side of the Court of Common Pleas, overlooking the mode pointed out by the Act of May 19, 1874, P. L. 207, wherein, in accordance with the usual practice of this Court, a petition only is required for an order in the nature of an injunction. This alleged bill is filed, so far overlooking the Act of Assembly mentioned, that it is only from the recollection of the auditing Judge, before whom the account mentioned therein was audited, and the statement of counsel at the argument, we gather that it refers to the estate of John Hamilton, as it nowhere else appears.

But, overlooking these irregularities, the proceeding appears to be, on the part of a party alleging his interest in the estate, to withhold final distribution of an award made by this Court, and payment thereof, in accordance with the decree of the Court.

It is therefore to prevent some act, "contrary to law or equity, prejudicial to the property over which they (the Court) shall have jurisdiction:" Act of May 19, 1874, *supra*.

It appears a large portion of the funds is still in the hands of the defendant as attorney-in-fact for the distributees, and consequently still within the control of the Court. But the petitioner or plaintiff alleges that the award was improperly made. This, however, cannot be corrected in this proceeding, nor is the proper party before us making the application. As far as we can understand, the proper party will be an administrator *c. t. a.*, and the correct proceeding to alter and amend the award is by a bill of review. To enable the appointment to be made and proper action taken, we have concluded, in this proceeding, to overrule the demurrer and enter a cautionary order prohibiting the distribution by the attorney-in-fact until final order of the Court. Demurrer overruled.

DECREE.—And now, March 30, 1895, upon hearing upon bill or petition and demurrer, it is ordered and decreed that the demurrer be overruled, and the defendant or demurrant, Richard L. Ashhurst, Esq., is ordered and directed to withhold payment of the balance of the award in his hands as attorney-in-fact of Robert Marquis de Montmort until the further order of the Court.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, AUG. 16, 1895.* [No. 27.

Supreme Court.

July '95, 39. May 16, 1895.

Carr v. H. C. Frick Coke Co.

Deed—Record of, explained by parol—Act of Feb. 24, 1770—Certificate of acknowledgment by justice of peace—Effect of—Evidence.

A mistake or inconsistency apparent on the face of a deed may be explained and corrected by parol.

Under the Act of February 24, 1770, the certificate of a justice of the peace to an acknowledgment by a married woman to the conveyance of her interest in real estate is conclusive except in cases of fraud or duress. In the absence of proof of such fraud or duress the facts certified to are conclusively presumed to be true.

Where the record of a deed purporting to be the deed of A., and B., his wife, for land owned by B. fails to show B.'s signature to same and a suit in ejectment is brought for this land by B.'s only son after the death of A. and B., it is competent for the defendant, after proof of loss of original deed, to show, as evidence that the deed was actually executed by B.: 1. *An original article of agreement* to sell according to the terms of the deed, which was signed by A. and B. although not acknowledged. 2. *The obligations in writing* which the purchaser gave for same, which were in accordance with the terms in the deed and which were in the name of A. and B. and two of which had been duly assigned in writing by A. and B. 3. *The record* of the deed which purported to be the deed of A. and B. to which was attached a certificate of a justice of the peace of the due acknowledgment of the deed by B.

In this case other evidence tended to show the payment of the consideration, the change of possession, and subsequent conveyance of this property and improvements, made with the knowledge of A. and B.

Held, that the question whether B. actually signed the deed was properly submitted to the jury.

Appeal of James B. Carr, from the judgment of the Common Pleas of Fayette County.

The facts of the case and the assignments of error are stated in the opinion of the Supreme Court, *infra*.

Verdict for defendant and judgment thereon.

Plaintiff appealed; the important assignments of error are set out in the opinion, below.

H. L. Robinson and *W. C. McKean*, for plaintiff.

It was error to admit in evidence the unacknowledged article of agreement to show title.

Glidden *v.* Strupler, 52 Pa. 400.
Stivers *v.* Tucker, 126 Id. 74.

It was also incompetent for the purpose of showing the execution of the subsequent deed.

Weidler *v.* Farmers' Bank, 11 S. & R. 134.
Tams *v.* Lewis, 42 Id. 402.

The record of the certificate of the justice was not evidence of the execution, when the record did not show that the deed had been signed.

Curry *v.* Raymond, 28 Pa. 144.
Miller *v.* Ruble, 107 Id. 395.
1 Greenleaf's Evidence, sec. 84.
Stevenson *v.* Hoy, 43 Pa. 191.

The evidence submitted was not so clear, precise and indubitable as to move the Court to reform the deed.

2 Pomeroy's Equity Jurisprudence, sec. 859.
Edmonds's Appeal, 59 Pa. 220.

A justice's certificate is evidence of nothing except that which the law requires him to certify to.

Williams *v.* Baker, 71 Pa. 476.

R. E. Umbel and *John Collins*, (with them *A. D. Boyd* and *D. M. Hertzog*), for appellees.

If it be true that the original deed was signed, then the record is incomplete and the deficiency may be supplied by parol.

Brier *v.* Woodbury, 1 Pickering, 367.
Com'th *v.* Blaine, 4 Bin. 187.
Parker *v.* Luffborough, 10 S. & R. 250.
Hillary *v.* Pollock, 13 Pa. 185.
McCay's App., 37 Id. 129.

The certificate of the justice as to the signing by the wife is conclusive.

Williams *v.* Baker, 71 Pa. 476.
Act February 24, 1770, 1 Sm. Laws, 307.
Helter *v.* Glasgow, 79 Pa. 83.
Cover *v.* Manaway, 115 Id. 345.

July 18, 1895. GREEN, J. If Priscilla Carr actually signed the deed of October 9, 1854, purporting to be the deed of Robert Carr and Priscilla Carr, his wife, to Amzi Fuller, the plaintiff has no case. The question whether she did sign it was the one controlling question in the cause. It was carefully and correctly submitted to the jury by the learned Court below with proper instructions and the jury has found that she did sign it. It was a pure question of fact and necessarily was submitted to the jury. No request was made by the plaintiff for a binding instruction to the jury to find for the plaintiff, and no such instruction could have been given if it had been asked. The ninth assignment of error, therefore, could not be sustained even if such a request had been made, and it can not be sustained because none was made.

The other assignments of error simply raise questions of the admissibility of various offers of proof. Taking them up in their order the first

Digitized by Google

assignment alleges error in admitting the original article of agreement for the sale of the land in question. It was dated Feb. 7, 1854, and it was signed by Priscilla Carr, Robert Carr and A. S. Fuller. It contained a covenant that Priscilla Carr and Robert Carr, being the parties of the first part, would "on or before the first day of April, A. D. 1856, at the proper cost and charges of the said parties of the first part, their heirs and assigns, by good and lawful general warranty deeds, well and sufficiently grant, convey and assure unto the said Amzi S. Fuller, his heirs and assigns in fee simple, clear of all encumbrances, (widow's dower excepted which is hereinafter arranged), all that piece of land," etc., etc., being the land in question. This was an agreement by Priscilla Carr and her husband, that they would do precisely what they purported to do by the deed of October 9, following. The consideration named in the agreement was seventy-five dollars per acre and it was to be paid, six hundred dollars on April 1, 1854, and the balance in two equal annual payments with interest from April 1, 1854, at which time possession was to be given. And it was also agreed that the widow's dower $282.27, was to be considered as part of the purchase money, that the interest was to be paid to the widow during her life and at her death the principal was to be paid to Priscilla Carr and Robert Carr. In the deed the consideration money named was nineteen hundred and sixty-eight dollars and thirteen cents. Certain obligations were given in part payment of the purchase money by Amzi S. Fuller to Robert Carr and Priscilla Carr, all dated Oct. 10, 1854, one for $688.28, payable the first Monday of April, 1855, another for $397.58, payable the first Monday of April, 1856, and another for $282.27, payable at the death of Elizabeth Springer, mother of Priscilla Carr.

When the article of agreement was offered in evidence, it was objected to on the ground that it was a paper agreeing to convey the land of a married woman and was not acknowledged in the manner prescribed by law. Of course if this was the only instrument under which it was claimed that the title passed, the objection would have been valid, and the paper should have been rejected. But it was not offered as such a paper, nor for any such purpose, but as one of a chain of facts, the whole of which tended to show that Priscilla Carr really did sign the deed which was subsequently executed and delivered. For that purpose it was undoubtedly competent, and it would have been manifest error to reject it.

The next three assignments of error are to the admission in evidence of the three obligations for $688.28; $397.58 and $282.27, above referred to, given by Amzi S. Fuller to Robert Carr and Priscilla Carr, together with written assignments of the first two of them, signed by Robert Carr and Priscilla Carr to Isaac Skiles, Jr. As these bonds are precisely such as were probably given in payment of the purchase money, and as the assignments of them were executed by Priscilla Carr as well as Robert Carr, they are just such papers as would have passed between the parties if Priscilla Carr had signed the deed which was given contemporaneously, for the land in question. They were strong and highly persuasive evidence that she had signed the deed. Indeed it is not possible to conceive that the purchaser of the land would have ever given these obligations if Priscilla Carr had not signed the deed. And still more they are very convincing proof that her right to receive the money was recognized by the fact that she was made a payee, and her consent to the whole transaction, including the execution of the deed by her, was strongly to be inferred, from the acceptance and assignment by her of these papers. In this point of view, they were undoubtedly competent, and it was for this purpose they were offered and properly received.

The fifth assignment alleges error in the admission of the deed in evidence, because the record did not show the signature of Priscilla Carr to the deed. Of course if the absence from the record of the deed, of her name as one of the grantors, was conclusive proof that she never signed it, the objection should have been sustained. But there is no law for such a proposition. Her name might have been omitted from the record by the mistake of the recorder, or his copying clerk, and it is simply a question whether the probabilities from all the testimony in the case are sufficient to justify the jury in attributing the absence of her name from the record to such a mistake. When the other facts are briefly reviewed it is simply impossible to account for them except upon the theory that the omission of her name on the record, as one of the grantors, was due solely to the mistake of the recorder or his clerks. In the first place, the deed with her signature attached was precisely what she agreed to give when she executed the article of agreement. In the next place the deed on its face purported to be her deed, as well as that of her husband. In fact her signature was more important for passing the title, than that of her husband. The land was hers, it came to her from her father by inheritance and upon proper proceedings in partition in the Orphans' Court, and it is so recited in the deed. In no possible sense can the deed be interpreted as being merely the deed of the husband for his life estate as tenant by the curtesy. In the designation of the parties the deed declares on its face that it is an indenture, "between Robert Carr and

Digitized by Google

Priscilla Carr, his wife, of North Union Township, Fayette County, State of Pennsylvania, of the first part, and Amzi Fuller, of Uniontown, county and State aforesaid, of the second part." And the deed proceeds to declare that "Robert Carr and Priscilla, his wife, for and in consideration," etc., do hereby grant, bargain and sell, etc., etc., all that certain lot or piece of land, etc., etc., to the said Fuller, his heirs and assigns forever. And both the husband and wife join in the covenant of title and assert that they have both set their hands and seals to the instrument.

As a matter of course the deed was intended by every one interested, to be the deed of the wife as well as of the husband, and no rational process of thought can attribute, either to the grantors, any intent or desire to execute and deliver a deed not signed by the wife, or to the grantee any willingness, intent or desire to accept such a deed. That conclusion is so enormously improbable that it is simply and absolutely incredible. In the next place the justice of the peace who took the acknowledgment certifies most distinctly and positively, under his hand and seal, that both the husband and wife did in fact appear before him on the day of the date of the deed, and did both, "severally" acknowledge "the foregoing indenture to be their act and deed and desired that the same might be recorded as such." And further that "the said Priscilla being of full age and separate and apart from her said husband by me examined declaring (the full contents of said indenture being first made known to her) she did voluntarily and of her own free will and accord sign, seal and as her act and deed deliver the said indenture without any coercion or compulsion on the part of her said husband."

As to this certificate there is no mistake. It is an affirmative, official declaration, that all the facts therein stated did actually occur, and this official declaration has assigned to it by the decisions of this Court a legal effect such as, in the absence of proof of fraud or duress, does not permit an opposite conclusion to be drawn.

In Williams *v.* Baker, 71 Pa. 482, we said, "Under the Act of 24th February, 1770, 1 Sm. 307, establishing a mode by which husband and wife may convey the estate of the wife, the official certificate of acknowledgment is the only evidence that the wife has acknowledged the deed in the form required by the statute, in order to make a valid conveyance of her interest in real estate, and except in cases of fraud and duress, it is conclusive of every material fact appearing on its face."

In Heeter *v.* Glasgow, 79 Pa. 79, we said, "The certificate of a justice of the peace of the acknowledgment of a deed or mortgage is a judicial act. It is conclusive of the facts certified to in the absence of fraud or duress. This is the current of all the authorities in this State."

To the same effect is Cover *v.* Manaway, 115 Pa. 345. Here then we have a conclusive judicial declaration that Priscilla Carr did appear in person and acknowledge that she did sign and seal this deed. There is no proof of fraud or duress and hence the facts certified are conclusively presumed to be true. But these facts can not be true and the record of the deed be a true record. While the accidental omission of the name of the wife as a grantor, on the record of the deed, can be easily accounted for on the theory of a mistake of the copyist, the positive judicial declaration, that she did acknowledge her signing and sealing the deed can not be accounted for, except upon the absolute assumption of its truth. This being so, it is a very modest estimate of the legal effect of the acknowledgment to say, that it is evidence of the fact of signing which may be considered by the jury. Of course if a deed is actually produced which contains a certificate of full acknowledgment, and yet does not contain the signature of one of the grantors, the physical proof demonstrates that there was a mistake in the acknowledgment. This was the fact in the case of Miller *v.* Ruble, 107 Pa. 395, but that is not this case. We are very clear that the recorded deed was properly admitted in evidence. Without pursuing the subject in all its details it may briefly be said that all the other facts in evidence, were consistent only with the fact of an actual execution of the deed by the wife. For instance the grantors gave up the possession of the property to the grantee, who lived on it a number of years, stripped it of its timber, sold it in 1863 to Craig, who occupied it until his death, and although Robert and Priscilla Carr lived in the neighborhood, never did they or either of them make any claim to the property. It remained in the possession of the purchaser, Fuller, and his grantees and successors to the title, from 1854 to 1893, almost forty years, and then was only claimed by a son who was informed of the defect in the record, by the present owners, and for that reason alone, and not on account of any defect in the title which his parents would certainly have known if his mother had really not signed the deed, he brought this action. In addition to this the purchase money was all paid a few years after the deed was made and valuable improvements were made on the land with the knowledge of Robert and Priscilla Carr, without any notice from either, of any defect in the title. In short, all the facts in the case are consistent with an actual execution of the deed to Fuller by Priscilla Carr, and are entirely inconsistent

Digitized by Google

with a refusal on her part to sign. The seventh and eighth assignments are without merit. The case was properly left to the jury who returned a verdict which we think was entirely justified by the testimony.

Judgment affirmed.

W. M. S., Jr.

July, '94, 134. May 13, 1895.

Moreland et al. v. The H. C. Frick Company, Limited.

Coal lands—Surface and underlying estates—Severance of—Adverse possession—Limitations as to in such cases.

Title to the surface, either by deed, or under the statute of limitations, carries with it the right to the coal beneath, but this may be rebutted by evidence of a severance of the coal, and such evidence is not contradictory of that which shows title by deed or adverse possession of the surface.

When a severance takes place, and the holder of a stratum of coal or other mineral, records his title or enters into possession of his sub-surface estate, he is not affected by the state of the title to or possession of the surface.

D. and A. inherited from their father, and became seized as tenants in common of a certain tract of land. without a defined partition of record; by mutual consent, they occupied separate portions of the land in severalty. A son of D., namely J., went to live with his uncle A. Several years afterwards A., who was unmarried, died intestate, leaving as his sole heir-at-law, his brother D., and J. continued to occupy the part of the tract of land belonging to A. Two years afterwards D. conveyed by deed the coal under the whole tract to R., and by mesne conveyances it passed into the possession of the F. C. Company. No question was raised as to the possession of J. during the lifetime of his father D., who died thirteen years after the conveyance of the coal to R.; but fifteen years after the death of D., his other children, claiming that the whole tract belonged to their father, began proceedings in partition against the widow and heirs of J. The defence set up was first a parol gift from A. to J., and second, adverse possession in J. and his heirs for more than twenty-one years. In this suit verdict and judgment were in favor of J.'s widow and children, the evidence being as to the question of possession of the surface only. Subsequently the F. C. Company began to mine coal under the tract belonging to the widow and heir of J., who brought an action of trespass therefor. It appeared that J. knew of the sale of the coal, and received some of the proceeds of the sale, and that the surface and coal were assessed for taxes separately from the time of the sale.

Held, that the proceedings in partition being between the children of D., who claimed under their father, and J.'s widow and children, who claimed under their uncle A., the judgment in that case was not even persuasive evidence against the title of a purchaser for value of the coal beneath.

Held, also, that there was nothing in the evidence to show adverse and hostile possession of the coal in J., or a gift from his uncle A.

Held, therefore, that the Court was right in directing a verdict for defendant.

Appeal of Mary Moreland, Laura Moreland, Montrose W. Moreland, Minnie Moreland, Lena Moreland, Nannie Moreland, and John H. Moreland, widow and children of John H. Moreland, deceased, plaintiffs, from the judgment of the Common Pleas of Fayette County, in an action of trespass brought by said plaintiffs against The H. C. Frick Coke Company to recover the value of coal mined and removed by said defendant company from the lands of the plaintiffs.

The facts of this case are set forth in the opinion of the Supreme Court, and in Moreland *v.* Moreland, 22 WEEKLY NOTES, 401.

The plaintiff offered the evidence of a witness to prove the declarations of John H. Moreland as to how he claimed to own the farm. Objected to. Objection sustained. (First assignment of error.)

The plaintiff also offered to prove in rebuttal that David Moreland, through whom the defendant company claimed title, admitted title in John H. Moreland. Objected to. Objection sustained. (Second assignment of error.)

The Court, SLAGLE, P. J., instructed the jury to find a verdict for the defendant. (Third assignment of error.)

Verdict accordingly, and judgment thereon; whereupon the plaintiffs took this appeal, assigning for error the rejection of the above evidence, and the action of the Court, in directing a verdict for the defendant.

S. E. Ewing and *A. D. Boyd*, (with them *J. C. Work* and *R. E. Umbel*), for appellants, cited—

Ewing *v.* Ewing, 96 Pa. 381.
Campbell *v.* Braden, 96 Id. 388.

Willis F. McCook (*W. H. Playford* with him), for appellee.

There was not sufficient evidence of a parol gift or sale to justify the Court in submitting that fact to the jury.

Washabaugh *v.* Entriken, 36 Pa. 513.
Blakeslee *v.* Blakeslee, 22 Id. 237.
Eckert *v.* Eckert, 3 P. & W. 332.
Christy *v.* Barnhart, 14 Pa. 260.
Myers *v.* Byerly, 45 Id. 368.
Postlethwait *v.* Frease, 31 Id. 472.
Harris *v.* Richey, 56 Id. 395.

The possession of John H. Moreland, the father of the plaintiffs, was the possession of his father, David. It was permissive, and is inconsistent with a claim of adverse possession under the statute of limitations.

Martin *v.* Jackson, 27 Pa. 504.
Cadwalader *v.* App, 81 Id. 194.
Poorman *v.* Kilgore, 26 Id. 365.
Wheatley *v.* Baugh, 25 Id. 528.
Caldwell *v.* Copeland, 37 Id. 427.

July 18, 1895. DEAN, J. This suit was brought to recover from defendant damages for

Digitized by Google

mining and removing a large quantity of coal, which plaintiffs claimed belonged to them, because it was under their land.

Originally, the tract of which this was a part, contained 300 acres, and was owned by Isaiah Moreland, who, having died intestate, the land descended to his two sons, David and Alexander Moreland, as tenants in common. Without a defined partition of record, the sons, by mutual consent, seem to have occupied the land in severalty; David, who was married, living on one end of the tract, and Alexander, who was single, living on the other end. The respective parts were known in the neighborhood as David Moreland's farm, and Alexander Moreland's farm. The division line was a rail fence, which usually seems to have been considered by the brothers as defining the boundary of their respective possessions; though apparently, as brothers might do, they did not rigorously adhere to this division, for one or the other, at times, passed over the line in the use of the property. August 11, 1862, Alexander died intestate, leaving his brother David his sole heir-at-law; on June 22, 1864, David and his wife conveyed by deed the coal under the whole tract to Daniel R. Davidson, which deed was duly recorded the 22d of November, 1864. By deed dated August 7, 1864, duly executed and recorded, Davidson conveyed the same coal to Henry Blackstone; and he the next day conveyed to the Connellsville Gas Coal Company, from which company it passed by sundry conveyances to the H. C. Frick Coke Company, this defendant. So far as shown by the record, the defendant was entitled to the coal, and plaintiffs had no claim to it; but plaintiffs showed, that in 1856, John, son of David, married, and with his wife took up their residence with the uncle Alexander, on his end of the farm. John managed his uncle's farm, and continued to live in the house until his uncle's death in 1862, a period of about six years, and the farm, after he took up his residence thereon, was known as John's farm; John, at his uncle's death, alleged he had given him the farm in consideration of support during his, the uncle's, life; as to this claim, so far as concerned the surface, his title does not seem to have been denied during the lifetime of his father, David, who died in 1877, about fifteen years after his brother Alexander; John, in the meantime, cultivating and using the surface of the land as his own; he died in 1881, in possession; after his death, his brother William, claiming that the whole tract belonged to their father, David Moreland, instituted proceedings in partition against the widow and heirs of John, who defended against the partition of the part on which John had resided and died, on the ground, first, that it was a parol gift, from his uncle Alexander to him, and second, adverse possession for a period of more than twenty-one years. After trial before a jury, verdict and judgment were in favor of John's widow and children. William appealed to this Court, and the judgment was affirmed; see Moreland *v.* Moreland, 121 Pa. 573. This judgment, as between the parties, conclusively established John's widow's and children's right to the surface of the 131 acres, which had belonged to Alexander Moreland in his lifetime. But the question settled in that case, was determined by evidence relating to the surface alone; the title to the surface, either by deed, or under the statute of limitations, carries with it the right to the coal beneath, but this may be rebutted by evidence of a severance of the coal, and such evidence is not contradictory of that which shows title by deed or adverse possession of the surface. The question on which that case turned, is clearly shown in the opinion delivered by the present Chief Justice, who, as preliminary to a consideration of the sufficiency of the evidence, says: "The main ground of the defence, and the one on which the case was finally submitted to the jury, was, that John H. Moreland and his widow and children, had continuous, adverse, exclusive and notorious possession of the land, for more than twenty-one years."

Besides, the parties in interest, there, were the children of David, who claimed under their father, and John's widow and children, who claimed under their uncle Alexander; a controversy in partition between them, could not affect the title of a purchaser for value to the coal beneath. Therefore, the judgment in that case is not even persuasive evidence in this.

Soon after the final judgment in the former case, the widow and heirs of John brought this action of trespass against defendant, for mining the coal under the tract, the surface of which, by that judgment, was determined to be theirs. The evidence on part of plaintiffs was not essentially different from that offered by them as defendants in the first case, but the evidence offered by this defendant, as purchaser of the coal, while not affecting plaintiff's surface right, in the opinion of the Court, was fatal to their claim for the coal, and accordingly, after hearing all the evidence, it directed a verdict for defendant. We now have this appeal by plaintiffs, assigning three errors, two to the rejection of testimony offered by plaintiff, and one to the peremptory direction to the jury to find for defendant.

We will treat the assignments as one, because if plaintiff's evidence was not sufficient to warrant a verdict in their favor without the rejected testimony, it would not have been sufficient with it; that rejected was of precisely the same character as that admitted; we must assume from the other testimony, that John H. Moreland claimed the

Digitized by Google

land in his lifetime, and that his father did not deny his claim. So, the only question for us, is, was there sufficient testimony to warrant a verdict for plaintiffs? If there was, the Court ought to have submitted it to the jury. In answer to plaintiffs' evidence of gift and hostile possession, defendant showed that in June, 1864, when David Moreland executed the deed to Davidson for the coal under the whole tract, John Moreland was present at the negotiation, and made no objections thereto; the house which John put up on his end, was paid for by the father out of the proceeds of the sale of the coal; after the sale of the coal, the surface was assessed separately to the two Morelands for taxes, and the coal to the coal company, to whom Davidson conveyed it; a statement of John to one witness, that they contemplated a sale of the coal; testimony of another witness as to conversation between John and his father about having sold the coal too cheap; of three witnesses, that they said they had sold the coal, and were building two houses, one for John and one for the father, out of the money; the testimony of a miner who put down the shaft to work the coal, as to John's inquiries whether the mining would affect the surface. Then the significant fact, that although John lived about seventeen years after the sale of the coal, and after the deed was of public record, and while the coal was being mined, yet there is no evidence that he ever protested against defendant's assertion of right, or made demand for compensation.

When a severance takes place, and the holder of a stratum of coal or other mineral, records his title or enters into possession of his sub-surface estate, he is not affected by the state of the title to or possession of the surface: Plummer *v.* Iron Co., 160 Pa. 483; Coal Co. *v.* Iron Co., 162 Id. 114.

It seems to us, in view of this evidence, no matter how strong may have been the evidence as to John's adverse possession of the surface, it in no way contradicts this positive evidence of defendant, that he acquiesced in the severance of the coal by his father's conveyance of it, shared in the proceeds, and never pretended to assert claim to it during his life. So far as the record showed to the purchaser, at the date of the deed, the title to the coal was in the father; the right to dig it then passed to the purchaser, who afterwards, and for years, exercised that right under that claim, without objection; clearly, there was nothing in the evidence to show adverse and hostile possession of the coal in John, when he so long acquiesced.

It is not material, in view of John's conduct at the date of the sale by his father, and subsequently until his death, whether the land was a gift from his uncle, or whether his claim thereto became a perfect title under the statute; if a gift, which is doubtful, he was estopped from denying the right of the purchaser; if his by hostile adverse possession of the surface, he showed no such possession of the coal; on the contrary, his whole conduct was significant of a disclaimer to such possession.

Under the evidence, the Court would not have permitted a verdict for plaintiffs to stand, therefore, there was no error in directing one for defendant.

The judgment is affirmed.

S. H. T.

Jan. '95, 9. March 29, 1895.

Martinez v. Earnshaw.

Written contract, construction of — Word "guarantee" not necessarily importing a technical guaranty—Evidence of custom of trade—Breach of executory contract of sale by vendee —Measure of damages.

March 28, 1887, a written contract was entered into between plaintiff and defendant, the first clause of which was as follows: "That R. Martinez e hijos y Conesa sell, and Alfred Earnshaw purchases, all the dry ore of usual quality which sellers can collect from the mine San Anisetto during the rest of this year, up to ten thousand tons or thereabouts, at the price of six shillings per ton of twenty-two hundred and forty pounds, f. o. b. Cartagena, guaranteed to contain a yield of fifty per cent. of iron in the natural state, with a sliding scale at the rate of three pence per unit additional for every unit over fifty per cent., and with a deduction at the rate of four pence per unit for every unit under fifty per cent. Final settlements to be made on output weights and assays found at port of discharge." The contract further provided that vendor should advise vendee of quantities ready for shipment, whereupon the latter should provide vessels for shipping the same. Vendee having failed to provide vessels as stipulated, vendor brought an action to recover damages laid at $3,750, with interest thereon from January 1, 1888:

Held, that it was competent for plaintiff to introduce evidence showing that by custom of the iron trade in the district of Cartagena, such a contract meant that the ore was to approximate fifty per cent. of iron and to be settled for according to the sliding scale referred to in the contract.

The use of the word guarantee did not constitute a technical guarantee, and it was competent to show the intent of the parties as to the words used by them in the contract.

The contract provided for delivery by loading on vessels furnished by vendee; until such delivery the ore remained the property of vendor, and if a breach of the contract occurred owing to vendee's failure to furnish vessels, the measure of damages was the difference between the contract price and the market price at Cartagena when vendor discovered definitely that vendee would not receive the ore.

After such breach, the vendor had the right to sell the ore, and the terms and conditions of the sale are not ma-

Digitized by Google

terial. Whether through mixture with other ore, the price which they secured was less than they could have gotten for the contract ore, is a matter of evidence for the consideration of the jury in determining the true market price of the latter.

Appeal of Ramon Martinez Guillon *et al.*, plaintiffs, from the judgment of non-suit entered by Common Pleas No. 3, of Philadelphia County, on motion of Alfred Earnshaw, defendant, a motion to set aside the judgment of non-suit having been refused by the Court.

Assumpsit to recover damages for breach of contract for the sale of iron ore. Plaintiffs filed a statement setting forth the contract, to which the defendant filed an affidavit of defence. Plaintiffs took a rule for judgment for want of a sufficient affidavit, which was made absolute, the Court holding that the contract taken as a whole did not contain a technical guarantee that the ore should contain fifty per cent. of iron, and therefore defendant's averment of belief that the ore did not contain over 48 or 49 per cent. was not a defence. Defendant appealed, and the Supreme Court reversed the judgment, (Martinez *v.* Earnshaw, 143 Pa. 479), holding that that was not necessarily the correct construction of the contract. At the trial which was subsequently held, testimony in the form of depositions, which was introduced by the plaintiffs to show the custom of the trade as interpreting the contract, was excluded by the trial Judge, his rulings thereon constituting the first eight assignments of error.

Plaintiffs showed that until the expiration of the year 1887, ore to the extent of 10,000 tons was maintained on a wharf at Cartagena and that defendant was urged to furnish vessels and to load the same but refused to do so; that after the expiration of the year, plaintiffs again urged defendant to accept the ore and on his refusal subsequently sold the same, after mixing it with a lower grade ore, to parties in Germany. The Court held that the placing of the ore upon the wharf was a delivery to the defendant; that the subsequent sale by plaintiffs, after mixing it with other ore, was at plaintiffs' risk; that the value obtained for the mixed ore determined the price of the ore; that the assay of the mixed ore in Germany was not shown to be in excess of 50 per cent. of iron; that the contract contained a technical guarantee of quality and no evidence of custom was admissible, and for these reasons entered a non-suit which the Court *in banc* refused subsequently to take off.

The first clause of the contract was as follows: "That R. Martinez e hijos y Conesa sell, and Alfred Earnshaw purchases, all the dry iron ore of usual quality which sellers can collect from the mine San Anisetto during the rest of this year, up to ten thousand tons or thereabouts, at the price of six shillings per ton of twenty-two hundred and forty pounds, f. o. b. Cartagena, guaranteed to contain a yield of fifty per cent. of iron in the natural state, with a sliding scale at the rate of three pence per unit additional for every unit over fifty per cent., and with a deduction at the rate of four pence per unit for every unit under fifty per cent. Final settlements to be made on output weights and assays found at port of discharge." The substance of the remainder of the contract is stated in the opinion of the Supreme Court.

Plaintiffs appealed, assigning as error, besides the exclusion of testimony above referred to, the entry of non-suit and the refusal to take it off.

Alexander Simpson, Jr., (*Isaac S. Sharp* with him), for appellants.

The Court did not decide on the former appeal that this contract was a technical guarantee.

Martinez *v.* Earnshaw, 28 WEEKLY NOTES, 493.

In relation to express warranties, the rules for interpreting them do not differ from those applied to other contracts. The intention of the parties is sought and carried into effect.

Benjamin on Sales (Bennett's Ed.), 565.
1 Parsons on Contracts (5th ed.), 576.
Heyworth *v.* Hutchinson, L. R. 2 Q. B. 447.

That it was proper to prove a custom of trade to interpret this contract would seem to have been already decided in Martinez *v.* Earnshaw, *supra.* There are abundant authorities.

Myers *v.* Sarl, 3 L. J. (Q. B.), 15.
Clarke's Browne on Usages and Customs, § 85.
Lawson on Usages and Customs, § 181.
Stultz *v.* Dickey, 5 Binn. 287.
Carey *v.* Bright, 58 Pa. 70.
McMasters *v.* Penna. R. R., 69 Id. 374.
Phœnix Iron Co. *v.* Samuel, 13 WEEKLY NOTES, 50.

The validity, nature, obligation and interpretation of a contract are to be governed by the law of the place of performance.

Brown *v.* R. R. Co., 83 Pa. 316.
Forepaugh *v.* R. R. Co., 128 Id. 226.
Baum *v.* Birchall, 150 Id. 168.
Waverly Bank *v.* Hall, Id. 472.

It has been many times decided that if there is nothing remaining to be done by the seller the delivery is complete though the quantity, quality or price are to be ascertained in the future by a standard agreed upon.

Scott *v.* Wells, 6 W. & S. 357.
Winslow *v.* Leonard, 24 Pa. 14.
Andrews *v.* Weaver, 4 Mont. Co., 110.
Macomber *v.* Parker, 13 Pick. 175.
Benjamin on Sales (3d Ed. Kerr's Notes), sec. 357, note 3.

It appears from the nature of the commodity dealt in, and from the language of the contract

Digitized by Google

itself that a technical guaranty could not have been intended.

"On an executory contract for the sale of goods not specific, the measure of damages for a refusal to receive them is the difference between the contract price and the market price on the day appointed for delivery."

Unexcelled Fire Works Co. *v.* Polites, 130 Pa. 537.
Sedgwick Lead. Cas. on Measures of Damages, 23.
Benjamin on Sales (3d Ed. Kerr's Notes), § 1011.

George Tucker Bispham, for appellee.

The defendant in this cause explained the contract, from a business standpoint, as meaning that there was an absolute warranty, coupled with a provision for the terms of settlement if the ore were accepted, and the right to reject for non-conformity to the standard had been lost because the non-conformity had not been discovered until it was too late to reject. The good sense of this proposition is obvious, and moreover it has been ruled as a proposition of law.

Simond *v.* Braddon, 2 C. B. N. S. 336.

We were not bound to accept something different from the thing bought.

Benjamin on Sales, § 894.
DePuy *v.* Arnold, 1 WEEKLY NOTES, 157.
Isaacs *v.* Maris, 1 Id. 268.
Martinez *v.* Earnshaw, 143 Pa. 479.

Custom is admissible to explain what is doubtful. It is never admissible to contradict what is plain.

Blackett *v.* Assurance Co., 2 C. & J. 249.
Browne on Usages, sec. 105.
Barnard *v.* Kellogg, 10 Wall. 390.
Coxe *v.* Heisley, 19 Pa. 243.
Wetherill *v.* Neilson, 20 Id. 453.
Hartje *v.* Collins, 46 Id. 268.
Stoddard *v.* Emery, 128 Id. 436.
First National Bank *v.* Fiske, 133 Id. 241.
Dickinson *v.* Ancient Order Un. Workmen, 159 Id. 258.

July 18, 1895. DEAN, J. The plaintiffs sued to recover the sum of $3,750, with interest from 1st of January, 1888, damages which they claimed to have suffered, by reason of defendant's breach of a written contract for sale by them to him, of iron ore.

The plaintiffs are dealers in and shippers of ore in Cartagena, Spain; the defendant is a resident of Philadelphia, and in this particular transaction acted by his agents Allan, Wrenn & Company, of London. Through these agents, on the 28th March, 1887, the contract sued on was made. It stipulates: 1. That defendant will purchase all the dry iron ore of usual quality, which plaintiffs can collect from the San Anisetto mine, during the rest of the year, up to ten thousand tons or thereabouts, at the price of six shillings per ton of 2240 lbs., f. o. b. Cartagena, guaranteed to contain a yield of fifty per cent. of iron in the natural state, with a sliding scale at the rate of three pence per unit additional for every unit over fifty per cent., and with a deduction of four pence per unit for every unit under fifty per cent. Final settlement to be made on output, weights and assays found at port of discharge.

2. Plaintiffs to advise the agents of defendant from time to time of the quantity ready for shipment, and the agents to charter vessels for carrying accordingly.

3. Plaintiffs engage to load at rate of two hundred and fifty tons per day, weather permitting, Sundays and holidays excepted, and to be paid five pence per ton for loading; dispatch money earned in loading to be equally divided; plaintiffs to pay demurrage charges at port of loading.

5. On arrival at port of discharge, cargo to be sampled and assayed by chemist of repute, whose decision is to be final; costs of assay to be equally divided between the parties.

The 4th, 6th and 7th stipulations are not material to this dispute.

The plaintiffs within the time specified in the contract, had ready for shipment at Cartagena the 10,000 tons of ore, and made repeated requests on defendant to provide vessels for shipment; this he did not do, assigning as an excuse that it was impossible to obtain them; then, under date of January 16, 1888, after the year had expired, plaintiffs, stating their disappointment at non-arrival of vessels, put this pointed interrogatory to defendant's agents: "Kindly tell us by return post whether you are going to charter for our contract or not; we cannot wait any longer." To this, the agents reply five days afterwards, that they are doing their best to secure vessels, but "If you have any outlet for the mineral, we should be perfectly willing for you to sell it." There was other evidence showing a readiness and willingness on part of plaintiffs to perform, and failure of defendant to fulfil his part of the contract, in furnishing vessels for shipment of the ore. Defendant having refused to pay damages, plaintiffs brought suit.

In answer to the alleged breach of contract, defendant, in his affidavit, averred that he made the contract on representations of plaintiffs, as to the quality of the ore, samples of which had analyzed over 53 and 59 per cent. of iron, and .025 per cent. of phosphorus; further, that shipments of two cargoes had been made on the strength of these representations, but before the arrival of the vessels, and in reliance on the samples, he had entered into the contract; but afterwards, when the cargoes arrived, and the ore was analyzed, it showed only 48 and 49 per cent. of iron, and .038 per cent. of phosphorus;

Digitized by Google

that, immediately on discovering these facts he repudiated the contract. He therefore avers, on belief, that plaintiffs were not ready and willing to deliver the kind of ore stipulated for in the contract.

On a rule for judgment for want of a sufficient affidavit of defence, the Court below made the rule absolute, and defendant appealed to this Court. The case is reported in 143 Pa. 479. We reversed the judgment for the reason that taking the affidavit as absolute verity, that the contract had been entered into on representation of quality of the ore, and the guarantee made to sustain the representation, the case was not one to be determined by a mere inspection of the pleadings, but should have gone to trial; and it was distinctly said in the opinion, after stating the averments of the affidavit, that we did not undertake to determine there was a breach of the guarantee which would relieve defendant from payment, and this language is used: "Possibly, the variation from the percentage of metallic iron required by the contract may be so slight that the ore delivered may be a substantial compliance with the contract, or a compliance which the law, when better informed by testimony, may regard as adequate." The opinion, when fairly considered, only shows, that on the record as it then stood, we would neither give a binding interpretation of the agreement, nor attempt to adjudicate the rights of the parties; that we could only intelligently do so, after trial of the issue in the Court below, on the evidence.

The case went back, and came on for trial. The plaintiffs then offered testimony by depositions to prove a custom of the iron ore trade at Cartagena, so that the Court and jury might have a clear understanding of the intent of the parties by the first, or guarantee stipulation of the agreement. The nature of the testimony offered is shown by this answer of Antonio Conesa, which is responsive to an interrogatory of plaintiffs:

"I was a mineral merchant. In consequence of my being in the business, I am aware of the customs of the iron ore trade in this district (Cartagena). I have had experience from the year 1884. The custom has always been to fix a standard of 50 per cent., with a sliding scale to regulate the price according to the result of the assay of the cargo when discharged. From the moment that a sliding scale is fixed for the rise or fall of the price of iron, the purchaser is obliged to receive the mineral, always provided, that it does not go below 45 per cent. or 46 per cent., and we have liquidations in which the mineral has resulted with 46 per cent. of iron, for which we have been paid without objection." And further on he says: "Iron ore not being a manufactured article, it has to be taken as it comes from the mines, and the contents in the natural state vary according to the moisture which it may contain at the time of sampling. For this reason it is impossible to give an absolute guarantee, so it is, and always has been, the custom to adopt a sliding scale."

This and much other evidence bearing on the guarantee clause of the contract, aiding in the interpretation of its terms, which, of themselves, are capable of divers interpretation, was offered, which, on objection by defendant, was excluded.

The Court below, being of the opinion that defendant had until the last day of 1888 to accept the ore on the wharf at Cartagena, and as plaintiffs had not shown that the ore at that time was up to the standard of the guarantee, fifty per cent. or over; and, at all events, as plaintiffs had, after that time, mixed the ores and sold them in Germany without notice to defendant, there could be no recovery, entered a compulsory non-suit. From this judgment we have this appeal by plaintiffs, who assign for error the rejection of the evidence as to the trade custom, and the construction of the guarantee clause of the agreement.

There is no cast-iron rule to be applied in the ascertainment of the intent of the parties as to the words used by them in the first clause of the agreement. It might be held to mean a guarantee of fifty per cent., with an option to reject, if under that analysis; but such construction, in view of the whole agreement, is an improper one. It seems to us, if believed, the evidence offered and rejected, of the custom of the trade, in what sense the words are used by sellers and purchasers of iron ore, is conclusive as to the construction to be put upon them; every word of this clause is in harmony with this trade construction.

It will be noticed this ore was to be mined in Spain, and delivered on board at Cartagena; even eighty per cent. of the invoice then became due and payable. Therefore, the place the contract was to be performed was Spain, and the law and the trade custom, which the law recognizes, would be those of Spain, and would control the contract. As is said in Phœnix Iron Company *v.* Samuel, 13 WEEKLY NOTES, 50: "Presumably they understood the contract as it is understood at the place where made, and where the vendors were to perform their part of the agreement." And Starkie on Evidence, 8th edition, 701, as to the admissibility of evidence to establish custom, lays down this rule: "Where terms are used which are known and understood by a particular class of persons, in a certain special or peculiar sense, evidence to that effect is admissible for the purpose of applying the instrument to its proper subject matter; and the cases seem to fall within the same consideration,

Digitized by Google

as if the parties, in framing their contract, had made use of a foreign language, which Courts are not bound to understand." This rule was adopted by this Court in Carey *v.* Bright, 58 Pa. 70, where it was held that evidence of the trade meaning of the word "colliery" was admissible.

The word "guaranteed" in this contract is manifestly used for warranted. The vendors warranted the ore to be of an average purity of fifty per cent; it was not in human power to have each and every ton in its natural state up to this standard; there cannot be an unvarying assay of a crude mineral; while this last fact appears in the rejected testimony, it is also an obvious inference from the terms of the contract. Every mineral varies as to purity with the character of its location in the natural bed; whether, when mined, it will absorb much or little moisture, depends on the character of the impurities inseparable from it, the humidity of the atmosphere, and the length of time exposed. While the variation may not be great, there will be some change incident to mining and shipment. It is a fair presumption in the absence of proof, that both parties knew this, because it is only presuming they had ordinary knowledge of the subject of the contract. Knowing this fact, that the ore would not be in the same condition when assayed at port of discharge as when mined at the point of shipment, how did they provide that the seller should get six shillings for every ton of ore up to a fixed standard, and the buyer should not pay more than it was worth, because below the standard? By a sliding scale, which provided, the vendor should pay three pence per unit when above fifty per cent., and have a deduction of four pence per unit when it fell below. The richer the ore the less the comparative cost of smelting; the poorer, the greater, and increasing much more rapidly in cost than it lessened in purity; for that reason, the deduction, when it fell below the standard, was greater than when it rose above it; and it may be conceded, too, that even this sliding scale is to have a reasonable interpretation; ore that did not come up to the standard was not to fall many units below it; for if it did, the ore was practically worthless for shipment; the cost of getting a ton of iron out of four tons of ore, yielding in the furnace twenty-five per cent., compared with the cost of a ton of iron out of two tons of ore, is so much greater that evidently the parties intended the purity of the leaner ore should approach closely the standard.

Here again comes in the evidence as to the trade custom; that ore within four or five units of the standard is alone merchantable.

In view of the evidence offered, we think the parties framed this contract to provide for the very contingency now complained of, a slight falling below the standard. And even if the ore only reached the same standard as that purchased before the contract was made, 48 and 49 per cent. of iron, plaintiffs fulfilled their contract when they placed it on the ore wharf, and notified defendants it was ready for delivery, f. o. b. for shipment.

Nor was it a breach of contract on part of plaintiffs to sell the ore at the best price obtainable when defendant had not taken away a pound of it for a month after the time stipulated in the contract. Through his agents' letter of January 21, 1888, to plaintiffs, he says: "If you have any outlet for the mineral, we should be perfectly willing for you to sell it." To this, on January 30th, plaintiffs reply: "We beg to thank you for your suggestion to sell the ore elsewhere, but really, as we have collected this special class of ore for Mr. Earnshaw, we should like him to receive it, and if he cannot ship the ore just now, he should authorize us to draw against these stocks. . . . . We think this much better than to be obliged to sell the ore elsewhere, perhaps at a great loss." But defendant neither took the ore, nor authorized plaintiffs to draw for any part of the price. Certainly, he has no right to complain that plaintiffs, months afterwards, sold it in Germany. Nor did he so complain at the trial below; his eminent counsel, Mr. McMurtrie, deceased, made this statement to the Court: "I admit the plaintiffs had the quantity of ore, but not the quality of ore. I admit the plaintiffs took the ore to Germany and sold it in the way of which we cannot complain, but the only question is, as to whether they fairly dealt with the ore, so as to make that scale a standard of price."

It will be noticed from the contract plaintiffs were to deliver the ore to defendant, not on the wharf, but f. o. b. at Cartagena, from time to time, defendant to furnish vessels on advices of quantity ready for shipment. The breach of contract of defendant was in the neglect to furnish vessels to receive the ore; it was not his ore, and was not to be in his possession until loaded. It follows, then, it was at the risk and charge of plaintiffs while at the wharf; as long as it was in their possession, their damages could not be the contract delivery price, unless the ore became absolutely valueless because of his failure to take it, and this last is not pretended. Then, the plaintiffs having been ready and willing to deliver at the time appointed in the contract, of which defendant had full notice, and the ore still belonging to plaintiffs, they were bound to get the market price at the time and place appointed for delivery. It is said in Fire Works Co. *v.* Polites, 130 Pa. 537, adopting a well established rule, as shown by the text books and cases there cited: "The present

Digitized by Google

tendency of the American cases is to the doctrine that where the vendor stands in the attitude of complete performance on his part, he is entitled to the contract price as the measure of damages; but on an executory contract for the sale of goods not specific, the measure of damages for a refusal to receive them is the difference between the contract price and the market price on the day appointed for delivery."

The measure of damage was the actual loss, and they lost the difference between what defendant had contracted to pay for the ore and the market price at Cartagena, when they discovered definitely he would not receive it. They had a right to sell it at Cartagena, not for any price, but for the market price, to German or any other buyers. In making the sale, they were bound to exercise reasonable and intelligent judgment in ascertaining the market price at that point. It is not important that they mixed one-fourth or fifth of inferior ore to further a sale of the whole, unless such mixture resulted in a less price than the market price for this Anisetto ore; if it did, that does nor bar their right, it only compels them to account for the market price of the Anisetto ore. If the price they got for the mixture was less than they could have got for the Anisetto, the price of the mixture does not determine their damages, but the market price of the Anisetto deducted from the contract price. This market price, plaintiffs claim, from the testimony, was only 4s. 6d. per ton, instead of the 6s. contract price. That is a matter of evidence for the consideration of a jury. We only say, plaintiffs were not bound to pay wharfage, and refrain from making a sale of their own ore, after defendant had broken his contract.

We conclude: 1. That it was error to reject the evidence of the trade custom at the place the contract was to be performed. 2. That the true measure of damages is the difference between the contract price and the market price of the ore at the point of delivery at the date it was sold.

The judgment is reversed, and a venire facias de novo awarded. J. D. B., Jr.

Jan. '95, 411. May 28, 1895.

Commonwealth v. Junkin and Sponsler.

Penal statutes—How construed—Act of May 9, 1889—Bankers and brokers—Receipt of deposit when insolvent—What amounts to a deposit under the Act of May, 9, 1889.

Penal statutes, which inflict punishment, must be strictly construed.

In order to secure a conviction under the Act of May 9, 1889, making the receipt of a deposit by a banker, who knows at the time that the bank is insolvent, embezzlement punishable with fine and imprisonment, the Commonwealth must prove beyond reasonable doubt: 1. Actual insolvency as the money is received. 2. Knowledge of the insolvency; and 3, The receipt of the money as a bank deposit.

When a bank officer after known insolvency receives money over the counter and does not mingle it with the general funds, but keeps it separate with the intention of returning the identical money, this does not amount to a receipt of money as a bank deposit.

Where the evidence shows that both partners in a private bank were in ill health when the fact of insolvency became known and that they instructed the cashier not to receive any deposits, or if he did to mark them specially and return to the depositor, and it appears that the cashier received a small amount at the end of banking hours which he neglected in the hurry of business to keep separate, which sum, however, was afterwards returned to the depositor; it was error to charge the jury, "We do not think the question as to whether the money deposited was to be returned, or the fact that it was afterwards returned, is material to the case."

Appeal of Benjamin F. Junkin and William A. Sponsler, from the judgment of the Quarter Sessions of Perry County.

Benjamin F. Junkin and William A. Sponsler were indicted for embezzlement under the Act of May 9, 1889, P. L. 145.

The facts as they appeared at the trial, before Bell, P. J., of the 24th district, specially presiding, are set out in sufficient detail in the opinion of the Supreme Court, *infra*.

Counsel for defendant requested the Court to charge, *inter alia*, as follows:

"XVI. If the jury believe from the evidence that Willis was ordered not to take deposits on the 24th of March, 1894, the day the money of Rice was taken, and if money was taken that it must be returned and it was returned, the verdict must be not guilty." *Answer*. "This point is denied. We do not think the question as to whether the money deposited was to be returned, or the fact that it was afterwards returned, is material to the case."

The verdict was guilty as indicted and the Court sentenced defendants to pay a joint fine of $20 and each defendant to one year's imprisonment in the penitentiary.

Defendants appealed, assigning for error, *inter alia*, the answer to the above point.

C. H. Bergner and *J. C. Bucher*, (with them *Louis E. Atkinson* and *Charles A. Barnett*), for appellants.

The enacting clause in the body of the Act is unconstitutional and incapable of enforcement; if the title is read into the body of the Act then the offence is receiving money as a deposit, but the evidence in this case does not show that it was received as a deposit.

See as to meaning of deposit—

2 Am. & Eng. Encyc. Law, p. 93, and cases cited. Morse on Banks and Banking, 28.

Digitized by Google

Luke Baker, district attorney, and *Albert Millar*, (with them *George Kunkel* and *W. H. Woods*), for appellee.

In the present case the Commonwealth showed that the appellants were bankers, that they were insolvent as a bank and as individuals, that they knew the insolvent condition of the bank, of themselves, and of each other; that Rice was a depositor and that with knowledge of their insolvency they received from him certain personal property, namely, a deposit of money. This being shown the case was completely made out, and the learned Judge who tried the case was right when he refused to instruct the jury that it was necessary for the Commonwealth to show that a contractual relation was created between the banker and the depositor at the time the deposit was received, or that, inasmuch as it appeared there was no such contractual relation created under the facts of the present case, the appellants could not be convicted under the Act.

July 18, 1895. DEAN, J. In September, 1866, the defendants entered into co-partnership in the banking business at Bloomfield, Perry County, with three others, under the name of "Perry County Bank," capital, $30,000. In the year 1876, by death and retirement, the number of partners was so reduced, as to leave but these two defendants, who continued the business down to 24th March, 1894, when the bank closed its doors because of undisputed insolvency. The defendants, from the time the bank opened until it closed, were lawyers, actively engaged in the practice of their profession in Perry and adjoining counties, so that the personal attention they gave the bank's affairs during that period, was only such as men in their situation could give; while often in the bank, they were not there in daily supervision, exercising that watchfulness the nature of the business demanded. Sponsler, it is true, was president, and inspected and passed upon much of the paper discounted, but he did not watch the daily balances of customers, and guard the resources of the bank from depletion by bad banking. This was entrusted to the cashier. When it was organized, William Willis was chosen cashier, and he remained in this position until his death in 1891, when his son James, who had been an assistant to his father for some years before the latter's death, was chosen to his place; he then continued as cashier until the bank closed. Most of the important details of the management were entrusted to the father and son, while cashiers; in the interval of two or three weeks between the death of the father and the selection of the son, Sponsler, one of defendants, acted as cashier. Whether defendants realized the fact, is not clear, but the evidence now makes it clear, that, at this time, when James Willis succeeded to the cashiership, the bank, practically, was insolvent, because a large part, if not all, of its original capital had been sunk, and no new capital had been contributed. The bank, under the new cashier, as is usual with lame institutions of that character, went limping along, in hopes of bettering its condition, which, however, continued to grow worse until the end on Saturday, the 24th of March, 1894. Some days before its close, Junkin, without doubt, and Sponsler, probably, knew the bank was very seriously embarrassed for money; their expectation of relief from this condition is not material; their knowledge of the fact is. On Saturday, the 24th, about a quarter to three o'clock, and just before the bank finally closed, Josiah Rice handed over the counter, as a deposit, $20. The money was received by Harry E. Bonsall, a clerk, acting under Willis, the cashier, and although afterwards returned to Rice, nevertheless, at the time, the money was mingled with the general funds of the bank. After the bank closed, Rice instituted this criminal prosecution against Junkin and Sponsler, bankers, under Act of 9th of May, 1889, for receiving a deposit, knowing at the time the bank was insolvent. Being convicted, and sentenced to fine and imprisonment, we have before us this appeal.

Appellants prefer sixteen assignments of error to the charge of the Court, and answers to points. With the exception of the eighth, it would be a waste of time to discuss and pass judgment on these multiplied complaints of error; while the gravity of the consequences of this judgment to their clients, doubtless impelled counsel to press them upon our consideration, they are so destitute of merit, that an elaborate review is not called for by any duty on our part to the Commonwealth or the defendants. The case was most carefully and ably tried; the learned Judge of the Court below, in all his rulings, displayed unassailable impartiality, and certainly defendants, unless as to the assignment noted, have no ground whatever of complaint. All assignments, except the eighth, are therefore formally overruled.

The eighth involves an interpretation of the Act of 1889. That Act being very short, we quote it in full, thus:—

"Section 1: Be it enacted, etc., that any banker, broker, or officer of any trust or savings institution, national, State or private bank, who shall take and receive money, from a depositor, with the knowledge that he, they, or the bank, is at the time insolvent, shall be guilty of embezzlement, and shall be punished by a fine in double the amount so received, and imprisoned from one to three years in the penitentiary."

Digitized by Google

The title of the Act is: "An Act Relating to the Receiving of Deposits by Insolvent Bankers," etc., and the title is part of the Act to be resorted to in interpreting it.

There are three essential elements, which the Commonwealth must prove beyond a reasonable doubt, before the jury can find the guilt which the Act makes punishable: 1. Actual insolvency at the time the money is received. 2. Knowledge of the insolvency. 3. The receipt of the money as a bank deposit.

As to the first two elements, there was much evidence tending to establish the fact of insolvency on and long prior to 23rd March, 1894, and knowledge of such insolvency by both Junkin and Sponsler; and the verdict of the jury on competent evidence under proper instructions, has established both in favor of the Commonwealth.

But, did the defendants, as bankers, in the face of the prohibition of the statute, receive Rice's money, as a bank deposit, on the 24th? The essential elements of crime, unless otherwise declared by statute, is the intent to commit it, or the wilfulness of it. The Legislature can declare an act a crime, and make it punishable, regardless of the intent, but this statute will not bear such interpretation; its aim is, to punish dishonesty; the moral guilt which prompts to falsehood and deception; for there is necessarily moral guilt on the part of a banker, who, with knowledge of insolvency, receives as a bank deposit the money of a customer; by necessary implication, when he so receives it, he says to the depositor, "My bank is solvent, and is able to repay this amount when called for;" if such were not the implied representation, relied on, too, by the depositor, he would not leave his money. To constitute the criminal intent, it is not, however, necessary that the banker at the time intended to defraud the depositor; his intention to repay may have existed; it is the concealment of his present, to him known, inability to pay, and in that condition, receiving, as part of the funds of the bank, the depositor's money, which he knows, without the false representation, he would not receive, that constitutes the criminal intent.

Was Rice's money received as a deposit of the bank?

The defendants, in their sixteenth point, the answer to which is the subject of the eighth assignment of error, requested the Court to instruct the jury: "That if they believed from the evidence, that Willis was ordered not to take deposits on the 24th of March, 1894, the day the money of Rice was taken, and if money was taken, that it must be returned, and it was returned, the verdict must be, not guilty."

To this, the Court made answer: "This point is denied. We do not think the question as to whether the money deposited was to be returned, or the fact that it was afterwards returned, is material to the case."

Is this rigid interpretation of the Act warranted? It must be borne in mind, that there was evidence to which the jury were to apply it in making up their verdict. The defendant had called to the stand, B. F. Junkin, who had been ill and confined to his room, from the 1st of February previous to the 24th of March, the day the bank closed; he stated, he first learned of its alarming condition on the evening of the 23rd of March; on the morning of the 24th, he sent a messenger for Willis, the cashier, to come to his house; he came, and he said to him, "'Jim, you must not open that bank this day, absolutely you must not do it;' he says, 'I will open it, I must open it;' 'No,' I said, 'Jim, it is closed now, and you can leave it closed, and leave it stand just as it is, this thing must stop.' He says, 'I can't close the bank in the daytime.' 'Why not,' I said. 'Well, I can't and won't close it in the daytime.' I said, 'Jim, if you won't close as I order you to do, and you open its doors, you must not take one deposit this day, not over its counter or anywhere else.' He says, 'I can't open the bank, and not take deposits, that would not be banking.' And I says, 'I don't want banking to go on, I want it stopped.' He says, 'I will open the bank and take deposits just as I have taken deposits.' I said, 'Jim, if you do that, you do it at your peril, and I warn you not to do it;' and I said, 'If you persist in doing this, if you persist in opening the bank against my order, and taking deposits against my order, then take care of yourself; and if you receive deposits, then make special deposits of them, put each up by itself, and put it by itself, and return it to the depositors,' and that he said he would do."

This statement is corroborated by Mrs. Junkin, and is partially admitted by Willis, the cashier, the principal witness for the Commonwealth.

Willis opened the bank, as he declared he would; all the deposits except two or three taken in that day, were marked special, and the money and checks put in special envelopes, and afterwards returned; they never entered into or formed part of the funds of the bank. Rice's deposit, as noticed, was taken over the counter by Bonsall, and as defendants alleged, inadvertently mingled with the bank's funds, but they afterwards returned to him a like amount, twenty dollars.

Putting aside for the present, the question raised as to Junkin's answerability criminally for the acts of his agent; assume, that he had himself been in the bank that day, and personally received

Digitized by Google

this twenty dollars at the counter, and had put it in an envelope, marked with Rice's name, to be returned to him, in case the bank closed, and then did return to him the same twenty dollars; would that, within the meaning of the Act, have been the receipt by a banker, knowing the bank to be insolvent, of money on deposit? The peril to and loss of the depositor's money, arises from the concealed insolvency of the bank; but if it never mingles with or forms part of the bank's funds, which are assets for the payment of creditors generally; remains separate from all other funds, and is capable of absolute identification, so that it may be returned, and is actually returned, that does not constitute the criminal receipt of money as a bank deposit. The real deposit, whether on time or call, when passed over the counter, is thereafter the property of the bank absolutely; it is the intention of the depositor and the bank, that the latter shall thereafter use it as its own by loaning it to others, and paying it out on checks drawn by others; the express or implied promise of the bank is, that it will repay him, not that money, but that amount of money; in the case we are supposing, the intention of the banker is, to hand back the identical money received, and that intention is manifested, not by what he says, but by what he does, not only at the time, but afterwards. This method of not receiving money on deposit by a banker knowing his insolvency, as demonstrated by the event here, is not an open, unequivocal observance of the law; he subjects himself to the peril of misconstruction of his real intention, and invites criminal accusation. But, unwise as may be the conduct, if no intention, in fact, existed, to appropriate in aid of his insolvent bank, the depositor's money, and he did not, in fact, so appropriate it, he is not a criminal. If such a transaction is not a deposit by a depositor, if there be no contract to which the minds of both parties assented, then, it is not within the terms of the Act. Penal statutes, which inflict punishment, must be strictly construed.

If Junkin himself would not have been guilty, had he, under such circumstances, personally received the money, he would not be answerable criminally if he instructed his agent to so receive it. Whatever may be the answerability of the principal for the wrongful act of his agent in civil actions, he is not answerable criminally, when the act is in positive disobedience of his explicit instructions. Willis was the agent in control, Bonsall was his subordinate; whether the neglect to specially mark Rice's deposit was wilful or inadvertent on their part, the act cannot be imputed to Junkin, whose orders were directly to the contrary; and if he be believed in his statement, that he had been confined to his room by illness for months before and months afterwards, he cannot even be accused of neglect to personally attend in the bank on that day, to see that his orders were executed.

As to the other defendant, William A. Sponsler, there is testimony that for a year before the bank closed, he had been so ill as to be confined most of the time to his bed; on the day it closed, he was in a very dangerous condition, and wholly unable to even converse on business affairs; because of his disability, about a week before the bank closed, he had given his son power of attorney to take his place in the management; the son testifies, that he came to Bloomfield from Newport, on Saturday, the 24th, and about eleven o'clock in the forenoon, went into the bank and gave Willis this instruction:

"James, I tell you what I want you to do, all the money that you take in to-day, I want you to keep separate, each parcel by itself, and not to receive it as a deposit, keep it by itself, and on Monday return it to each of the respective parties, who deposited or left the money with you. He said, I will do so. And he said, that is what Judge Junkin told me I should do this morning, and that is what I am doing."

As Rice's deposit was made at a quarter to three o'clock, in the afternoon, when, as alleged, according to both defendants' instructions, that, or no other money was to be received as a bank deposit, it follows, Sponsler's situation is the same as Junkin's.

Much of the testimony as to the instructions given Willis, was contradictory in its character, but in passing on this assignment of error, we must assume the defendants' averments to be the fact, because their sixteenth prayer for instruction, only asked the Court to say to the jury: If they believed from the evidence, Willis received such orders, then defendants were not guilty. The Court's answer, was, in effect, that it was immaterial what they believed from this evidence. This instruction may have operated to the conviction of defendants. We think the learned Judge of the Court below, mistakenly gave too rigid an interpretation to the Act of 1889, in favor of the Commonwealth; under that interpretation, the negligent, incompetent and unfortunate banker can be convicted of a serious crime, as well as the swindling and dishonest one; this was not the object of the Act. If the Legislature intend such result, it must be accomplished by a law leaving no reasonable doubt of such intention.

The judgment is reversed, and a venire facias de novo awarded.

W. M. S., Jr.

Digitized by Google

July, '94, 88. May 7, 1895.

Irons v. Allen.

Justice of the peace—Fee bill—Acts April 2, 1868, P. L., page 3, and March 28, 1814.

Where a statute establishing a fee bill contains no penalty for the exaction of fees illegal under it, the penal provision of a former statute on the same subject may not be resorted to to recover.

The penalty imposed by the earlier statute is for taking fees illegal under that Act, not for taking illegal fees generally.

Appeal of George Irons, from the judgment of the Common Pleas of McKean County, in refusing to take off a non-suit in an action of assumpsit wherein appellant was plaintiff, and M. N. Allen defendant.

On May 7, 1892, Barbara Vantz brought suit against George Irons, the appellant herein, before M. N. Allen, a justice of the peace, the appellee herein, claiming for wages of manual labor. There was a hearing in the case May 14, 1892, and judgment given for the plaintiff, with costs of suit. The appellant on the same day paid the costs and took an appeal. The docketed costs amounted to $10.32, but the appellee exacted and received from the appellant $11.32, which included 10 cents charged for satisfaction of the judgment aforesaid upon appellee's docket, and also a charge of 25 cents for the affidavit of appellant that his appeal was not taken for delay.

On August 26, 1892, appellant served notice, of his intention to bring suit, on the appellee.

The appellant, October 18, 1892, sued the appellee before a justice of the peace for the illegal fees so as aforesaid charged, claiming a penalty of $50 for each of the three alleged illegal fees charged. At the hearing, October 25, 1892, judgment was given in favor of the appellant for the sum of $100. An appeal was taken to the Common Pleas and upon the trial the Court ordered a compulsory non-suit and subsequently discharged a rule to take it off.

The plaintiff then appealed.

J. M. McClure, for appellant.

"The rule of implied repeal is clearly inapplicable where the revising statute declares what effect it is intended to have upon the former law, as, where it declares that it shall operate as a repeal of such provisions of earlier acts as are inconsistent with it, which is regarded as a declaration that it shall repeal only such provisions and leave unaffected such as are not inconsistent.

"Where the Legislature expressly declares what effect, in the way of repeal, an Act is intended to have, there can be no room for any implication."

Endlich on the Interpretation of Statutes, ¶ 203, p. 272.

In a civil action for the penalty, it has been held to be immaterial whether the illegal charge was made ignorantly or oppressively and fraudulently.

Miller *v.* Lockwood, 17 Pa. 248.

A well-known rule for the interpretation of statutes is that where there are earlier Acts relating to the same subject, all are, for the purposes of construction, considered as forming one homogeneous and consistent body of law.

Jacoby *v.* Shafer, 105 Pa. 610.

Another rule for the interpretation of statutes is that in construing them we are to presume that the Legislature does not intend to make any alteration in the law, beyond what it explicitly declares, either in express terms or by unmistakable implication.

If the 26th section of the Act of March 28, 1814, imposing a penalty upon justices of the peace for taking illegal fees, is repealed by the Act of April 2, 1868, entitled "An Act to ascertain and appoint the fees to be received by the several officers of this Commonwealth," (P. L. 1868, page 3), the repeal is by implication only. The repealing clause of the latter Act is in these words: "That any law now in force, which is supplied by or is inconsistent with this Act is hereby repealed." The 26th section of the Act of March 28, 1814, is clearly not supplied by the Act of April 2, 1868, nor is that section inconsistent with any of the provisions of the latter Act. The only way we can give such force to the Act of 1868 is by implying that because the Act was subsequent to the Act of 1860, making such taking of illegal fees a misdemeanor punishable in the criminal Courts, and because the Legislature omitted the penal clause from the Act, it was therefore the legislative intent to repeal the 26th section.

E. L. Keenan, (*J. N. Apple* with him), for appellee.

Prior to the Act of March 28, 1814, giving a penalty to the party injured, the offence of extortion by taking illegal fees was punishable by indictment at common law; but not so after the passage of that Act, for the only remedy then was to proceed for the recovery of the penalty. The provisions of the common law were, however, restored by the Act of March 25, 1831, which, by the 12th section of the Criminal Code of 1860, was so far modified as to take away the criminality of taking fees where the business for which they are chargeable shall not have been done or performed. And the law now is, if any

Digitized by Google

justice, clerk, prothonotary, sheriff, coroner, constable, or other officer of this Commonwealth, shall wilfully and fraudulently receive or take any reward or fee to execute and do his duty and office but such as is or shall be allowed by some Act of Assembly of this Commonwealth; or shall receive or take by color of his office any fee or reward whatsoever, not or more than is allowed as aforesaid, he shall be deemed guilty of a misdemeanor in office, and on conviction be sentenced to pay a fine not exceeding five hundred dollars or to undergo an imprisonment not exceeding one year.

Commonwealth *v.* Evans, 13 S. & R. 426.
Purd. Digest, 317, Pl. 16.
Butts *v.* Miller, 13 WEEKLY NOTES, 448.

It is also contended, on the part of the appellee, at the time of the trial of this case, to wit, September 14, 1893, in the Court below, that previous thereto, to wit, the 23d day of May, A. D. 1893, an Act was passed (see P. L. 117) entitled an Act to regulate and establish the fees to be charged by justices of the peace, aldermen, magistrates and constables in this Commonwealth. The repealing section of which is as follows: "That all Acts or parts of Acts in force at the date of the passage of this Act inconsistent with its provisions are hereby repealed."

And the repealing section of the Act of 2d April, 1868, is as follows: "That any law now in force which is supplied by or is inconsistent with this Act, is hereby repealed."

We contend the Act of 2d April, 1868, P. L. 3, repealed the Act of 1814, so far, at least, as McKean County and other counties in the State, except the counties of Allegheny, Montgomery, Philadelphia, Beaver and Washington. And as to these last mentioned, by proviso the Act shall not apply.

It is a general principle in the construction of statutes that a subsequent statute revising the whole subject matter of a former statute, and evidently intended as a substitute for it, although it contains no express words to that effect, operates to repeal the former.

B. & L. Ass'n, Appellant, *v.* Model Plan B. & L. Ass'n, 159 Pa. 308.
Comth *v.* Oil Co., 101 Pa. 150.

July 18, 1895. FELL, J. This appeal is from an order of the Court refusing to take off a judgment of non-suit entered in an action brought against a justice of the peace to recover a penalty for taking illegal fees. The fees of the justice are fixed by the Act of April 2, 1868, and the penalties which the plaintiff sought to recover are imposed by the Act of March 28, 1814. The question then is whether the penalties fixed by the earlier Act extend to the later Act, and its consideration requires a review of the legislation upon the subject.

The Act of March 28, 1814, is entitled "An Act establishing a fee bill," and the 26th section provides: "If any officer whatsoever shall take greater or other fees than are hereinbefore expressed and limited, for any service to be done by him in his office, or if any officer shall charge or demand and take any of the fees hereinbefore ascertained when the business for which such fees are chargeable shall not have been actually done and performed, or if any officer shall charge or demand any fee for any service or services other than those expressly provided for by this Act, such officer shall forfeit and pay to the party injured $50, to be recovered as debts of the same amount are recoverable." This section was re-enacted by the 15th section of the Act of Feb. 22, 1821, which is entitled "An Act to alter and amend the fee bill," and again re-enacted by the 4th section of the Act of April 18, 1857, which is "An Act relating to the fees of aldermen, justices of the peace and constables." It is omitted from the Act of 1868, which is "An Act to ascertain and appoint the fees to be received by the several officers of the Commonwealth." This Act contains no penal provision. A later Act, that of June 12, 1878, fixing the fees of the sheriffs, coroners and other officers, but not including justices, provides a penalty greater than that of the Act of 1814. Briefly the legislation is this: the 26th section of the Act of 1814 imposes a penalty for taking greater or other fees than therein expressed and limited. That section is extended to and made a part of the Acts of 1821 and 1857, but not of the Act of 1868, which fixed the fee in question. This Act provides no penalty. The Act of 1878 imposes a new and more severe penalty, but does not apply to justices of the peace.

It is of interest to note the course of the criminal law relating to this offence during this period. Before the Act of 1814 the exacting of illegal fees was punishable at common law as extortion. After the passage of the Act it was held that an indictment would not lie, for the reason that as there was a penalty fixed by statute, proceedings by indictment at common law were forbidden by the Act of March 21, 1806: Commonwealth *v.* Evans, 13 S. & R. 425. It was made punishable by indictment by the Acts of March 25, 1831, and March 31, 1860.

The penalty imposed by the Act of 1814 is not for taking illegal fees generally, but for taking fees illegal under that Act. No fee fixed by the Act of 1868 can be said to be "expressed and limited" or "expressly provided" by the Act of 1814, and for taking a fee illegal under the Act of 1868 the only punishment is by indictment. It is not a question of repeal of the

Digitized by Google

26th section of the Act of 1814 by implication or otherwise, but of the omission to re-enact or extend it; and without such re-enactment or extension it cannot by its own terms apply to any offence not against its own provisions. This construction is not close or narrow, in view of the fact that the penalty of the Act, as held in Commonwealth *v.* Evans, *supra*, and Meredith's Executor *v.* Cist, 7 S. & R. 183, is not in the nature of compensation, but is a penal infliction. It is a construction required by the established rules as to penal Acts, and is fortified by the express extension of section 26 of the Act of 1814 by the Acts of 1821 and 1857.

Practically the same question was considered and decided in Baldwin *v.* Cash, 7 W. & S. 427. The action was to recover the penalty of the Act of 1814 for taking a fee illegal under the Act of March 29, 1827, which Act like that of 1868 provides no penalty. It is said in the opinion: "The Act of March 29, 1827, does not impose any penalty, and the Act of Feb. 22, 1821, which re-enacts the 26th section of the Act of 1814, is confined, as far as the penal clause is concerned and so far as relates to the matter in question, to an officer's taking any of the fees hereinbefore ascertained when the business for which such fee is chargeable shall not have been actually done or performed. But the fee charged here is ascertained by the Act of March 23, 1827, and not by the Act of 1814 or of 1821; and the Court has not the power to extend the penalty to a fee given by a subsequent Act which imposes none." Judge SERGEANT adds that the omission of the penalty from the Act was probably inadvertent, but one which the Legislature alone could supply.

Heinrich *v.* Venter, 1 Atlantic Reporter, 598, was decided expressly on the ground that the Act of Feb. 3, 1865, under which the fees taken were illegal, was an amendment of the Act of 1814. The Act of 1868, although upon the same subject, is not an amendment, but a separate Act.

The judgment is affirmed.

W. D. N.

Jan. '95, 315. April 10, 1895.

Justice et al. v. City of Philadelphia.

Widening of streets—Damages for—Tenants' rights.

A tenant who leases property after the passage of an ordinance directing the widening of a street, is entitled to recover for damages occasioned by the actual widening during his tenancy.

Appeal of the City of Philadelphia, from the judgment of the Common Pleas No. 4, of Philadelphia County, in an action for damages caused by the widening of Chestnut street between Seventh and Eighth streets, in the City of Philadelphia.

On the trial, plaintiffs showed that they were in possession of a store at No. 718 Chestnut street, under a lease dated October 7, 1891, for a term of five years from the first day of December, 1891, at an annual rental of $5,000, payable monthly. That on July 5, 1892, the front of the store was taken down in pursuance of city ordinance, causing damages as claimed by the plaintiff as follows:—

Expense of a watchman during alteration,	$128 00
Sharpless Bros., draping show windows,	3 50
Replacing electric light wires,	29 69
For taking down, removing and resetting cases,	100 00
Plate-glass broken in removal,	17 50
Lamp stand,	45 00
Moving stock,	25 00
Damage to stock from dust and dirt during alterations,	253 75
Injury to the goods,	100 00
Nine weeks' rent,	950 00
And for loss of five feet until end of the term of five years,	850 00
Making a total of	$2,502 44

After offering testimony tending to substantiate these claims, plaintiff rested.

Defendant offered in evidence ordinance of March 31, 1891, authorizing the director to give three months' notice of the widening of the street, also ordinance of April 10, 1891, authoring the director to suspend operations until the 1st of July, 1892, and called to the attention of the Court that the plaintiff came into possession of the premises after notice of the widening.

Defendant requested the Court to charge that "Under all the evidence the verdict should be for the defendant." *Answer.* Refused.

Verdict for plaintiff for $1,250, and judgment thereon.

Defendant appealed, assigning for error the refusal to affirm the point as above.

James Alcorn, assistant city solicitor, (with him *Charles F. Warwick*, city solicitor, and *George E. Fili*, assistant city solicitor), for appellant.

It was not necessary for the city to give actual notice of the ordinance.

Heland *v.* City of Lowell, 3 Allen, 407.
Buffalo *v.* Webster, 10 Wend. 99.
Georgetown *v.* Smith, 4 Cranch, (C. C.) 91.

Tenant is not in better position than the owner, and it is settled that an owner cannot after the

Digitized by Google

passage of an ordinance to widen, do anything that would add to the expense of widening.

Forbes Street, 70 Pa. 137.
Grugan *v.* City of Phila., 158 Id. 346.
Furman Street, 17 Wendell, 649.
Bush *v.* McKeesport City, 166 Pa. 57.

Samuel H. Kirkpatrick, for appellees.

The right to damage for injury done by widening a street accrues when the property is taken.

Plan 166, 143 Pa. 423.
Brower *v.* Philadelphia, 142 Id. 356.
Whitaker *v.* Phœnixville Bor., 141 Id. 333.
Volkmar Street, Philadelphia, 124 Id. 326.

A tenant for years is an owner entitled to damages for injury done to his estate.

Railroad Co. *v.* Eby, 107 Pa. 166.
N. P. R. R. Co. *v.* Davis, 26 Id. 238.
Brown *v.* Powell, 25 Id. 229.
Turnpike Road *v.* Brosi, 22 Id. 29.
Railroad Co. *v.* Eby, 107 Id. 173.
Bethlehem Gas Co. *v.* Yoder, 112 Id. 136.

It is true that an owner cannot erect permanent structures after the widening is directed, but that docrine cannot be further extended.

July 18, 1895. GREEN, J. The only assignment of error in this case is that the learned Court below refused to give a binding instruction to the jury to find for the defendant. The proposition upon which the defendant's point was based was, that as the plaintiffs leased the premises in question after the city ordinance of March 31, 1891, directing the widening of Chestnut street between Seventh and Eighth streets was passed, they could not recover any damages occasioned by the widening of the street thereafter.

The authorities relied upon by the appellant are those which decide that there can be no recovery of damages for buildings which are erected upon ground over which public streets are laid out but not yet opened. We do not think that doctrine is applicable to this class of cases, because this is not a claim to recover damages for an erection, but for taking down a part of a building which had been erected long before the ordinance was passed. The owner of the building certainly could recover damages for such an injury, and we can see no good reason why his tenant, who was in the ordinary and lawful possession of the premises under a lease, should not be entitled to the same redress. The principle of the cases which exclude a recovery where a new erection is made after the street is laid out, is, that the owner may not thereafter do any act which will increase the cost of opening, but that principle is not applicable where there is nothing but a continued occupancy of a pre-existing erection. Surely the owner is not obliged to abstain from using by himself or by his tenant such premises during the uncertain period which elapses, and which may long continue to elapse after the passage of the ordinance to widen and before the work of widening is commenced. It would work a great hardship to owners if they were prohibited from leasing such premises during such a period. In this case the rental was $5,000 per year, and it was fifteen months after the passage of the ordinance before the work was commenced.

There can be no doubt that the plaintiff was actually damaged by the taking down of the front of the building. The charge of the learned Court below was eminently fair and impartial, and the verdict, which was for about half the plaintiff's claim, seems to be reasonable. We think it was the duty of the Court to submit the case to the jury, and therefore no error was committed in refusing the defendant's point.

Judgment affirmed. W. M. S., JR.

[See next case.]

Jan. '95, 316. April 10, 1895.

Shaw v. The City of Philadelphia.

Widening streets—Damage—Elements of—Tenants' right to recover—Charge.

In an action by a tenant for damages caused by reason of widening a street under ordinance, whereby four feet were taken from the front, plaintiff is entitled to recover only the actual money loss caused by the necessary work in taking down with care the front of the building in question. There can be no allowance for loss of profits.

In such a case plaintiff may give testimony showing actual injury from dirt and grime occasioned by the work. The extent of such injury, and whether the work could have been done without any loss from this source, were questions for the jury.

Where plaintiff testified that he was damaged by loss of business to the extent of $700, the refusal to strike out the testimony because it was a claim for loss of profits was not error, when the record shows that the jury was clearly instructed that there could be no allowance for loss of profits and the whole verdict was less than this item.

In this case the Court declined to charge the jury that "the plaintiff is only entitled to recover the depreciation in the market value of his leasehold as affected by the widening of Chestnut street:"

Held, that this was not error; the jury were particularly limited to actual money loss incurred, and the defendant obtained under this all the supposed advantages it would have derived from an affirmance—and an unqualified affirmance of the same would have been error.

It is not error to fail to refer in the charge to particular testimony of defendant, when the question upon which he gave testimony was fairly submitted to the jury.

Appeal of the City of Philadelphia from the judgment of the Common Pleas No. 4, of Philadelphia County, allowing damages to tenants for

Digitized by Google

the widening of Chestnut street, in the City of Philadelphia.

On the trial, before WILLSON, J., plaintiff gave in evidence the ordinance of March 21, 1891, directing the widening of Chestnut street by five feet, also lease to plaintiff from June 1, 1890, at monthly rental of $375, with the provision if tenant held over, the lease to continue from year to year.

Plaintiff was asked to what extent his stock was damaged by grime and dirt. Objected to, and objection overruled. (First assignment of error.)

Answer. "I approximate it at $325."

Plaintiff testified that the loss to his business by reason of his deprivation of the front of his building was $700.

Defendant moved to strike out the testimony because it was a claim for loss of profits. Refused. (Second and third assignments of error.)

Wm. P. Fogg, a witness for defendant, testified that the change in the front could have been made without any loss from dust and dirt.

The defendant requested the Court to charge the jury, *inter alia*, as follows:—

1. "The plaintiff is only entitled to recover the depreciation in the market value of his leasehold as affected by the widening of Chestnut street."

Answer. "I cannot affirm that point. I have said to you upon that subject all that I need say. In any event I think that the adverb 'only' would make the point too strong." (Fourth assignment of error.)

2. "The plaintiff is not entitled, as a separate element of damage, for any injury caused to his stock and goods by dust and dirt while the owner of the property was making the alterations in the building, in order to widen the street."

Answer. "That I cannot affirm. I have said to you substantially, what I will try to repeat in a sentence, that in this case the plaintiff is only entitled to recover for injury to his stock of goods by dust and dirt while the work was in progress, which was necessary as a result of what the city did. Of course, if that work was carried over a period of time unnecessarily long, if it was made to cover a year or two when it should be done in a month or so, then the city would not be responsible for that. The necessary result which was caused by the act of the city while the work was being done in reasonably prompt time the city may be responsible for, but not for anything else." (Fifth assignment of error.)

4. "Under all the evidence, the verdict should be for the defendant."

Answer. Refused. (Sixth assignment of error.)

The Court charged the jury, *inter alia*, as follows:—

"If there was a reasonable, practical method by which the goods of the plaintiff could have been shielded from the injury, that method ought to have been adopted. If the fault was the fault of the owner of the property, who employed the builder, it was not the city's fault. It is only the city's action which can be made the basis of a claim against the city. If you see no reason to think otherwise than that this work of reconstruction was properly done, in view of what you have heard, and that there was a necessary resulting injury to the plaintiff's stock, then, to the extent of that injury, the plaintiff is entitled to recover. . . . . It has been said in your hearing, and I repeat it emphatically, that a plaintiff cannot recover for loss of profits, and if the way in which he has got at what he claims to have been his loss, other than that which I have referred to, was simply by computing a loss of profits, he is not entitled to recover upon that score. He is not entitled to throw a claim into the jury box and ask you to guess at it, any more than he has a right to guess at it himself. If there was an actual loss by reason of the action of the city in taking away the front and depriving him of the opportunity of advertising, and you can get at that, if you can find some standard of measurement of it, if there was an actual loss by reason of that state of affairs, then of course the plaintiff is entitled to be paid for it, but he is not entitled to be paid for it on the basis of loss of profits, because those are matters which the law says cannot be estimated, cannot be computed according to any reliable standard, and where you have to float around in the air and guess at results, the law says, no matter what the loss may be, it cannot be allowed, it cannot be estimated, because it is too uncertain. There are losses which people have to bear simply because they are incapable of computation. A man's loss of business or loss of profits might result from other circumstances; it might be a bad year, it might be that people would go somewhere else for business. All those things are illustrations of reasons why losses in business might occur, without their being attributable to the causes to which they are ascribed by parties to a litigation. I state this to you simply for the purpose of showing, in some degree, the legal principle which is applicable to the case."

"In view of what I have said, the question for you to determine is what, if anything, has the plaintiff shown to you was his actual necessary money loss by reason of what the city did in the widening of the street."

Verdict for plaintiff for $562, and judgment thereon.

Defendant appealed, assigning for error the points above noted, and, seventh, because the Court did not refer in the charge to the testimony of W. P. Fogg.

Digitized by Google

James Alcorn, (with him *Charles F. Warwick*, city solicitor, and *George E. Fili*), for appellant.

It was error to refuse to charge as requested in defendant's first point.

Railroad *v.* Eby, 107 Id. 166.
Pitts. & Lake Erie R. R. *v.* Jones, 111 Id. 204.
Getz *v.* R. R. Co., 105 Id. 547.

Joseph de F. Junkin, for appellees.

July 18, 1895. GREEN, J. This case is quite similar to that of Justice & Co. *v.* The City, just decided. The lease to the plaintiff, however, of the premises in question, was made more than a year before the passage of the ordinance directing the widening of the street. It was a continuing lease from year to year if the tenant held over, which he did. The assignments of error raise some questions which did not arise in the Justice case, but we think they were correctly ruled by the learned Court below. The jury was carefully and emphatically instructed that they could allow no damages to the plaintiff except for actual money loss caused by the necessary work of taking down, with care, the front of the building in question. They were specially instructed that no allowance could be made for loss of profits, and that element of the plaintiff's claim was entirely stricken out. As to the first assignment of error, we think the evidence was properly admitted, showing actual injury from dirt and grime which was necessarily encountered in doing the work, and which, it was claimed, injured the stock more or less. The extent of that injury, and whether the work could have been done without any loss arising from this source, raised a question of fact which was necessarily submitted to the jury, and had to be determined by them.

We do not think the defendant was injured by the refusal of the Court to strike out the testimony as to the item of $700 claimed for loss of profits. The Court did most strongly and clearly instruct the jury that they could allow nothing for loss of profits, and as the entire amount of the verdict was only $562, it is evident the jury understood and obeyed the direction of the Court. This disposes of the second and third assignments of error.

We do not understand how the city has cause of complaint with the answer to the first point of the defendant. The point claimed that the plaintiff could only recover for the depreciation in the market value of the leasehold. If that element of damage was sent into the jury box the result might, and probably would, have been much more serious to the city. But when the Court had so decidedly limited the plaintiff to a recovery for nothing more than actual money loss incurred, the city obtained all the supposed advantage that could, in any point of view, have been derived from an affirmance of the point. We think also that an absolute affirmance of the point without qualification would have been error. The depreciation in the value of the leasehold would not be the *only* subject for allowance of damage.

The sixth assignment has been considered and disposed of in the Justice case above referred to, and the seventh is without merit, as the question whether, under the evidence, the work might have been reasonably done without injury to the goods was properly submitted to the jury.

Judgment affirmed.

W. M. S., Jr.

[See preceding case.]

Jan. '95, 457. May 1, 1895.

Benson's Estate.
Davis's Appeal.

Construction of will—Testator's intention the controlling rule—Expression "read law."

Testator, who was a member of the bar, provided by will as follows: "My law books to be taken charge of by H. H. Benson, and to be divided among my nephews who may read law; not to be sold—never! rather be burned." At the date of the will, one of testator's nephews had begun the study of the law and abandoned it. Subsequent to the date of the will three other nephews studied law, and at the time of the testator's death, two had been admitted to the bar and one was still a student:

Held, 1. To "read law," while not strictly a legal technical term, is an expression which should find its interpretation in the common understanding of lawyers as meaning to take up the study of the law with the purpose of being admitted to the bar and practicing the profession. Its meaning is not confined to the preparatory course, but may properly be said to include that reading of cases and text books of which every lawyer does more or less.

2. Under the circumstances of this case, the construction adopted by the Court was to exclude that nephew who had abandoned the study of the law, and to decree that the library of the testator should be divided equally between the three nephews, of whom two were practicing lawyers, and the third a law student at the time of testator's death.

Appeal of Joe A. Davis, from the decree of the Orphans' Court of Erie County, in the estate of William Benson, deceased.

William Benson, a member of the bar of Erie County, died June 2, 1891, testate. By his will dated March 7, 1880, he provided, *inter alia*, as follows: "My law books to be taken charge by H. H. Benson, and to be divided among my nephews who may read law; not to be sold—never! rather be burned." The executors being in doubt as to the proper disposition to be

Digitized by Google

made of testator's law library, the matter was referred to E. L. Whittelsey as master, who found the following facts:

"It is admitted that the claimants are all nephews of the testator. In order to entitle them to participate in the division it must further appear they are the ones designated by the testator as 'my nephews who may read law.'

"Two of the nephews, James B. Benson, of Potter County, Pa., and J. A. Davis, of Bureau County, Ills., at the time of the death of the testator were members of the bar in the counties wherein they respectively reside, having been admitted to the bar subsequently to the date of testator's will and prior to his death. The other two nephews, Isaac Lloyd Benson and Paul A. Benson, had both been duly registered as students at law by the testator himself, but had not been admitted to the bar at the death of the testator. Since testator's death Paul A. Benson has completed his studies and has been admitted to the bar, and is now engaged in the practice of the law. Isaac Lloyd Benson was registered as a student on July 7, 1875, and recited to the testator for a time, but has not completed his studies, nor has he been admitted to the bar. He has been engaged in other business since his registration as a student; and has read occasionally, and says that he has never abandoned his intention of completing his studies and becoming a member of the bar, and has so stated from time to time to Mr. Sproul and Mr. Nason, prior to the death of the testator, as testified to by them. He is now forty-two years of age and has not taken any active measures for many years to fit himself for admission to the bar and the practice of the law."

The master reported that, in his opinion, the testator meant to give his books to such of his nephews as might adopt the law as a profession; and he reported that Isaac L. Benson was not entitled to participate in such distribution and that a decree should be entered that testator's law books be divided equally between James B. Benson, J. A. Davis, and Paul A. Benson.

Exceptions to the report were sustained by the Court, GUNNISON, P. J., who held that the testator, by the expression "who may read law" intended to confine the bequest to students of law, to the exclusion of practicing lawyers; and accordingly decreed that the law books of the testator be delivered to Paul A. Benson, who was a student of law at the time of testator's death.

Joe A. Davis appealed, assigning as error the action of the Court and the failure to find that appellant was entitled to participate in the distribution of the law books of the testator.

S. M. Brainerd, (of *Brainerd & Higgins*), for appellant.

Clark Olds, for appellee.

July 18, 1895. FELL, J. The only difficulty in this case is to determine what the testator meant by the expression "my nephews who may read law." The learned master and the Court below were clearly right in holding that Isaac L. Benson was not entitled to a distributive share of the testator's law library. "To read law," while not strictly a technical legal term to which a certain meaning must attach to the exclusion of all others, is yet an expression which should find its interpretation in the common understanding of lawyers. Among lawyers "to read law" means to take up the study of the law with the purpose of being admitted to the bar and practicing the profession. Nor is its meaning confined to the preparatory course; it may properly be said to include that reading of cases and text books of which every lawyer does more or less after his admission. It certainly does not mean to read law books casually, for amusement or general instruction, nor in the desultory manner in which Isaac L. Benson appears by the testimony to have read. The learned master was right in holding that one who, although he has registered as a student and read for a year or more, has long since abandoned all intention of being admitted to practice, cannot properly be said either to be reading law or to have read law.

Concerning Paul A. Benson, who was a student at law at the time of the testator's death, there appears to be no dispute, as he has fulfilled all the conditions of the will; but as to the right of the other two nephews, J. B. Benson and J. A. Davis, who had read law and been admitted to practice before the testator's death, to participate in the distribution, we are of opinion that the learned Judge erred in setting aside the report of the master. The testator undoubtedly meant to create a class of such of his nephews as should read law, and by "read law" he meant "become lawyers." The time at which they should do so does not seem to have been any part of his plan. The rule that a will speaks from the time of the testator's death must, like all rules of construction, yield to a manifest intention to the contrary. Indeed, if that rule were allowed in this case, the only one whose position would be shaken by its application would be the appellee, in whose behalf it is so strenuously urged; for at the time of the testator's death, when the class must be ascertained, he was the only one of the three nephews who had not completed his studies, been admitted to the bar, and "read law" within the meaning of those words as we have construed them. But we take it that the application of that rule is unnecessary, for in the face of such words as "not to be sold, no—rather to be burned," which clearly indicate the testator's desire that his

Digitized by Google

library should remain in the possession of his relatives for their own personal use, it would be unreasonable to adopt a construction which would limit the class of beneficiaries either to such of his nephews as should have completed their studies at the time of his death or to such as should still be reading their preparatory course at that time.

In view of the construction which we have adopted, the testator's nephews J. B. Benson and J. A. Davis are properly within the class which the testator contemplated at the time of making the will, and are therefore entitled to their equal distributive shares in the testator's law library with the other nephew, P. A. Benson.

The decree of the Orphans' Court is reversed and set aside at the cost of the appellee, and the record is remitted in order that a decree may be entered in accordance with this opinion.

J. D. B., Jr.

Jan. '95, 110. May 27, 1895.

Johnson's Estate.
Appeal of Johnson et al.

Will—Intent of testatrix—Stock or pecuniary bequest.

Where the words of the will are "I give and bequeath the said gas stock to the extent of six thousand dollars," the subject of the gift is gas stock, not money; in such case the words "six thousand dollars" are not used to define the gift itself, but as a means of measuring the extent of it.

Hoff's Appeal, 24 Pa. 200, followed.

Appeal of William E. Johnson *et al.*, from the decree of the Orphans' Court of Juniata County, distributing a balance in the hands of F. M. M. Pennell, administrator c. t. a. d. b. n. of Mariah Johnson, deceased.

Mariah Johnson died in April, 1889, having made her will in March, 1886, which has been duly probated since her death, by which she, *inter alia*, bequeathed as follows: "And the income of my Harrisburg gas stock for six years after my death I give and bequeath to James P. Johnson, and after that period I give and bequeath the said gas stock to the extent of six thousand dollars, to be equally divided among the said four children of the said James P. Johnson, share and share alike, and the balance to the general missionary fund of the United Presbyterian Church." Letters testamentary were issued to James P. Johnson, the executor named therein, which were revoked and vacated by the Orphans' Court on April 29, 1893, and some time afterward the register granted letters of administration to F. M. M. Pennell, the present accountant.

At the time of making her will, and at the time of her death, decedent owned 353 shares of the capital stock of the Harrisburg Gas Company of the par value of $25 per share. James P. Johnson subsequently sold 36 shares of this stock, and the remaining 317 shares he delivered to Mr. Pennell, administrator, who sold the same under the order of Court, made by consent of all the parties in interest, for $40.45 per share, and this is the fund now in Court for distribution.

The appellants in this case, Nevin K. Johnson, William E. Johnson, Margaret A. Spangler, and Mariah Johnson, are the children of James P. Johnson. James P. Johnson has admitted that he has received all he is entitled to out of this gas stock, and he has no interest in the present distribution, to which he has agreed. The fund, therefore, is to be distributed between these children and the United Presbyterian Church, under the clause of the will quoted. The appellants claim that they are entitled to $6,000 worth of the stock or its money equivalent at its par value.

The Court, Lyons, P. J., decided that the clause of decedent's will, "I give and bequeath all said Harrisburg gas stock, to the extent of $6,000, to be equally divided among the said four children of the said James P. Johnson, share and share alike," meant that said children are "at least entitled to that sum ($6,000), less the collateral inheritance tax, as so much of the stock at its market value," whereupon this appeal was taken.

F. M. Pennell and *Will L. Hoopes*, (with them *Atkinson*), for appellants.

This bequest is specific.

Roper on Legacies, 2d Amer. Ed., Vol. 1, p. 191.
2 Williams on Executors, 6th Amer. Ed., 1250.
Blackstone *v.* Blackstone, 3 Watts, 335
Appeal of the Fidelity Insurance, Trust and Safe Deposit Company, 108 Pa. 492.
13 Amer. & English Ency. Law, 21.
Kirby *v.* Potter, 4 Vesey, Jr., 750.
Barton *v.* Cooke, 5 Vesey, Jr., 461.

Such a legacy can only be satisfied by the delivery of the identical article or subject. It is a bequest of particular stock, and the executor must deliver the stock itself to the legatees, or, in this case, its money equivalent.

Howell *v.* Hooks, 4 Iredell Equity Cases, 188.
Hood *v.* Haden, 82 Virginia, 589.
Oakley *v.* Gries, 1 Woodward, 311.
Washington Asylum *v.* Corporation of Washington, and Wright's Executors, 7 District of Columbia, 259.

These bequests are not made in money but in securities, and the denomination of the security, not its money value, is the measure of the legacy.

Digitized by Google

Hixon *v.* Hixon, 7 Humphrey (Tenn.) 33.
Clay *v.* Huston's Admrs., 1 Bibb. 461.
Anderson *v.* Ewing, 3 Littel, 245.
Phelps *v.* Riley, 3 Connecticut, 266.
Smith *v.* Dunlap, 12 Ill 184.
Coldren *v.* Miller, 1 Blackford, 296.
Van Vleet *v.* Adair, Id. 346.
Parks *v.* Marshall, 10 Ind. 20.
Williams *v.* Jones, 12 Id. 561.
Pierce *v.* Spader, 13 Ind. 458
Robinson *v.* Noble's Admr., 8 Peters, 181.

In the case of a specific legacy, that is a legacy of any specific article or thing, the income, profits, or produce of the article, goes to the legatee without regard to the time at which the article is to be delivered to the legatee.

Sleech *v.* Thorington, 2 Vesey, Sen., 563.
Barrington *v.* Tristram, 6 Vesey, Jr., 345.
Bristow *v.* Bristow, 5 Beavan, 289.
Sawrey *v.* Rumney, 15 E. L. & Eq. 4.
Loring *v.* Woodward, 41 N. H. 391.

These legatees, therefore, by the terms of testatrix's will were clearly entitled to $6,000 of the capital stock of the Harrisburg Gas Company, to wit, 240 shares, or 60 shares each. At their request the Court below directed the administrator d. b. n. c. t. a. to sell this stock, and this he did for the sum of $9,660. And our complaint is, while the Court below, in the opinion filed, decided that these legatees were entitled to the stock itself, it refused in the distribution to give them the proceeds thereof, to wit, the said $9,660, a conclusion which of necessity should have followed the Court's premises.

R. E. Stewart, for appellee.

July 18, 1895. GREEN, J. The learned Court below held, correctly as we think, that the legacy of the Harrisburg gas stock to the four children of James P. Johnson, is specific. The opinion of the Court proceeding upon this basis was apparently in favor of the claim of the children, giving to them the proceeds of the sale of 240 shares, but the decree was made for only $6,000 of money out of the proceeds, treating the legacy as pecuniary only. We are disposed to agree with the reasoning of the Court, but are quite unable to agree to the conclusion reached.

The language of the will on this subject is, "And the income of my Harrisburg gas stock for six years after my death I give and bequeath to James P. Johnson, and after that period I give and bequeath the said gas stock to the extent of six thousand dollars ($6,000), to be equally divided among the said four children of the said James P. Johnson, share and share alike, and the balance to the general missionary fund of the United Presbyterian Church." The only question in the case is, what was the intention of the testatrix? Was it to give shares of gas stock defined by a limit, or was it to give $6,000 in money? We think the question is quite free from difficulty. The very words of the will are "I give and bequeath *the said gas stock*, to the extent of six thousand dollars." The subject of the gift, is gas stock, and is not money. If a gift of money had been intended the testatrix would have simply said that she gave six thousand dollars to be divided among the children. But she did not give money at all. She gave gas stock specifically as such. The words "six thousand dollars" were not used to define the gift itself, but as a means of measuring the extent of the stock. If the gift had been of gas bonds to the extent of six thousand dollars every one would have understood that the gift was of bonds expressing an obligation to pay six thousand dollars in money. In other words, the face or par value of the bonds would have been necessarily understood as meaning the extent of the gift. It is difficult to conceive how any other limitation of the gift could be understood. The uncertainty alone in defining the extent of the gift, upon the estimate of the market value, which is constantly fluctuating, ought to be sufficient to determine the question. This particular gift of stock was not to become effective until six years after the testator's death. The market value of the stock at the time of the death of the testatrix might have been a very different thing from what it was six years later. It is a very rare occurrence for any stock to have the same market value during an entire period of six years. The conditions of general business, the state of the money market, or the intrinsic condition of the stock itself, may cause wide variations in its market value. What would be six thousand dollars' worth of the stock at the death of a testator, might be very much more or very much less at the end of six years from that period. A given number of shares would pass under the gift at the death of the testator, and a very different number, either greater or less, might be required six years later. Whereas if the par value be the standard of measure, the gift would be the same at all times, and hence far more in accord with the intent of the donor. We are very clearly of opinion that this testatrix intended to give to these four children as many shares of stock as would amount to the sum of six thousand dollars measured by the par value of the stock. That would make the subject of the gift two hundred and forty shares of stock at the death of the testatrix, and at the time the gift became effective, and there could be no question than that the intent of the testatrix was literally accomplished. Had the stock gone down in market value it might have taken the whole 353 shares owned by the testatrix at the time of making the will, and at the time of her

Digitized by Google

death, to produce the sum of six thousand dollars, and in that event, the intent of the testatrix to give "the balance" of the stock to the church would have been defeated.

In Hoff's Appeal, 24 Pa. 200, we held that a bequest to the widow of "the interest on $15,000 of such stock I may possess," meant that she was entitled to the interest on $15,000 of the testator's Pennsylvania six per cent. stock at its par value. Extended argument is unnecessary; the question is very simple.

The decree of the Court below is reversed, and the record is remitted with instructions that the fund be distributed in accordance with this opinion, the costs of this appeal to be paid by the appellee. W. C. S.

July, '95, 51. May 29, 1895.

Carpenter's Estate.

Murder—Penalty for—Confiscation of property or deprivation of inheritable right no part of—Imposition of penalty, act of the Legislature, not of the Court—Cases examined.

The Constitution of Pennsylvania positively prohibits any attaint of treason or felony by the Legislature, and any corruption of blood, or any forfeiture of estate, except during the life of the offender.

The penalty for murder in the first degree in Pennsylvania, is death by hanging. The Legislature has never imposed any penalty of corruption of blood or forfeiture of estate for the crime of murder, and therefore no such penalty has any legal existence.

The Legislature having declared who shall succeed to the estates of deceased intestates, to deprive a son of this inheritable right, because it is his own wrongful act that has terminated his father's life, is an imposition of punishment for the son's wrongful act, beyond the legislative enactment and outside of the power of the Court.

Cases in which instruments between private persons are set aside, on the ground of fraud or wrong-doing, are in no sense analogous to a case in which the law itself casts the descent. Unless the law contains some qualification, which changes its application, or provides some disqualification, by way of penalty, no limitation can be put upon it.

Appeal of A. M. Carpenter, one of the collateral heirs of James Carpenter, deceased, from the decree of the Orphans' Court of Juniata County, dismissing exceptions to the report of an auditor, appointed to distribute the assets in the hands of F. M. M. Pennell, administrator of said decedent.

The facts of this case, as agreed upon by the parties in interest and so found by the auditor, George J. Parker, Esq., were as follows:

That James Carpenter died intestate on December 10, 1893, and left to survive him a widow, Hetty Carpenter, and one child, James B. Carpenter, and A. M. Carpenter and S. L. Carpenter, brothers, and Margaret Losh, Martha Kneiper and Balinda Sellers, sisters, and a deceased sister, Amanda Moorhouse, who died intestate and left to survive her six children, to wit, Alma Weaver Miller, Newton A. Weaver, Solomon H. Weaver, Henry A. Weaver, Sarah J. Stutzman and Charles M. Monohan, and a sister, Arabella Good, who died intestate and left to survive her one child, Clayton Good.

That Hetty Carpenter, the widow, and James B. Carpenter, the son of the decedent, executed and delivered an assignment of all their interest in the estate of the decedent, saving and excepting two hundred dollars, to Hon. J. C. Bucher, Hon. Wm. H. Sponsler and J. N. Keller, Esq.

That James B. Carpenter was convicted in the Oyer and Terminer of Juniata County for the murder of his father on the 12th day of February, 1894, and was executed on the 14th day of June, 1894.

That his mother, Hetty Carpenter, the widow, was acquitted of being an accessory before the fact on the 23d day of April, 1894, and was convicted and sentenced in the same Court as an accessory after the fact to the murder aforesaid, on the 23d day of April, 1894.

That one of the several motives which prompted James B. Carpenter, the son, to murder his father, and one of the motives which induced Hetty Carpenter, the widow, to become an accessory after the fact, was to get immediate possession of the estate of James Carpenter, deceased.

By virtue of the assignment from Hetty Carpenter, the widow, and James B. Carpenter, the only child and heir-at-law of the decedent, of all their interest, except the sum of two hundred dollars as aforesaid, Messrs. Bucher, Sponsler and Keller claimed the funds in the hands of the accountant after the payment of all legal costs, with the exception of the said two hundred dollars. To this claim it was objected on behalf of the collateral heirs of James Carpenter:—

1. That James B. Carpenter murdered his father, James Carpenter, deceased, on December 16, 1893, for which crime he was convicted and hung, and Hetty Carpenter, the wife of the deceased, was an accessory after the fact to said murder, and of this offence she pleaded guilty.

2. That the proofs on the trial of the said crime established the fact that this murder was committed to enable James B. Carpenter and Hetty Carpenter to get the estate of James Carpenter, deceased.

3. That no estate ever vested in either James B. Carpenter, the son, or Hetty Carpenter, the wife, from the estate of James Carpenter, de-

Digitized by Google

ceased, and they had no interest that could be assigned.

The collateral heirs, therefore, claimed the fund. The auditor allowed the claim of the assignees, and disallowed the claim of the collateral heirs. To this conclusion of law the collateral heirs excepted, and the exceptions were dismissed by the Court, LYONS, P. J., and the auditor's report confirmed. Whereupon A. M. Carpenter, one of the collateral heirs, took this appeal, assigning for error this action of the Court.

J. Howard Neely and *W. U. Hensel*, for appellant.

A man can take no advantage of his own wrong, nor will he be allowed to found any claim upon his own iniquity.

Broom's Leg. Max., page 297.
Finch's Common Law, 1759 Ch. 3.
Dillon's Laws and Jurisprudence, Lecture 1, p. 4, also pages 5, 17, 20.

It would be contrary to public policy to permit a murderer to take advantage of the felony which he has committed.

N. Y. Mut. Life Ins. Co. *v.* Armstrong, 117 U. S. 591.
Riggs *v.* Palmer, 115 N. Y. 506.
Shellenberger *v.* Ransom, 47 N. W. Rep. 700.

The subsequent view taken by the Nebraska Court, in a reargument of the last case, Shellenberger *v.* Ransom, 59 N. W. Rep. 935, is against all sound legal reasoning; for no interpretation should be given to a statute which will lead to injustice, oppression or to an absurd consequence.

Endlich on Inter. of Statutes, secs. 258, 267.
Perry Co. *v.* Jefferson Co., 94 Ill. 214.
Smith *v.* The People, 47 N. Y. 330.
Com. *v.* Kimball, 24 Pick. 370.

It has been expressly decided both in England and Canada that it is contrary to public policy, that anyone guilty of the death of another, or any person claiming through such a one, should take any interest in the dead man's estate.

McKinnon *v* Lundy, 24 Ontario Rep. 132.
Cleaver *v.* Mut. Reserve Fund Life Assoc., 1 Q. B. 147.

The subsequent reversal of McKinnon *v.* Lundy, *supra*, is based on the fact that the conviction was of manslaughter, and the element of intent or motive was necessarily absent.

McKinnon *v.* Lundy, 21 Ontario App. Rep. 560.

J. N. Keller and *J. C. Bucher*, (*W. H. Sponsler* with them), for appellees.

The intestate statute of April 8, 1833, P. L. 315, is without any exception, and where a statute makes no exception the Court can make none.

Endlich on Inter. Statutes, § 17, 23.
Pittsburgh *v.* Kalchthaler, 114 Pa. 552.
Penn. R. R. Co. *v.* Pittsburgh, 104 Id. 553.
Potter's Dwarris on Statutes, 146.
Bradbury *v.* Wagenhorst, 54 Pa. 180.
Shellenberger *v.* Ransom, 59 N. W. Rep. 935.
Woodbury *v.* Berry, 18 Ohio, 456.
Clingan *v.* Mitcheltree, 31 Pa. 25.

Especially will the Court refuse to engraft an exception upon a statute of descent.

Owens *v.* Owens, 100 N. C. 242.
Deem *v.* Milliken, 6 Ohio Circuit Ct., 357.
Shellenberger *v.* Ransom, 59 N. W. Rep. 935.

The insurance cases cited by the appellant are not applicable. The principle upon which they are based is, that a contract will not be enforced on the ground of public policy when it has been made operative by fraud or crime.

July 18, 1895. GREEN, J. The penalty for murder in the first degree in Pennsylvania is death by hanging. No confiscation of lands or goods, and no deprivation of the inheritable quality of blood, constitutes any part of the penalty of this offence. The Declaration of Rights, Article 1, sec. 18 of the Constitution of the State, declares that "no person shall be attainted of treason or felony by the Legislature," and by section 19 it is provided that "No attainder shall work corruption of blood nor, except during the life of the offender, forfeiture of estate to the Commonwealth. The estate of such persons as shall destroy their own lives, shall descend or vest as in cases of natural death; and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof." These are provisions of the organic law which may not be transcended by any legislation. Inasmuch as the prescribed penalty for murder is death by hanging, Crimes Act of 1860, sec. 75, Bright. Purd. 511, pl. 232, without any forfeiture of estate or corruption of blood, it can not be said that any such consequence can be lawfully attributed to any such offence. In other words our Constitution positively prohibits any attaint of treason or felony by the Legislature and any corruption of blood by reason of attainder or any forfeiture of estate, except during the life of the offender.

The Legislature has never imposed any penalty of corruption of blood or forfeiture of estate for the crime of murder, and therefore no such penalty has any legal existence.

In the case now under consideration it is asked by the appellants that this Court shall decree, that in case of the murder of a father by his son, the inheritable quality of the son's blood shall be taken from him, and that his estate, under the statute of distributions, shall be forfeited to others. We are unwilling to make any such decree, for the plain reason that we have no lawful power so to do.

The intestate law, in the plainest words, desig-

Digitized by Google

nates the persons who shall succeed to the estates of deceased intestates. It is impossible for the Courts to designate any different persons to take such estates without violating the law. We have no possible warrant for doing so. The law says if there is a son he shall take the estate. How can we say that although there is a son he shall not take, but remote relatives shall take who have no right to take it if there is a son? From what source is it possible to derive such a power in the Courts? It is argued that the son who murders his own father has forfeited all right to his father's estate, because it is his own wrongful act that has terminated his father's life. The logical foundation of this argument is, and must be, that it is a punishment for the son's wrongful act. But the law must fix punishments, the Courts can only enforce them. In this State no such punishment as this is fixed by any law, and therefore the Courts can not impose it. It is argued, however, that it would be contrary to public policy to allow a parricide to inherit his father's estate. Where is the authority for such a contention? How can such a proposition be maintained when there is a positive statute which disposes of the whole subject? How can there be a public policy leading to one conclusion when there is a positive statute directing a precisely opposite conclusion? In other words, when the imperative language of a statute prescribes that upon the death of a person his estate shall vest in his children in the absence of a will, how can any doctrine, or principle, or other thing called public policy, take away the estate of a child and give it to some other person? The intestate law casts the estate upon certain designated persons, and this is absolute and peremptory, and the estate can not be diverted from those persons and given to other persons without violating the statute. There can be no public policy which contravenes the positive language of a statute.

The supposed analogies derived from the fraudulent abuse of a contract right, or an actual notice accomplishing the same result as a constructive notice under the recording Acts, or the waiver of an exemption Act by one entitled to its benefits, and other instances of a similar character, are no analogies at all. There may be reasons why a statutory provision may not be applicable in a given case when the purpose of the statute is subserved in a different mode, or dispensed with altogether, but here is a contingency which does not depend upon any act, or omission to act, of any person whatever. It is the act of the law which casts the descent of estates, and that is not regulated or controlled by the acts, the follies, the frauds or the crimes of any individual persons. Unless the law itself contains some qualification which changes its application, or provides some disqualification by way of penalty, it must have its way because there is no other way.

If we consider the question upon authority, we find the great preponderance of judicial decision in accord with the views above expressed. In view of the dreadful and unnatural character of the crime of the son in this case, it is not a matter of wonder that the precise question has never yet been before us, and that there is a dearth of authority among the tribunals upon such a subject.

In the case of Owens *v.* Owens, 100 N. C. 242, Sarah Owens was convicted of being an accessory before the fact to the murder of her husband. She was sentenced to imprisonment for life, and while undergoing her sentence she petitioned the Court to assign her dower in the real estate of her deceased husband. In allowing her petition the Court said: "We are unable to find any sufficient grounds for denying to the petitioner the relief which she demands; and it belongs to the law-making power alone to prescribe additional grounds of forfeiture of the right which the law itself gives to a surviving wife. Forfeitures of property for crime are unknown to our law, nor does it intercept for such cause the transmission of an intestate's property to heirs and distributees, nor can we recognize any such operating principle."

In Deem *v.* Milliken, 6 Ohio Circ. Ct. Reports, 357, the facts were that Elmer L. Sharkey murdered his mother for the purpose of succeeding to the title to her real estate. He was convicted and hanged after having mortgaged the real estate. The collateral heirs contended that by reason of his crime, no interest had passed to the son and therefore the mortgages were void.

In the opinion the Court said, "The statute of descent neither recognizes mischief nor provides a remedy. It is a legislative declaration of a rule of public policy. . . . There should be no difficulty in distinguishing this case from those in which the rights asserted have no foundation other than the fraudulent or unlawful conduct of a contracting party, nor from those in which attempts are made to use the process of the Courts for fraudulent purposes. . . . The natural inference is that when the Legislature incorporated the general rule into the statute and omitted the exception, they intended that there should be no exception to the rule of inheritance prescribed."

In the case of Shellenberger *v.* Ransom, 59 Northwestern Reporter, 935, the Supreme Court of Nebraska, reversing its own former decision, reported in 47 N. W. Rep. 700, held that the murderer did not forfeit the estate of his daughter whom he had murdered in order that he might acquire the title to her real estate. At the first hearing the Court followed the decision of a ma-

Digitized by Google

jority of the New York Court of Appeals in Riggs *v.* Palmer, 115 N. Y. 506, but changed their ruling on the re-argument in 1894. In delivering the second opinion the Court says, "The conclusion reached by the reasoning of Judge EARLE in Riggs *v.* Palmer, as well as that in this case, was based very largely on that species of judicial legislation above characterized as rational construction. If Courts can thus enlarge statutory enactments by construction, it may be that the references in the majority opinion in Riggs *v.* Palmer, to the provisions of the civil law were very apt as illustrating how, by rational interpretation, our statute should be made to read. . . . The Legislature has spoken, their intention is free from doubt, and their will must be obeyed. 'It may be proper,' it has been said in Kentucky, 'in giving a construction to a statute to look to the effects and consequences when its provisions are ambiguous or the legislative intent is doubtful. But when the law is clear and explicit and its provisions are susceptible of but one interpretation its consequences, if evil, can only be avoided by a change of the law itself, to be effected by legislative and not judicial action."

The case of Riggs *v.* Palmer, was decided by a divided Court, but it was a case of devise and not of descent, and involved only the question of permitting a devisee to take title under the will of a testator whom he murdered in order to get the property devised to him by the will. While we do not agree to the conclusion reached, the case only involved the operation of a private grant, and therein differs widely from a case in which the statutory law of descent is in question. In the former case it was only necessary to set aside an instrument between private parties on the ground of fraud, but in the latter it would be necessary to set aside the positive law of the State.

The case of New York Mutual Life Ins. Co. *v.* Armstrong, 117 U. S. 591, cited for the appellant, merely decided that proof that the assignee of a policy of life insurance caused the death of the assured by felonious means was sufficient to defeat a recovery on the policy. Mr. Justice FIELD, delivering the opinion said, "It would be a reproach to the jurisprudence of the country if one could recover insurance money, payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he has wilfully fired," thus showing that the decision was based entirely upon the ground of fraud upon a contract right.

The case of Cleaver *v.* Mutual Reserve Fund Life Association, 1 Q. B. 147, also cited for appellant, is of an entirely similar character. It was an attempt to enforce a trust in favor of one who had brought about the conditions essential to its fulfilment by killing the person whose death made it operative. Lord Justice FRY said in the opinion, "If no action can arise from fraud it seems impossible to suppose it can arise from felony or misdemeanor."

In the argument for the appellant no case is cited which presents the very question which arises on this record. But there are at least the three cases above cited which do involve the same question as this, and they are all decided against the contention of the appellant. These authorities appear to us to be far more in consonance with sound principle than those which are seemingly, though not really, of an opposite tendency, and they certainly harmonize with the views we entertain. The assignments of error are not sustained.

The decree of the Court below is affirmed, and the appeal is dismissed at the cost of the appellant.

Eo die. WILLIAMS, J. I concur in the disposition of so much of the fund as is derived from the estate of Mrs. Carpenter, who was convicted only of being an accessory after the fact to the murder of her husband. I dissent from the disposition of so much of it as is derived from the alleged estate of the son who was convicted of murder, and whose crime was committed for the purpose of securing the property of his father. The son could not by his own felony acquire the property of his father and be protected by the law in the possession of the fruits of his crime.

S. H. T.

Jan. '94, 224. February 25, 1895.

Simrell v. Miller.

Statute of limitations—Promise of payment—Evidence—Assumpsit—Act June 3, 1887, P. L. 332.

Where a debtor in acknowledging the owing of money couples the acknowledgment with the statement that if she could not raise the money the plaintiff "could have it out of the land," it is not a promise to pay, but a remission of the creditor to his legal rights for recovery.

It is error to combine the testimony of witnesses to bring any of them up to the required standard.

No number of insufficient acknowledgments of an indebtedness will constitute a sufficient one.

A creditor who does not assert his rights within the lifetime of his debtor, but for many years prior to the death does not make his claim, will be held to strict proof in establishing it.

Appeal of Francis Miller, executor of the will of Phœbe Ann Simrell, from the judgment of the Common Pleas of Lackawanna County, en-

Digitized by Google

tered in discharging a rule for a new trial in an action of assumpsit, wherein M. B. Simrell was plaintiff and appellant defendant.

The facts of the case appeared to be that appellee was the son of Phœbe Ann Simrell, and that after her death he made claim on the executor of her will for $320, which he claimed he had advanced to her, at her request, between 1860 and 1865. Witnesses were produced by plaintiff to prove that in the autumn of 1886 or 1887 Mrs. Simrell had acknowledged the debt and expressed herself as willing to endeavor to pay it; and it was proved that she said that if she couldn't raise the money he (the plaintiff) could have it "out of the land."

The assignments of error were nine in number, the first as to the admission of evidence proving the acknowledgment of the indebtedness in 1886; the sixth that the Court charged, "And she would then have been able by her own promise, even though her husband were living, to make herself liable for a preceding loan."

The seventh: That the Court erred in that part of the general charge in which the Court said: "So that there is a moral obligation in regard to it, and if a debt in that situation is more than six years old, and the party promises to pay it, or admits that he owes it in such a straightforward or unequivocal way that the law presumes that he means to pay it, then he is liable on that promise express or implied."

And the eighth: That the Court erred in that part of the general charge in which the Court said: "So that in this case with regard to this claim, if you are satisfied that the plaintiff advanced money to his mother you must be satisfied that she made this promise in 1887; that her attention was called to the debt and to the amount of it, and that she admitted in a clear and unequivocal way that it was due, and that she intended to pay it and would pay it; not that she intended to pay it in some indefinite time, but that she actually admitted it as an obligation resting upon her at that time. The testimony, if you believe it, goes that far. These witnesses say that a paper was produced showing the amount; that the amount was mentioned, and she said that she did owe that amount, and that it ought to have been paid before."

George M. Watson, (with him *C. B. Gardner* and *R. A. Zimmerman*), for appellant.

A conditional promise is not sufficient to take the case out of the statute of limitations.

Bank *v.* Patton, 14 Pa. 479.
Linderman *v.* Pomeroy, 142 Id. 168.

Any uncertainty as to the acknowledgment is fatal to plaintiff's case.

Burr *v.* Burr, 26 Pa. 284.
Landis *v.* Roth, 109 Id. 621.

In the conversation to which Eliza Howey testifies plaintiff was not present, and Mrs. Simrell did not mention any amount that was due or owing to him.

Neither of these witnesses was an agent for plaintiff, and any admission or promise made to them by Mrs. Simrell would not have been binding on her.

Kyle *v.* Wells, 17 Pa. 286.
McKinney *v.* Snyder, 78 Id. 497.

The acknowledgments as shown by any one witness, standing alone, would not be sufficient to remove the bar of the statute, and several insufficient acknowledgments will not constitute a sufficient one.

Patterson *v.* Neuer, 165 Pa. 66.

No acknowledgment of an antecedent debt was shown by the testimony to have been made sufficiently distinct and palpable in its extent and form as to preclude hesitation about the debtor's meaning, or sufficiently clear, plain, unambiguous and express as to remove the bar of the statute.

Allison *v.* James, 9 Watts, 380.
Webster's Exrs. *v.* Newbold, 41 Id. 482.
McClelland's Exrs. *v.* West, 59 Id. 487.

An implied promise is not sufficient. It must be express.

Allison *v.* James, 9 Watts, 380.
McClelland's Exr's *v.* West, 59 Pa. 487.

A. A. Vosburg, (*W. S. Hulslander* with him), for appellee.

The statute of limitations is a bar to the remedy merely, and does not discharge the debt; there remains, therefore, the pre-existing indebtedness as a consideration for a new promise, besides the moral obligation to pay; it has therefore been repeatedly held that from a clear and distinct acknowledgment of the debt a promise may be inferred, if that acknowledgment is consistent with a promise.

Bolton *v.* King, 105 Pa. 78.
Yaw *v.* Kerr, 47 Id. 333.

In the case of a note a promise to pay "as soon as I could" was held to be sufficient.

Wells *v.* Wilson, 140 Pa. 645.

The moral obligation of a married woman to pay a debt is sufficient to support a promise to pay it made after the passage of the Act June 3, 1887.

Brooks *v.* Bank, 125 Pa. 394.

Therefore the fact that there was a pre-existing indebtedness from Phœbe Ann Simrell to M. B. Simrell having been found by the jury, this would be a sufficient consideration for a new promise on her part to pay the debt, besides the moral obligation to pay it.

Bolton *v.* King, 105 Pa. 78.

Digitized by Google

The rights and liabilities of married women in this State have been greatly enlarged by the Act of June 3, 1887. The authorities which were applicable to questions arising before the passage of that Act are inapplicable now. That Act has emancipated a married woman from the shackles of the common law, so far as her separate property is concerned, and permits her to stand alone and exercise her own judgment.

Milligan *v.* Phipps, 153 Pa. 208.
Adams *v.* Gray, 154 Id. 258.

A married woman since the Act of 1887 may engage in business and enter into contracts in regard to it, or the management of her separate estate as fully as a *feme sole*. In other words, as to every contract which she is authorized to make, her rights and responsibilities are those of a *feme sole*.

Abell *v.* Chaffee, 154 Pa. 254.
Milligan *v.* Phipps, 153 Id. 208.
Building and Loan As. *v.* Fritz, 152 Id. 224.

Where a married woman has a separate estate, she may make any and all contracts that a party *sui juris* may make.

McCormack *v.* Bottorf, 155 Pa. 331.

July 18, 1895. MITCHELL, J. The learned Judge instructed the jury that the plaintiff must recover, if at all, on the testimony of Lowry and Harvey, the other witnesses being "in a measure corroborative," but not sufficient to make out the case if those two did not do so.

Lowry testifies positively to the promise to pay, "she promised that she would give Byron the money that fall," but he does not identify the debt. He not only fails, but distinctly declines to say how much it was, but says the plaintiff went and got a paper, and his mother said "the money that was on the paper was all right." This paper is not produced, or accounted for, and without it the testimony amounts to nothing. It is not nearly so strong as that which was held insufficient in Landis *v.* Roth, 109 Pa. 621.

Harvey also refers to the paper but fixes the amount at $320. But he does not make out any sufficient promise to pay. According to him, the decedent said, "if she couldn't raise the money why he (the plaintiff) could have it out of the land." This was at most a conditional promise to pay when able, and the additional statement that if she was not able plaintiff could have it out of the land, is not a promise but a remission of plaintiff to his legal rights for a recovery. In Lowrey *v.* Robinson, 141 Pa. 189, the promise was to pay "when he got ready" and "he said he didn't have the money just at present, but he intended to pay it when he had it," and this Court said emphatically that "a claim twice barred by the statute of limitations should have a better foundation." See also Linderman *v.* Pomeroy, 142 Pa. 168.

Neither of these witnesses by himself makes out a positive promise to pay an identified debt, and without that plaintiff cannot recover, for even if a clear acknowledgment of the debt were made out, which it is not, the decedent being a married woman at the time of the alleged loan and the alleged promise, would not be bound by it: Kelly *v.* Eby, 141 Pa. 176.

Nor can the testimony of the two witnesses be combined to bring either of them up to the required standard. As our brother McCOLLUM said in Patterson *v.* Neuer, 165 Pa. 66, if an acknowledgment "does not appear in either of their conversations it cannot be inferred from both In other words several insufficient acknowledgments will not constitute a sufficient one."

The plaintiff's claim is brought forward under circumstances that raise every presumption against it. His alleged loan was made to his mother, a married woman at the time, and he waited twenty-five years and until she was dead before taking any steps to get payment. Parties who do this must understand that they will be held to strict proof of every step towards their claim. The plaintiff failed to make out his case, and the request for a binding instruction for the defendant should have been granted.

Judgment reversed.

W. D. N.

July, '94, 213. January 29, 1895.

Ralston's Appeal.

Assignment for benefit of creditors—Release—Dividend—Trustee.

A releasing creditor who has received his proportionate share of the sum realized from the assets of an estate assigned for the benefit of assignor's creditors, has no further claim upon that sum, and may not participate in a distribution of the shares of other creditors who failed to accept the terms of the assignment, or who having accepted the terms of it have not claimed their dividends and can not be found; nor has he any standing to contest the payment of such dividends to the assignors or their personal representative.

Estate of Potter and Page, 54 Pa. 465, followed.

Appeal of Robert and Francis W. Ralston, Jr., administrators d. b. n. c. t. a. of William Meredith, deceased, from the decree of the Common Pleas No. 4, of Philadelphia County, entered in dismissing the exceptions of appellants

Digitized by Google

to the report of the auditor appointed to audit the account of certain unclaimed dividends of Eli K. Price (as stated by his executors), surviving trustee under a deed of trust made August 11, 1819, by Maurice and William Wurts.

The facts, as appeared in the auditor's report, were that Maurice and William Wurts, by deed of August 11, 1819, conveyed certain property to William Meredith and John Day, in trust, to dispose of the same and to "divide all the clear moneys that shall remain in their hands and have been raised and received out of the premises assigned *pro rata* unto and amongst such and so many of the creditors of the said Maurice Wurts & Co. as shall within five months from the date of these presents, execute and deliver to the said Maurice Wurts & Co., or to their agent and attorney, duly authorized and appointed by writing under their hand and seal for this purpose, a full, entire and effectual release and discharge of all demands against them or either of them jointly and severally," and provided that in case any creditors should neglect or refuse to execute a release within five months, such creditors should not be entitled to any distribution under the deed of trust, and that the said trustees should deliver to Maurice and William Wurts, for their own use, such proportion of said clear moneys as the refusing or neglecting creditor would have been entitled to receive, in case he had executed and delivered the proper release.

John Day did not act, and Mr. Meredith died in 1844, and Mr. Price was appointed administrator of his estate.

Mr. Price was appointed by the Court trustee under the aforesaid deed.

Maurice Wurts died in 1855, and William Wurts in 1858, and letters d. b. n. c. t. a. on William Wurts's estate were granted to S. Davis Page, and similar letters on the estate of William Meredith were granted to the appellants.

It appeared from the correspondence, papers, dividend book and receipts produced by the executors of Mr. Price that William Meredith or his estate did regularly participate in all the dividends which had been declared, upon a basis of $56,904.84, composed of claims which were recited in said documentary evidence to have been bought, assigned, held or owned by William Meredith.

In 1867 Mr. Price, as administrator of William Meredith, deceased, filed his account, which was referred to John M. Clayton, Esq., as auditor, who found a part of the balance in the hands of the administrator then invested in $3,000 of Philadelphia City Loan was the investment of a fund of $2,742.55 appearing at Mr. Meredith's death, according to his books, as unclaimed dividends belonging to certain creditors of Maurice and William Wurts who could not be found. At this audit, the Meredith estate made a claim that the fund in the hands of Mr. Meredith's administrator was not earmarked from the residue of his assets, and that his estate was merely indebted to the creditors of M. and W. Wurts, and that upon the failure of such creditors to establish their claims, this fund should be distributed to Mr. Meredith's heirs or next of kin. The auditor overruled this contention and awarded the fund to Mr. Price to be held by him "in his capacity of trustee for the creditors of Maurice and William Wurts for the unpaid creditors, or in the event of their not being reached, then for the benefit of the original assignors or their representatives." The auditor's report was subsequently confirmed and distribution made in accordance therewith.

The fund for distribution was composed of certain unclaimed dividends in the hands of Mr. Price, and of the aforesaid sum of $3,000, and the income already accrued thereon, and of further accretions of income less sundry allowances.

The auditor awarded the fund in hand to S. Davis Page, administrator of the estate of William Wurts, deceased, and upon hearing exceptions filed by appellants, the Court dismissed the same, and confirmed the auditor's report, whereupon appellants appealed.

Lewis Lawrence Smith and *Caldwell K. Biddle*, for appellants.

As to the fact of the assignment of the claims to William Meredith being sufficiently proven, cited—

Starkie on Evidence, *89.
Albrecht *v.* Breder, 12 WEEKLY NOTES, 170.
McReynolds *v.* Longenberger, 57 Pa. 30.
Starkie on Evidence, *523-4 and *93-4.
Best on Evidence, secs. 504 and 499.

As to alleged invalidity for the assignment by reason of William Meredith's trusteeship, and the tardiness of setting forth the objection—

Pearsoll *v.* Chapin, 44 Pa. 9.
Harrington *v.* Bank, 101 N. Y. 257.
Meanor *v.* Hamilton, 27 Pa. 143.
Kribbs *v.* Downing, 25 Id. 404.
Christy *v.* Sill, 95 Id. 380.
Hovenden *v.* Lord Annersly, 2 Sch. & Lef. 633.
Wedderburne *v.* Wedderburne, 4 My. & Cr. 52.
Randall *v.* Errington, 10 Ves. 427.
Chalmer *v.* Bradley, 1 Jac. & Walk. 59.
In re Morgan, L. R. 18 Ch. Div. 100.
Wright *v.* Vanderplank, 8 De G. M. & G., 137-151.
Harrington *v.* Bank, 101 N. Y. 257.
Kane *v.* Bloodgood, 7 Johns. Ch. 90-114.
Buckner *v.* Calcote, 28 Miss. 596-7.
Watson *v.* Saul, 5 Jur. N. S. 404.
Life Asso. *v.* Siddal, 3 De G. F. & J., 72.
Kerr on Fraud and Mistake, 298-311.
Pomeroy Eq. Juris., § 965.
Bispham's Equity, 260.

Digitized by Google

Adam's Equity, 62.
Perry on Trusts, § 869.

The purposes of the trust are clear: (1) that every creditor shall be paid his debt with interest; (2) no creditor shall be paid to the injury of another creditor.

Dividends remaining in hands of accountant are held as unadministered assets of the estate.

Mitchell *v.* Stiles, 13 Pa. 306.
In re Wilson, 4 Id. 430.
McLellan's Appeal, 26 Id. 463.
Trickett on Assignments, p. 204, Note.
Carson *v.* McFarland, 2 R. 118.
Duhring's App., 13 Pa. 240.

S. Davis Page, (*Howard W. Page* with him), for appellee.

An assignment by an insolvent debtor for the benefit of creditors always leaves a resulting trust in the assignor, which, if his debts were actually paid, or a legal presumption of their payment has arisen from lapse of time, entitles him to the possession of the assigned property.

Estate of Potter & Page, 54 Pa. 465.

Where a man conveys his interest in land to a trustee for payment of certain creditors in the order specified, and in further trust to apply them to the payment in equal and ratable proportions to all his creditors, according to their respective debts, and, after paying the aforesaid debts, the balance to his wife: *Held*, after a lapse of more than twenty-two years, the law will presume the debts to have been paid and the trust executed, so far as respects the creditors.

Drysdale's Appeal, 14 Pa. 531.
Biddle *v.* Girard Bank, 109 Id. 349.
Gregory *v.* Commonwealth, 121 Id. 627.

The doctrine of presumption is very extensive in application—the computation runs from the period when the money was demandable. The presumption would not be destroyed by the fact that the trustees in a deed of assignment for the benefit of creditors had not been called on to settle their accounts. This would rather add to the presumption, because it is difficult to account for the acquiescence of the creditors, except by the natural presumption that they had been paid, or that some satisfactory arrangement had been made with them by the owner of the resulting trust.

Power *v.* Hollman, 2 Watts, 222.

A debt due and unclaimed, and without recognition for twenty years is, in the absence of explanatory evidence, to be presumed to have been paid. This presumption *prima facie* obliterates the debt, and the onus is upon the creditor to show that payment of the debt has not been made.

Bentley's App., 99 Pa. 500.

Presumption of payment from lapse of time necessarily arises and must be rebutted.

Ingraham *v.* Cox, 1 Parsons, 70.

The claim of appellants is in direct conflict with the fundamental principle that a "trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which can have a tendency to interfere with his duty in discharging it." Above all, he shall not traffic in the assets of the estate for his own advantage.

Story's Eq. Juris., § 322.

The principle has been repeatedly applied to purchases by assignees, for creditors, and, in bankruptcy, of debts and other assets of the estates in their hands.

Ex parte Lacey, 6 Ves. 628.
Ex parte James, 8 Id. 346.
Hamilton *v.* Wright, 9 Cl. & F., 123.
Pooley *v.* Quilter, 2 De G. & J., 350.
Hawley *v.* Mancius, 7 Johns. Ch., 174, 188.
Campbell *v.* McLain, 51 Pa. 200.
Reed *v.* Warner, 5 Paige Ch. (N. Y.), 650.

Where acquiescence is relied on, it is essential that the person acquiescing should know exactly the nature of the thing to which his acquiescence is supposed to be given, and the effect of such acquiescence.

Hamilton *v.* Wright, 9 Clark & Fin. 119.
Strange *v.* Forks, 4 Giff. 413.
Cockerell *v.* Cholmeley, 1 Russ. & Myl. 425.
Adair *v.* Brimmer, 74 N. Y. 539.
Cumberland Coal Co. *v.* Sherman, 20 Md. 151.
Lammot *v.* Bowly, 6 Har. & J. (Md.), 525.
Beach Modern Eq. Jur., § 244.
Campbell *v.* McLain, 51 Pa. 203.

The English cases relied upon by the appellants were either ruled by the provisions of their bankrupt law, or by the special circumstances of each particular case, or the special terms of the deeds of trust or wills under which they were decided, and this is particularly true of Green *v.* Weston, 3 Myl. & Cr. 385; Ward *v.* Arch, 12 Sim. 472; and a careful analysis of every American case cited by them shows that each is as little applicable to that before the Court on this appeal; many of them do not refer to the points in support of which they are cited.

July 18, 1895. McCollum, J. The fund in dispute consists of the unclaimed dividends in the estate assigned by Maurice Wurts & Co., on the 11th of August, 1819, for the benefit of their creditors. It was awarded by the learned Court below to the administrator of William Wurts, who was the surviving assignor. The award or decree so made is contested on this appeal by the administrators of William Meredith on whom the active duties of the trust devolved.

Digitized by Google

From 1819 to 1844 Meredith had the exclusive management of the estate. He died in September, 1844, and Eli K. Price became his administrator and also a trustee under the deed of assignment. No account of his administration of the trust was filed by Meredith, but he made and preserved memoranda showing what he did in execution of it. From these it appears that he "paid to himself or retained for his own use" the dividends on certain claims standing in the names of parties who were creditors of the assignors. It also appears from memoranda made by and from books and papers in the possession of Price, that he, as trustee of the assigned estate, paid to himself as Meredith's administrator all the dividends subsequently appropriated to these claims. There is no direct evidence of a sale of the claims to Meredith, but his legal representatives contend that his action and the action of his administrator in reference to the payment of dividends upon them, authorize and support an inference or presumption that he purchased them while he was trustee. That Price retained the dividends in the belief that the claims on which they were awarded belonged to Meredith's estate is manifest from the recitals in his receipts for the same, but upon what information his belief was based does not appear. If Meredith bought the claims and they were assigned to him, it is reasonable to suppose that he would have preserved the evidences of his title to them. Price was the administrator of his estate and entitled to the possession of the books and papers pertaining to the ownership of the assets he was called to administer, and such of them as were applicable to the issues in this distribution were accessible to the appellants. Their failure to produce any evidence of an assignment of the claims to Meredith other than the appropriation of the dividends by him and his estate compels them to rest their present contention on the presumption arising from such appropriation. A presumption that he purchased the claims for his personal benefit would contain an imputation of dishonesty in the administration of the trust. The law condemns speculation by the assignee in the debts of his assignors, and will not allow him to appropriate the profits of it. If Meredith bought the claims in question and the parties from whom he purchased were satisfied with their sale of them, whatever he made by the transaction inured to the benefit of the trust estate. He certainly could not recover from the estate in the form of dividends on the claims more than he paid for them, and this was presumably less than the dividends applicable to them. All of these dividends having been received by him or his estate it would seem that something more than the mere appropriation of them was necessary to give his representatives a legal or equitable standing in this contest. But we do not rest our affirmance of the decree on this ground alone. It appears to be in harmony with and sustained by the provisions of the assignment in reference to distribution. The trust deed shows that it was the intention of the assignors that each of their creditors should accept in full satisfaction of his claim his proportionate share of whatever sum might be realized from the assigned effects, and that the share of any creditor refusing to so accept it within the time prescribed should revert to them. The share of each creditor was ascertainable on the basis of the whole indebtedness, and therefore the share of a releasing creditor was not affected by the refusal of another creditor to comply with the conditions on which the right to a share depended. A releasing creditor who has received his proportionate share of the sum realized from the assets has no further interest in that sum. His receipt of the share which his compliance with the provisions of the deed gave him extinguished his interest in it and satisfied his claim. It appears to be conceded that the shares of the creditors were correctly ascertained and that the dividends awarded to them have exhausted the assigned estate. As each creditor was the exclusive owner of the dividends appropriated to his share under the deed he was without any interest in or lawful claim upon the dividends awarded to the shares of the other creditors. Neither Meredith nor Price as his administrator ever claimed any part of the dividends which constitute the fund in dispute. In 1867 Meredith's heirs endeavored to have them adjudged to be assets of his estate, but the decision of the Orphans' Court was adverse to their contention and they acquiesced in it. The renewal of their contention in another form and forum after the lapse of a quarter of a century is, to say the least of it, somewhat remarkable, and evincive of a change of view respecting their relation to the dividends they then sought to appropriate. These dividends were in the hands of their ancestor, who they allege was the owner of the claims on which they base their present contention. His books showed that the parties to whom they were awarded could not be found. If his legal representatives are entitled to them now, his estate was entitled to them in 1867. But we need not discuss this subject further. For the reasons already stated we think the appellants have no standing to contest the claim of the appellee. We think, too, that as no one having the right to contest the claim appears, or can be found, the proper decree was entered on the authority of the decision in the Estate of Potter & Page, 54 Pa. 465.

Decree affirmed and appeal dismissed at the cost of the appellants. W. D. N.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, AUG. 23, 1895.* [No. 28.

Supreme Court.

Jan. '93, 374. March 19, 1895.

Re Sewer on Park Avenue.

Parker's Appeal.

Municipalities—Sewers—Assessment of benefits—Acts of May 16, 1891, and May 23, 1889—The extent of taxing power—Non-abutting properties.

The Act of May 16, 1891, providing, *inter alia*, for the construction of sewers and assessment for the cost and expense of same, gives no authority for the viewers to assess any but property on the line of the improvement, nor could it constitutionally have done so.

Lots having no present connection with the sewer have no present special advantage from it, and the mere fact that a city's plan contemplates a connection is no ground for the imposition of a present lien and obligation to pay.

Upon the general principle governing such local and special taxation, it is sustainable only on the basis of special and individual benefit, and the limit of the benefit is the limit of the taxing power.

Where the facts agreed upon by the parties show that there is no special benefit to an owner's property by reason of a main sewer required for lands further off, but that a smaller sewer would have been sufficient to give the property all the benefits it derives from the improvement, the property can only be assessed to the extent of the cost of the latter. This is in accordance with the terms of the Act of 1891, which provides that if sufficient property benefited cannot be found, the extra expense is to be paid by the municipality, and is further in accord with the principle that the limit of special benefit is the limit of special assessment.

Oil City *v.* Oil City Boiler Works, 152 Pa. 348, distinguished. Apparent conflict between Act of May 23, 1889, and case of Morewood Ave., 159 Pa. 20, commented upon.

Appeal of Clara M. Parker *et al.*, from the decree of the Common Pleas of Lycoming County, in the matter of assessments for cost of sewer on Park avenue, Williamsport.

On July 17, 1891, the city of Williamsport, in accordance with the provisions of Article XIII. of the Act of May 23, 1889, P. L. 312, by ordinance No. 473, divided the city into three sewer districts, and adopted the sewer system devised by its city engineer.

September 25, 1891, an ordinance known as No. 441 was passed, providing for the construction of sewers in certain streets, *inter alia*, in Park avenue from Campbell to Sixth avenue, in Fifth avenue, and in Isabella street, and that the cost thereof should be assessed upon the properties benefited, by viewers to be appointed by the Court, according to the provisions of the Act of May 16, 1891, P. L. 75.

Bids were duly advertised for, the contract awarded, and the work done.

To the report of the viewers Clara M. Parker *et al.* filed the following exceptions:—

First. Because said viewers have assessed the cost of said sewers upon the abutting properties only, and not upon all properties benefited thereby.

Second. Because said viewers have assessed the properties of your exceptants abutting on Park avenue with the cost of a 15-inch sewer, whereas the excess of cost of said 15-inch sewer over and above the cost of a 10-inch sewer should have been assessed upon all properties that will, according to the sewer system adopted by the city, have occasion to connect with said Park avenue sewer.

Third. Because said viewers have included in the amount assessed against the properties of your exceptants abutting on Park avenue a part of the cost of the sewer on Campbell street, with which said Park avenue sewer connects; which they had no right or authority of law to do in this proceeding.

Fourth. Because said viewers have assessed unimproved lots on said Park avenue from 50 per cent. to 75 per cent. higher than improved lots of the same or greater size on Isabella street, where the sewer is 10 inches in diameter.

Fifth. Because the assessments assessed by said viewers on Fifth avenue amount in the aggregate to a sum greater than the contract price of the sewer laid in said street, said price being $197.12, and the amount assessed being $245.

When the exceptions came up for argument the following facts were agreed to by counsel:—

First. That said viewers have assessed the cost of said sewers upon the abutting properties only, and not upon all properties which, according to the city sewer system, will connect therewith for purposes of house sewage.

Second. That said viewers have assessed the properties of the exceptants with the cost of a 15-inch main sewer, and that a 10-inch local sewer would have been sufficient to serve the properties of your exceptants and all others abutting on Park avenue, between Campbell street and Fifth avenue, for house sewage.

Third. That said viewers have included in the amount assessed against the properties of said exceptants on Park avenue a part of the cost of the sewer on Campbell street, with which said Park avenue sewer connects; and that Campbell street is not named in the order of Court in the above entitled case.

Digitized by Google

Fourth. That ordinance No. 439, entitled "An ordinance establishing a sewer system for the city of Williamsport," approved July 17, 1891, and the engineer's map accompanying the same; also ordinance No. 441, approved September 25, 1891, entitled "An ordinance providing for the construction of a sewer in Mulberry and other streets, etc.;" also the contracts for the sewers in Park avenue and Fifth avenue, shall be considered as part of the record in this case.

Fifth. That according to said engineer's map or plan of sewerage, all properties lying between Campbell street on the east, Cemetery street on the west, Park avenue on the south, and Rural avenue on the north, will connect with the sewer in Park avenue for house sewage.

Sixth. That according to said engineer's plan, all properties lying between Walnut street on the east, Cemetery street on the west, Isabella street on the south, and Rural avenue on the north, will connect and drain into the sewer on Campbell street for house sewage.

Seventh. That the cost of the Park avenue sewer was $2,403.40; of the Fifth avenue sewer was $198, and of the Isabella street sewer was $1,847.37.

Eighth. That all the properties of your exceptants on Park avenue and Fifth avenue are unimproved lots, and that the majority of lots on Isabella street are improved lots.

Ninth. That the sewer in Campbell street was laid, and viewers appointed to assess the cost thereof, before the viewers appointed to assess the cost of the Park avenue sewer had made their assessments, but that no notice of the assessment of the cost of the Campbell street sewer had been given before the report of the viewers assessing the cost of the Park avenue sewer was filed.

The Court, MAYER, P. J., sustained the third exception and recommitted the report to the viewers for correction in that regard, which was done, and an amended report filed. The Court subsequently filed an opinion and decree sustaining the fifth exception also, but overruling the first, second and fourth; holding, in substance, first, that no matter what the size of the sewer, or the extent of the territory draining into it, only the properties directly abutting on the sewer could be assessed with any part of its cost; and, second, that the finding of the viewers as to the *quantum* of benefits was not the subject of review, and confirmed the report of the viewers.

From that decree this appeal is taken.

John J. Reading, (*William D. Crocker* with him), for appellants.

J. A. Beeber, (*N. M. Edwards*, city solicitor, with him), for appellee.

July 18, 1895. MITCHELL, J. This case suggests, and has been broadly argued on the question of the true basis of assessments on property owners for benefits from the construction of sewers. More specifically stated it involves the right of a municipal corporation to have benefits assessed on any property not abutting directly on the line of the sewer, and the assessment of the excess of the cost of a main over a branch or lateral sewer. The appellant's complaint is, first, that the cost of the sewer was assessed on abutting properties only, and not on all the property in the sewer district, including non-abutters on other streets who have no present sewer connections, but whose property will ultimately when the municipal plan is fully carried out, be drained by branches which will empty into the sewer now in question; and secondly, that appellant's property is charged for the cost of a main fifteen-inch sewer, when a branch ten-inch sewer would have given it all the benefit it now has. The City of Williamsport, appellee, on the original argument contended that the assessments were right on both points, and conceded that the excess of the cost over the benefits to abutting properties should be paid out of the city's general revenue. On the reargument, however, this concession was withdrawn, and appellee united with appellant on the first point, in arguing that the excess should be assessed on all the properties in the sewer district. We have thus had the advantage of the presentation of every view of the question, and as it is not only new but of great and growing importance, we have considered it upon somewhat broader grounds than the assignments of error strictly require.

First, as to the assessment upon non-abutting property. It would be sufficient to rest on the fact that this proceeding is under the Act of 16th May, 1891, P. L. 75, and that Act gives no authority to assess any but property on the line of the improvement. The Act applies to opening, widening, grading and paving streets and to the construction of bridges and sewers, and makes no distinction in these several cases, as to the powers of the city, or the mode of procedure. Its terms are, (Sect. 8, p. 78), "viewers shall be appointed . . . . who shall assess the cost and expenses of the sewer, or grading, paving, curbing, macadamizing or other improvement of each street or alley, upon the property benefited, according to benefits, if sufficient can be found, or if not, then the deficiency, when finally ascertained, shall be paid by the municipal corporation." Property damaged and property benefited are classed together throughout the whole Act, and no indication is anywhere given that damages are to be allowed or benefits imposed upon any different basis than the usual one of the special and local effects of the improvement

Digitized by Google

upon the property along its line. A departure from this long established rule will not be presumed in the absence of explicit expression of such legislative intent.

Recognizing the force of this view of the Act of 1891, it is argued that the city has the power to assess non-abutting property, by the express words of the Act of 23d May, 1889, Art. XIII., sec. 1, P. L. 312, and that it was held in Hand *v.* Fellows, 148 Pa. 456, that this Act was not repealed by the Act of 1891. Accordingly a considerable part of the argument has been devoted to that question. As to that, however, it is only necessary to say now that the Act of 1889 is an elaborate statute of nineteen articles covering one hundred and forty-five sections, relating to the affairs of cities of the third class, and the part which the Court had under consideration in Hand *v.* Fellows, concerned assessments for paving, made by the foot-front rule. It was held that the provision in the Act of 1891 for assessments by benefits was not in conflict but alternative. The subject of sewers is in a different article and whether the system of assessment is consistent with that prescribed by the Act of 1891 would be by no means so easy to show. But it is unnecessary to go into this inquiry, as the present proceeding is altogether under the Act of 1891, and must stand or fall by its conformity thereto.

But viewing the subject on the broader ground of the nature of local assessments, it is settled beyond all question by a line of cases of which it is only necessary to mention Hammett *v.* Philadelphia, 65 Pa. 146, and Washington Avenue, 69 Pa. 352, that they are special and individual taxation, sustainable only on the basis of special and individual benefit, and the limit of the benefit is the limit of the taxing power. It was accordingly held in Morewood Avenue, 159 Pa. 20, and repeated in Fifty-fourth Street, 165 Pa. 8, that assessments for local improvement by paving must be confined to property abutting on the street so improved. It is not easy to see any valid distinction in this respect between improvement by a pavement and improvement by a sewer, and there are very strong reasons why no such distinction should be recognized. It might be sufficient to say, as already pointed out, that the Act of 1891 makes none, but classes paving and sewering together both as to rights and mode of procedure. But beyond this it is clear that lots having no present connection with the sewer in question, derive no advantage from it, further than the general improvement and healthfulness of the neighborhood, which is common to the whole public. Nor does it appear that they ever will certainly have any special benefit, for the sewer connections on the plan may be changed or if left on paper may never be carried out. To impose a present lien and obligation to pay where the special benefit is future and contingent on the will of the municipality would be a clear violation of the fundamental basis on which all such assessments rest. There is only one other class of non-abutting property, that which though not on the same street, has a connection with the sewer in question by means of its own branch or lateral sewer. This class is in precisely the same situation as the property assessed in the Morewood Avenue case, to wit, it was benefited by the increased facility of access by means of graded and paved streets, but as was shown by our brother GREEN, "that is only the same general and public advantage which is enjoyed by all citizens of the Commonwealth passing over the improved street."

We hold, therefore, that by the terms of the Act of 1891, the assessments for benefits from the sewer on Park avenue were properly confined to property abutting on that avenue, and further that on the general principles on which such local and special taxation is sustained, no assessments could constitutionally have been made on property not on Park avenue.

Secondly, the appellant was assessed with the cost of a fifteen-inch main sewer, while the facts agreed upon by counsel show that a ten-inch local sewer would have been sufficient to give the property all the benefit it derives from the improvement. This assignment of error must be sustained. In the first place the assessment is contrary to the express terms of the Act of 1891, sec. 8, already quoted, by which the costs and expenses are to be assessed according to benefits if sufficient property benefited can be found, and if not then the deficiency to be paid by the municipal corporation.

But beyond this, as already discussed, the limit of special benefit is the limit of the liability to special assessment. The agreed facts show that there is no special benefit to appellant's property from having in front of it a main sewer required only for lands further off from the point of discharge. The flagrant transgression of the fundamental principle by such an assessment may be shown by an illustration, which, as I am not familiar with the localities, I take from the appellee's first paper book. Park avenue sewer drains into a twenty-four-inch main sewer in Campbell street, and this in turn into a still larger sewer in Jefferson street. Whether this leads directly or through still another sewer into the river does not appear, but on the principle adopted by the viewers in the present case, a lot on the river front at the point of final discharge, would have to pay for the largest sewer, though it had a natural drainage into the river, and of all the lots in the city it had least need, and got least benefit

Digitized by Google

from the sewer, whose size was determined wholly by the requirements and for the benefit of remote properties. Such an assessment cannot be sustained. Appellant's property can only be charged with such proportion of the cost as would have paid for a branch sewer sufficient to give it all the benefits now enjoyed. The excess must, by the express words of the Act of 1891, be paid out of the municipal treasury.

Appellee cites Oil City *v.* Oil City Boiler Works, 152 Pa. 348, in support of the assessment of the excess of cost of a main sewer over what would have been required for local sewerage on all the property in the sewer district. That case, however, arose under the Act of 1889, and what it decided was that the discretion of councils as to what should be a main sewer and where it should be placed, was not reviewable, and that assessments being an exercise of the taxing power the absence of provision for an appeal was not necessarily fatal to the validity of the Act. In that case the assessments were made by viewers appointed by city councils under the authority of the Act of 1889. That authority has since been taken away and vested by the Act of 1891 in the Court of Common Pleas. Whether the other provisions of the Act of 1889 as to assessments on all the property in the sewer district for the excess of the cost of main over that of local or branch sewers, are also repealed, and if not, whether they are reconcilable with the decision in Morewood Avenue, we are not called upon at present to consider.

Judgment reversed, and the assessment on appellant's property is directed to be modified and reduced in accordance with this opinion.

W. M. S. Jr.

Jan. '95, 339. March 7, 1895.

Witman v. City of Reading.

Assessments—Foot-front rule—Foundation of rule—To whom cost of sewer chargeable.

The foundation of the foot-front rule of assessment for street improvements is not in uniformity of value, but in uniformity of benefit. The latter is not always, and perhaps not even generally, dependent on the former, or in any fixed ratio to it. Therefore the difference in value of property on the line of an improvement will not prevent the assessment of a claim upon it by the foot-front rule.

While the measure of the assessment is the amount of the benefit, yet it is limited to the cost of the improvement.

No properties can be assessed for the cost of a sewer, except those that abut on the line of it.

Appeal of the City of Reading, defendant, from the decree of the Common Pleas of Berks County, upon a bill in equity wherein Valeria Witman and Harrison T. Witman, her husband, were complainants.

On March 27, 1893, the councils of the City of Reading, which is governed by the General Act of 23d May, 1889, P. L. 272, divided the city into eight sewer districts for house sewerage purposes. Valeria Witman, the appellee, is the owner of a building lot 23 feet front and 110 feet in depth, situate in the first sewer district in the City of Reading. This locality is a densely built-up portion of the city. On October 10, 1893, the city councils directed that a system of sewers be constructed in this district, and directed that the cost thereof be assessed upon the properties abutting thereon under the foot-front rule, this assessment being based upon the contract or cost price to the city. The plaintiff in this case was charged with $66.19 as her assessment upon a frontage of 77 minutes 6 seconds, together with a charge of $12.50 for a house connection. Valeria Witman and Harrison T. Witman, her husband, plaintiffs, filed a bill in equity, praying that the assessments be declared void, and that an injunction be issued against the City of Reading, restraining it from filing liens or collecting claims. The bill alleges: First, that the assessment is illegal on account of certain alleged irregularities in making it; second, that the assessment for house connection is in excess of the actual cost of doing said work; third, that the foot-front rule of assessing is not applicable; and fourth, that the authorities being about to file a claim against the complainant, there is a cloud upon the title of her property and there will be a multiplicity of suits. Upon answer filed on behalf of the City of Reading, the Court below decided that the assessments were void upon the ground that the foot-front rule is not applicable to a whole district in a built-up portion of a populous city, because of the differences in the values of the properties located in such district; a decree was entered in accordance with the opinion, from which this appeal was taken.

William J. Rourke, city solicitor, (with him *Stevens & Stevens*), for appellant.

The first sewer district in the City of Reading, consisting of a closely built up portion of the city, and including no rural properties within its limits, assesssments made under the foot-front rule are valid.

Seely *v.* City of Pittsburgh, 82 Pa. 360.
Washington Ave., 69 Id. 352.
Michener *v.* Philadelphia, 118 Id. 535.

The constitutionality of the Act of May 23, 1889, P. L. 312, which authorizes councils in cities of the third-class to divide the cities into sewer districts and to provide for the construction of sewers therein, has been judicially interpreted by this Court.

Digitized by Google

Oil City *v.* Oil City Boiler Works, 152 Pa. 353.

The duties of the city engineer in computing the assessments are merely ministerial and not a delegation of legislative power.

While it is admitted that municipal powers or discretion cannot be delegated, a public corporation is not prohibited from appointing agents and empowering them to make contracts, or from appointing committees and investing them with duties of a ministerial or administrative character.

Dillon's Municipal Corporations, sec. 96, p. 124.
Schenley *v.* Comth., 36 Pa. 62.

It is apparent that in effect the bill in equity as filed is intended to restrain the city from the collection of "assessments for municipal purposes, which, while differing from general taxation in many respects, are a species of taxation, and the power to make such assessments, is an exercise of the taxing power of the municipality."

Washington Ave., 69 Pa. 352.
Olive Cemetery Co. *v.* Philadelphia, 93 Id. 129.
City of Erie *v.* First Universalist Church, 105 Id. 278.
Pettibone *v.* Smith, 150 Id. 118.

Courts of equity have no jurisdiction in a case of this kind, as there is an adequate remedy at law upon suit brought to enforce a lien filed under the Act of 1889.

2 Dillon's Municipal Corporations, secs. 906-907.
Clinton School District's Appeal, 56 Pa. 315.
Hughes *v.* Kline, 30 Id. 227.
Van Nort's Appeal, 121 Id. 118.
Wilson *v.* Town of Philippi, 19 S. E. Rep. 553.

Cyrus G. Derr, (*Ralph H. Mengel* with him), for appellees.

The foot-front rule was intended by the Legislature as a convenient substitute for actual valuation and to be used only in cases where its adoption would bring about substantially the same result as a valuation. Such rule is therefore not legally applicable to a large district embracing properties situate remotely from one another and extremely different in size, in kind and in value. Under the method adopted by the city in this case, the inequality of the distribution of the burden is at least two-fold: (1), As the chief streets require larger sewers than the alleys the owners of properties upon the latter are required to pay more than the cost of construction of the part of the sewer immediately before their properties, while the owners of the properties situate upon the main streets pay less than such costs; (2), the person whose property is situate in an alley, and worth $10 per front foot, pays as much as he whose property is situate on Penn Square and is worth $1600 per front foot.

"An assessment by a municipality for the cost of building a sewer is a tax."

McKeesport *v.* Fidler, 147 Pa. 532.

"All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

State Constitution, Art. IX., sec. 1.
Washington Ave., 69 Pa. 361.
Seely *v.* Pittsburgh, 82 Id. 364.

The delegation by councils to the city engineer, under ordinance of October 10, 1893, of the power to make plans and "to ascertain the amount to be levied and collected from each owner of real estate . . . . and to assess the same," and after giving five days' notice of the time and place of making said assessment to hear all parties interested, was unlawful and the assessment so made by the city engineer is void. Nowhere is there any expressed or implied authority for the delegation of this power to the engineer.

Municipal Act of 1889, Art. XIII., sec. 1, P. L. 312.

In the case of Thomas *v.* Schermerhorn, 6 N. Y. 92, the Legislature having authorized councils to direct streets to be leveled and paved in such manner as they might prescribe, it was held that an ordinance directing a street to be leveled and paved "in such manner as the city superintendent, under the direction of the committee on roads of the common councils shall, direct and require" was void.

Bellinger *v.* Gray, 51 N. Y. 610.
Davis *v.* Read, 65 Id. 566.
Thomas *v.* Gain, 35 Mich. 164.

As under the statutes the property owners are to be assessed for and pay simply the cost and expense of the improvement, an assessment based upon an estimate made at a time when the cost and expense cannot, as is admitted in the answer, be ascertained, is void.

As to the argument that a Court of equity has no jurisdiction to restrain the collection of a tax such as this, it is manifest that the assessment in question is a cloud upon the plaintiff's title. The case of Thomas *v.* Gain, 35 Mich. 155, grew out of an attempt to collect an unlawful sewer assessment, and Mr. Chief Justice COOLEY delivering the opinion of the Court said: "This case differs from Youngblood *v.* Sexton, in that the tax is one levied upon real estate and which, by the statute, is made a lien. The case is consequently a proper one for a bill to remove a cloud from the title."

Hannewinkle *v.* The Mayor, etc. of Georgetown, 82 U. S. 547.

Digitized by Google

July 18, 1895. MITCHELL, J. The learned Judge below held that the foot-front rule could not be lawfully applied, as a method of assessment, to complainant's property, and based his conclusion mainly if not exclusively on the difference in value per foot front, of the property along the line of the sewer. From this result we are constrained to differ. While the foot-front rule of assessment, it is true does not express a principle of taxation but merely a convenient method, yet its foundation is not in uniformity of value, but in uniformity of benefit. The latter is not always, and perhaps not even generally dependent on the former, or in any fixed ratio to it. Properties in the same general situation are presumed to get the same general benefit from a common improvement, and as this benefit is assessed exclusively on property abutting on the line of the improvement, it is presumed to be fairly measured by the foot frontage of the property on that line, though values may be and usually are very different, and dependent on other circumstances, such as the depth of the lots, the buildings erected upon them, the use to which they are put, and their proximity to business centres, etc. Value undoubtedly is one element to be considered, but no case has been cited, nor have I found any, in which it was held to be controlling, while in at least one, Harrisburg *v.* McCormick, 129 Pa. 213, it was practically considered of little or no weight at all. It is held in several of our cases there must in the public interest be a general rule, and it must be certain and uniform. And there could be no more striking examples of the unbending necessity for a general rule than Harrisburg *v.* McCormick, *supra*, and Michener *v.* Philadelphia, 118 Pa. 535. In my own view, the best, if not the only entirely just plan would be as was done in the earlier cases to assess the benefit in each instance by the difference in market value of the property before and after the improvement, yet of this plan Justice SHARSWOOD says in Hammett *v.* Philadelphia, 65 Pa. 146, "appraising market values and fixing the proportion according to these is open to favoritism or corruption and other objections. No system of taxation which the wit of man ever devised has been found perfectly equal." And he adds, "perhaps no fairer rule can be adopted than the proportion of feet front, though there must be some inequalities if the lots differ in situation and depth." And in Washington Avenue, 69 Pa. 352, although the foot-front rule was held inapplicable to the circumstances of the property there charged, yet Chief Justice AGNEW says of it, "Whatever doubt might have been originally entertained of it as a substitute, which it really is, for actual assessment by jurors or assessors under oath, it has been so often sanctioned by decision, it would ill become us now to unsettle its foundation by disputing its principle."

In the present case the sewer district is large, and includes lots with very different frontages and very varying values per foot, but it is not averred that it is not all a closely built-up portion of the city, and fairly within the situation laid down in regard to the applicability of the foot-front rule, even in Washington Avenue, the most unfavorable case to the rule, in our reports. We are of opinion that the circumstances of this case do not justify the setting aside of the rule.

The city took the aggregate cost of local sewers for the whole district; that is, for the purpose of assessment it treated the main sewers as local, and required the excess of cost to be paid by the city, and divided this aggregate sum by the aggregate frontage of the abutting lots, to establish a rate of cost, and then assessed this rate so ascertained, against each lot fairly in accordance with its frontage, with an equitable allowance for corner lots, etc., liable to charge for more than one sewer. It is objected that by this method the properties in front of which the smaller sewers are laid, are assessed with more than the cost of those sewers, and that they thus have to pay in part the cost of other sewers from which they derive no benefit. And this result is found as a fact in the case. The objection must prevail, for it is settled that while the measure of assessment is the amount of benefit, yet it is limited to the cost of the improvement. If the cost is only one dollar a foot, that is all that can be assessed on the property, though the benefit may be equal to two dollars a foot. It may be said with some plausibility that while by the system pursued in this case the small sewer fronts pay more than the actual cost of such sewers, yet they get the advantage of the outlet into the larger ones, and therefore do not pay more than for the benefit received. If each local sewer had to be extended to the point of final discharge its length and cost would be greatly increased. If instead of being thus extended, it gets its outlet through the medium of another sewer, there is a certain fairness in assessing the properties with a part of the cost of that other sewer, and it is argued that such part may be reasonably included in the cost of the small sewer. This argument, however, is open to the serious objection that it presents no principle on which the limitations of such charges can be fixed. The main sewer into which any particular branch shall empty is not located or its size determined by the needs or convenience of that branch alone or even chiefly, but by the requirements of the whole district. This includes, or may include, many branches, of different situations and very various cost. Thus one branch may be through ordinary ground having a natural grade

Digitized by Google

in the right direction, while another may have to be built up through low land with the wrong slope, or cut through rock at greatly increased expense. A ratio of cost made up of the average of these, is not an accurate measure of any one of them.

It is held in *Re* Park Avenue Sewer, opinion filed herewith, that no properties can be assessed for the cost of a sewer, except those that abut on the line of it. We are of opinion that the mode of ascertaining the rate of cost in the present case is in conflict with that principle, and therefore cannot be sustained.

We have reached this result with some regret, as the system adopted by the City of Reading is an earnest and intelligent effort to deal fairly with a subject of serious and inherent difficulties, and the plan appears to work in practice as justly and conveniently as any that has come to our notice. But the legal and constitutional objections are insurmountable.

There are some other questions in the case which have been argued, but which we do not think necessary to pass upon at the present time, as they may become unimportant. The injunction being against the whole assessment because of the application of the foot-front rule, is too broad and must be dissolved, but the complainant may show that her property is one of those charged more by the city's mode of assessment, than its proper share for the sewer in front of it, and if so her assessment will have to be reduced.

Decree reversed and record remitted for further proceedings in accordance with this opinion. W. C. S.

Jan. '95, 61. February 14, 1895.

Price's Appeal.

Wills—Probate of—Domicile—Lex loci rei sitæ—Real estate.

A will invalid by the law of the testator's domicile will not, though valid in this State, be sufficient to pass title to real estate acquired after the execution of the will. The will which bequeaths "moneys" and "other effects" was therefore limited to the disposition of personal estate only, notwithstanding it contains words of a general devise.

The Court will set aside the probate of such a will.

Appeal of Martha Price, Caroline Peel and Matilda E. Price, from the decree of the Orphans' Court of Chester County.

Henry F. Price died in West Chester, Pa., on August 26, 1890. His will, which was in his own handwriting, was dated February 11, 1890, was duly proved by witnesses acquainted with his handwriting and signature, and was admitted to probate by the register of wills of Chester County; and letters testamentary were granted to Charles J. Price, the executor therein named.

The testator was the owner of a farm of 48 acres in Chester County, Pa., purchased by him on April 30, 1890, subsequent to the date of his will, and worth, at the time of his death, $1400. His personal estate, after payment of debts and expenses, amounted to $1153. Testator's daughter, Jennie E. Price (now Jennie E. Leopold), who was given one-third of the estate by the will, and who lived in Philadelphia, with her mother, the divorced wife of testator, appealed from the probate of the will to the Orphans' Court, and an issue, framed and sent by the latter Court to the Court of Common Pleas to determine the domicile of the testator at the time of his death, resulted in a finding by the jury that he was domiciled in the State of New York. The judgment entered upon the verdict was affirmed by this Court. (See Price *v.* Price, 156 Pa. 617).

The will was without subscribing witnesses, and for that reason invalid under the laws of New York. It followed that the testator died intestate as to his personal estate, and that the register of wills of Chester County had no jurisdiction to grant letters testamentary thereon. Upon the result of the issue being certified into the Orphans' Court, the executor, Charles J. Price, handed over to Jennie E. Leopold the entire net personal estate, to wit, $1000 in cash, and articles appraised at $153, and received from her a receipt and release for the same. The will, however, having all the requisites of a valid will in Pennsylvania, the sisters of the testator, who were the residuary devisees, contended that it was entitled to probate, in order to pass title to the real estate in Pennsylvania. The Court below, on the authority of the case above cited, held that the testator died intestate as to the real estate in Chester County also; and set aside the probate of the will. From this decree, this appeal is taken.

William T. Barber, for appellants.

A will, though not valid by the law of the testator's domicile, to pass his personalty, may yet, if executed in conformity with the laws of the State where the testator's real estate is situate, be valid to pass such real estate, and may be admitted to probate in such latter State.

Wharton on Conflict of Laws, 2d Ed. (1881), sec. 587.

A will of fixed or immovable property is generally governed by the *lex loci rei sitæ*; and hence, the place where such a will happens to be made, and the language in which it is written, are wholly unimportant, as affecting both its construction and the ceremonial of its execution; the locality of the devised property is alone to be considered.

Digitized by Google

Jarman on Wills, 5th Am. Ed. (1880), vol. 1, p. 2.

The doctrine is clearly established at the common law, that the law of the place where the property is locally situate is to govern as to the capacity or incapacity of the testator, the extent of his power to dispose of the property, and the forms and solemnities to give the will or testament its due attestation and effect.

Story on Conflict of Laws, sec. 474

The general doctrine of international law is, that wills concerning land must be executed according to the prescribed formalities of the State in which the land is situated.

Kent's Commentaries, Vol. IV., 513.

While the question of domicile is the controlling one in determining what is a proper execution of a will of personalty, it has nothing to do with the validity or invalidity of a will disposing of real estate.

Estate of John Thomason, dec'd, 13 Phila., 377.
Brine *v.* Ins. Co., 96 U. S. 627.
Pratt *v.* Douglas, 38 N. J. Eq. 516.

A general devise will pass real estate acquired after date of execution.

Act April 8, 1833, Purd. Dig. 1711, Pl. 11.

The word estate in a will, will carry everything, unless restrained by particular expressions.

Turbett *v.* Turbett's Ex'rs, 3 Yeates, 187.
Peppard *v.* Deal, 9 Pa. 140.
Zerbe *et al. v.* Zerbe *et al.*, 84 Id. 147.
Hofius *v.* Hofius, 92 Id. 305.
Widener *v.* Beggs, 118 Id. 374.

It is among the oldest legal principles that a devise of all one's estate carries a fee.

Schriver *v.* Meyer, 19 Pa. 87, 92.

On a bequest of "the remainder and residue of my money," after-acquired real estate was held to pass to the residuary legatee.

Jacobs' Estate, 140 Pa. 268.

William M. Hayes, (*J. Carroll Hayes* with him), for appellee.

Where a will professed to dispose of "my worldly goods of all sorts and kinds," *held* not to pass real estate.

Bradford *v.* Bradford, 6 Wh. 236, (1840).

"The word 'effects' is confined to personal estate, and does not include real estate, unless an intention appears to the contrary."

Hawkins on Wills, (Amer. Notes), p. 54.

"There is no doubt that the meaning of the word 'effects' is, in common parlance, confined to personal things; and it has been judicially decided to bear that meaning unless the context shows that the testator used it in a more comprehensive sense."

Doe *v.* Earles, 15 M. & W. 456.
Camfield *v.* Gilbert, 3 East, 510.
Doe *v.* Langlands, 14 Id. 370.
Doe *v.* Dring, 2 M. & Sel. 458.

The use of general words like these (where it was the expressed intention of the testator to dispose of his "worldly estate") do not of themselves create a fee, and will not carry an estate that is clearly omitted.

Busby *v.* Busby, 1 Dall. 226.
Cassell *v.* Cooke, 8 S. & R. 289.
Rupp *v.* Eberly, 79 Pa. 145.

A devise of "all my property, consisting of bonds, mortgages, ground rents, stocks and personal effects," does not include real estate.

Howe's Appeal, 126 Pa. 233, (1889).

If a question should arise as to whether the terms of the will include a bequest of real estate, or show an intention on the part of the testator to bequeath real estate as well as personal property, such question is to be determined according to the law of the place of his domicile, where the will was made; and the same interpretation must be put upon those terms in every other country which would be put upon them by the law of that domicile."

Am. & Eng. Encyc. of Law, Vol. III., p. 635-6, citing:
Enohin *v.* Wylie, 10 H. L. Cases, 1.
Guerard *v.* Guerard, 73 Ga. 506.
Stewart *v.* Garnett, 3 Sim. 398.
1 Redfield on Wills. (3d Ed.) 388.
Wharton, Conflict of Laws, sec. 593.
Story, Conflict of Laws, sec 479 a.
Brown *v.* Brown, 4 Wils. & Sh., 28, 37.
Price *v.* Dewhurst, 8 Sim. 279.
Parsons *v.* Lyman, 20 N. Y. 103.
Dannelli *v* Dannelli, 4 Bush. (Ky.) 61.
Adams *v.* Norris, 23 How. (U. S.) 354.

July 18, 1895. McCollum, J. Although Henry F. Price died in West Chester, Pa., his domicile was in Brooklyn, New York: Price *v.* Price, 156 Pa. 617. At the date of the paper alleged to be his will he owned no real estate. Subsequently he bought a small farm near West Chester, of which he died seized. It is conceded that the paper referred to is not a valid will in New York and that as to his personal estate the maker thereof died intestate. But it is contended that the paper is testamentary in its character and includes the real estate in Pennsylvania acquired after its execution, and that by it the appellants have interests in said real estate the proper protection of which requires that it shall be duly probated in the county in which the same is located. The paper in question is in form a letter from Henry F. Price to his brother Charles J. Price. It expresses the desire of the

Digitized by Google

former concerning the disposition at his death of the effects he may leave, and it contains "a rough enumeration of such effects other than cash" as he then had. The directions in it manifestly refer to the distribution or division of the writer's personal estate. The language used by him does not fairly admit of a construction which includes land. The word "moneys" was used in the sense of "cash," and the enumeration he made plainly shows what he meant by "other effects." It is cash and "other effects," as defined by him, to which all his instructions regarding distribution relate and are limited. The words "of all my estate" manifestly refer to and embrace only "the effects" previously mentioned, and are not reasonably consistent with any other interpretation. The admissible construction of them most favorable to the appellants is that, considered in connection with what precedes and what follows them, they constitute a bequest of the writer's estate consisting of money and other effects of the nature and kind enumerated in his letter or will. But this construction does not satisfy or accomplish the purpose of the appellants' contention, because as we have already seen the words "moneys and effects" as used in the instrument under consideration obviously include personalty only, and their meaning is not enlarged or qualified by the words "of all my estate." It is probable that our interpretation of the writing before us agrees with the view entertained of it by the appellants when the question whether "it is or is not the last will of Henry F. Price," was first in this Court on their appeal. It was not then contended or suggested by them that if his domicile was in New York and the so-called will was invalid there it could be admitted to probate in Chester County, Pa., on the ground that it embraces his after-acquired real estate there, and is, under our laws, a valid testamentary paper. If they had presented for consideration at that time the question they now raise, it is quite likely this appeal would not have been taken.

We think the writing to which this contention relates does not comprehend the disposition of the after-acquired real estate and that, as before stated, the directions in it refer exclusively to the distribution or division of the writer's personal effects. The presumption that he did not intend to die intestate as to any portion of his property cannot prevail against the clear import of the paper he prepared as expressive of his purpose regarding the disposition at his death of the effects he might leave. We discover nothing in it which deprives his only heir of her right, under the intestate laws, in the real estate of which he died seized.

Decree affirmed and appeal dismissed at the cost of the appellants. W. D. N.

Jan. '95, 126. March 28, 1895.

Graham v. Dempsey.

Landlord and tenant—Lease—Notice of surrender.

A lessee having given the requisite notice under the terms of his lease of his intention to surrender possession at the end of the current term, cannot escape liability for the rent of another term if he remains in possession after the beginning of a new term.

That "actions speak louder than words" is sound law as well as proverbial wisdom, (per MITCHELL, J.)

Appeal of Theodore A. Graham from the judgment of the Common Pleas No. 1, of Philadelphia, entered on a case stated in assumpsit wherein appellant was plaintiff, and J. A. Dempsey was defendant.

The facts of the case as agreed upon were that appellant leased premises 1830 North Twenty-first street to defendant for the term of one year, from May 16, 1888, at a rental of $360 per annum. The lease contained the following proviso:—

"V. That either party hereto may determine this lease at the end of said term by giving the other notice thereof in writing at least three months prior thereto, but in default of such notice this lease shall continue upon the same terms and conditions as are herein contained for a further period of one year, and thereafter from year to year, unless or until terminated by either party hereto giving to the other three months' notice, in writing, for removal previous to the expiration of the then current term. Provided, however, that if the lessors shall have given three months' notice in writing, previous to the expiration of said term, or any extension or renewal thereof as above, of an intention to change the terms and conditions of this lease, and the lessee shall hold over after such notice, he shall be considered lessee under this lease, for such further period, and under the terms and conditions mentioned in such notice, and until this lease is terminated by notice, as hereinbefore provided."

That on February 6, 1892, the said defendant sent the following notice to Savidge & Smith, the agents of said plaintiff, to wit:

PHILADELPHIA, Feb. 6, 1892.

MESS. SAVIDGE & SMITH,

Dear Sirs:

At expiration of my lease of property 1830 N. 21st., Phila., I desire to vacate the same. If the improvements now going on prove satisfactory I may sign a new lease.

Yours truly, J. A. DEMPSEY.

That the then current term expired on the fifteenth day of May, 1892.

That said defendant did not vacate said premises at the expiration of his then current term, but continued in possession till July, 1892.

Digitized by Google

Plaintiff rented the premises again on December 1, 1892, and brought suit to recover rent (and gas bill unpaid), accruing from July 15 till that date.

The Court entered judgment for plaintiff for five dollars and forty-one cents without filing any opinion.

Plaintiff appealed, assigning as error the action of the Court in entering judgment as stated instead of for $154.91, plaintiff's full claim.

Joseph Savidge, for appellant.

The relation between landlord and tenant is reciprocal, so that if the landlord is bound for the year the tenant must also be bound for the same period.

Logan *v.* Herron, 8 S. & R., 465.
Phœnixville *v.* Walters, 147 Pa. 501.

When a tenant holds over and continues in possession after the expiration of the term he becomes a tenant for another year under the same terms and conditions as in the original lease. And the law implies an agreement to continue the lease for another year upon the same terms and conditions; and the relation of landlord and tenant is continued as it formerly existed and subjects the tenant to all the covenants contained in the original lease.

Phillips *v.* Monges, 4 Wharton. 226.
Hemphill *v.* Flynn, 2 Barr. 145.
Hollis *v.* Burns, 100 Pa. 209.

Nothing appears to be better settled in Pennsylvania than that a tenant for years cannot relieve himself from liability under his covenant to pay rent by vacating the demised premises during the term.

Breuckmann *v.* Twibill, 89 Pa. 58.
Auer *v.* Penn, 99 Id. 375.

Although the defendant may have given proper notice prior to the termination of his lease of his intention to vacate, if, however, he remained in possession after the expiration of the term, he became a tenant for another year, under the terms and conditions as set forth in the original lease.

McBrier *v.* Marshall, 126 Pa. 390,

is directly in point and conclusive. In that case there was a lease for five years, with a renewal clause for five years.

Pittfield *v.* Ewing, 6 Phila. 455.

No argument or paper book, *contra*.

July 18, 1895. MITCHELL, J. A tenant cannot escape liability for the rent of another term by giving notice that he is going out at the end of his year, and then not going. That actions speak louder than words is sound law as well as proverbial wisdom.

Judgment reversed and judgment ordered to be entered for plaintiff for the full amount of his claim with interest. W. D. N.

U. S. Circuit Court—Eastern District.

April, '95, 9

The Pennsylvania Company for Insurances on Lives and Granting Annuities v. The Philadelphia & Reading Railroad Company et al.

Corporation mortgage—Foreclosure—Interest.

Where a corporation mortgage, securing the payment of a series of railroad bonds with interest coupons attached, provides that, before foreclosure, demand for payment of interest shall be made in writing, no particular form of demand is necessary. Any writing warning the company that the holder of coupons for such interest expected payment is sufficient.

Where it appears that default in the payment of interest upon such bonds had taken place at a certain time, and that subsequent defaults had followed thereon, and that the company had passed into the hands of receivers, who had repeatedly announced their inability to pay this accrued interest, and that the company was without means to pay it:

Held, that the bondholders could compel a foreclosure of the mortgage.

The purpose of such a mortgage is as well to secure the payment of the interest as the principal thereof, and default in the payment of the interest on the appointed day is as much a breach of the condition of the mortgage as is a like default in the payment of the principal.

Semble, that a provision of the mortgage requiring the co-operation of other bondholders before suit can be brought does not deprive any one bondholder of his right where there is a general default in the payment of interest.

Bill in equity, by the Pennsylvania Company for Insurances on Lives and Granting Annuities against the Philadelphia & Reading Railroad Company; the Philadelphia & Reading Coal and Iron Company; Thomas C. Platt, Edward M. Paxson, Joseph S. Harris, and J. Lowber Welsh, receivers of the Philadelphia & Reading Railroad Company and of the Philadelphia & Reading Coal and Iron Company; and the Pennsylvania Company for Insurances on Lives and Granting Annuities, as trustee of the mortgage known as the preference income mortgage.

The bill set forth, *inter alia*, the following facts:—

That on the 3d day of January, 1888, the said Philadelphia & Reading Railroad Company and the Philadelphia & Reading Coal and Iron Company, executed and delivered to the plaintiff as trustee, indentures of mortgage, for the

Digitized by Google

purpose of securing an issue of its bonds known as general mortgage bonds. The bonds intended to be secured by this mortgage amounted to $100,000,000, and bore interest at the rate of four per cent. per annum. The bonds were issued in the form of coupon bonds. Of the said $100,000,000 upwards of $44,000,000 had been issued. The condition of the said mortgage was that the said railroad and the said coal and iron company would pay the principal and interest of the bonds outstanding when and as the same became due. By article fourth thereof it was provided: that if the said companies should at any time thereafter, after demand made in writing, omit, neglect or refuse for any period exceeding three months, to pay the principal or interest on the bonds thereby secured, or any of them, then upon the written request of the holders of one-tenth of the bonds then outstanding the trustee might enter upon and take possession of the property and estate thereby granted, and operate and manage the same, and appropriate the net income derived therefrom to the payment of the said interest, or after or without entering upon or taking possession of the said premises so granted, proceed to sell the said property, after giving due notice, and appropriate the amount received to the payment of the said interest and principal of the said bonds.

That on the 20th day of February, 1893, Thomas C. Platt, one of the defendants, a citizen of the State of New York, filed a bill in the said Circuit Court of the United States, against the Philadelphia & Reading Railroad Company, the Philadelphia & Reading Coal and Iron Company, and the Pennsylvania Company for Insurances on Lives and Granting Annuities, trustees of the said income preference mortgage, reciting that he was a holder of a large amount of third income preference bonds upon which interest had not been paid, asking the Court to appoint a receiver to take charge of, keep and preserve the property of the said two companies. That subsequently the said Circuit Court appointed Edward M. Paxson, Joseph S. Harris, and J. Lowber Welsh, receivers, with power to continue the business of the said companies, and further ordered an injunction against the defendants and all other persons, to restrain them from interfering with the said receivers, with leave for any party in interest to apply for further directions.

That on the 1st day of July, 1893, interest became due and payable upon all of the general mortgage bonds theretofore issued, and also fell due upon said bonds on the first day of January, 1894, on the first day of July, 1894, and on the first day of January, 1895. That no part of said interest had been paid by the mortgagors, nor was there any money in the hands of said mortgagors to pay the same. That said receivers were unable to make payment of said interest, and so announced on or about July 1, 1893, when said interest became payable, and have repeatedly so announced since.

That on July 1, 1893, the holders of more than three-fourths of the total amount of said general mortgage bonds outstanding made a written demand upon the complainant to enter upon said property in accordance with the terms of fourth article of the said mortgage and proceed to sell the same.

That on the first day of July, 1893, James Bell, holder of four hundred and eighteen coupons of the said general mortgage bonds of $20 each, of which he was possessed, delivered to the said railroad company the following demand in writing:—

"PHILADELPHIA, Pa., July 1, 1893.
To Phila. & Reading Railroad Co.:

Please take notice that four hundred and eighteen coupons of the Phila. & Reading R. R. Co., general mortgage bonds for twenty dollars each, being this day due, and payment having been demanded and refused, is delivered to me for protest by the holder, James Bell, of London, England, and by reason of said non-payment the holders will look to you for payment thereof. Yours, etc.,

GEO. H. HILL,
Notary Public."

No attention was paid to this written demand by the said railroad company, or by any one acting on its behalf. The default in payment of said interest upon said bonds, then existing, has continued until the present time.

That by reason of the possession and control of the aforesaid receivers it was impossible to comply with the written request of the holders of the general mortgage bonds to enter into possession of the said mortgaged property, or to foreclose the same without special allowance from this Court. The bill prayed, *inter alia*, for a foreclosure of the said general mortgage.

The defendants demurred to the bill upon the ground that the notice of demand for payment of the interest was insufficient demand in writing within the provisions of the fourth article of the said mortgage.

John G. Johnson, *F. W. Whitridge*, and *George L. Rives*, for complainant.

Thomas Hart, *George Tucker Bispham*, and *Theodore L. Jenkins*, for defendants.

The demand set out in the bill is not a sufficient demand in writing. The provisions of the mortgage should be strictly fulfilled.

Loomis *v.* McClintock, 10 Watts, 274.
Shalter's Appeal, 43 Pa. 83.
Wickersham *v.* Savage, 58 Id. 365.

Digitized by Google

Williams *v.* Peyton, 4 Wheaton, 77.
Deputron *v.* Young, 134 U. S. 241.

The paper of July 1, 1893, is not a demand, it is a notice of something to be done in the future, which was technically known as a "protest."

19 Amer. & Eng. Enc. of Law, 292.
Dennistoun *v.* Stewart, 17 Howard, 606.

A bill for a foreclosure cannot be maintained for non-payment of interest only without a proper notice of demand. There was no provision in the mortgage providing for the maturity of the principal sum except in the event of a demand. It is at least unsettled in this country whether a foreclosure can be maintained before the maturity of the principal debt merely on account of non-payment of interest.

8 Amer. & Eng. Enc. of Law, 188.
Cootes' Law of Mortgages.
Brodribb *v.* Tibbetts, 58 California, 6.
Mussina *v.* Bartlett, 8 Port. (Ala.) 284.
Greenman *v.* Pattison, 8 Blackf. (Ind.) 465.
Adams *v.* Essex, 1 Bibb. (Ky.), 149 S. C. 4 Am. Dec. 623.
Caufman *v.* Sayre, 2 B. Mon. (Ky.), 202.
Magruder *v.* Eggleston, 41 Miss. 284.
James *v.* Fisk, 17 Miss. (9 Smed. & M.), 144, 153 S. C., 47 Am. Dec. 111.
Suffern *v.* Johnson, 1 Paige Ch. (N. Y.), 450. S. C., 19 Am. Dec. 440.
Drexel *v.* Canal & Railroad Co., 6 Phila. 503.
Fickes *v.* Ersick, 2 Rawle, 166.
Ewart *v.* Irwin, 1 Phila. 78.
Whitecar *v.* Worrell, Id. 44.
Bradley *v.* Chester Valley R. R. Co., 36 Pa. 141 (1860.)
Mendenhall *v.* West Chester & P. R. R. Co., Id. 145.

July 18, 1895. ACHESON, J. The paper of July 1, 1893, addressed to the Philadelphia & Reading Railroad Company, after reciting that payment of four hundred and eighteen coupons of the company's general mortgage bonds that day due had been demanded and refused, declared that the holder would look to the company for payment thereof. I strongly incline to the opinion that this was substantially a "demand made in writing" within the fair meaning of article fourth of the mortgage. It certainly was an explicit warning that the holder expected the company to pay these matured coupons, and it fulfilled the purpose to guard against inadvertence and surprise which that provision was intended to subserve. If, however, it were to be conceded that the paper was technically deficient for lack of a present demand formally expressed therein, still, in my judgment, these demurrers cannot be sustained. The bill is not one exclusively in aid of the powers conferred upon the plaintiff by the mortgage. The bill shows that the default in the payment of the interest upon the company's general mortgaged bonds which occurred on July 1, 1893, has been followed by like default with respect to the interest thereon, which fell due at the end of each half year thereafter, and that none of this overdue interest has been paid; that on February 20, 1893, under a decree of this Court, the railroads and all the property of the company, passed into the hands of receivers, who are still acting, that the receivers have repeatedly announced their inability for want of funds to pay this accrued interest, and that the company itself is without means to pay it, and, under the restraining order of the Court, would not be at liberty to do so even if it had the means. The prayers for relief contained in the bill are appropriate to this state of facts.

Now the declared purpose of the mortgage is the securing the payment of the interest as well as the principal of the bonds, and both interest and principal are equally within the positive terms of the condition of the mortgage. Upon sound reason then, a default in the payment of a half year's interest on the appointed day is as much a breach of the condition of the mortgage as would be a like default in the payment of the principal of the bonds. In support of this view and of its sequence, that upon such a failure to pay interest the mortgagee has a right to bring a bill for a foreclosure we have decisions of great weight: Gladwyn *v.* Hitchman, 2 Vern. 135; Burrowes *v.* Molloy, 2 Jones & La T. 521, 526; Edwards *v.* Martin, 25 Law J. N. S. Ch. 284. To deny to a Philadelphia & Reading general mortgage bondholder the right to proceed by bill to enforce his mortgage security upon default in the payment of the semi-annual interest, might work the greatest injustice, for by the provisions of the mortgage a bondholder is precluded from levying upon, taking in execution, or selling under an ordinary judgment at law for interest any part of the mortgaged premises. Now the bonds run until the year 1958, therefore, if a bondholder cannot resort to a bill for a foreclosure upon the non-payment of interest, he might be, and unless he could procure the co-operation of other bondholders representing the requisite amount, surely would be, left practically remediless.

A construction of the mortgage involving consequences so unreasonable is not to be accepted.

And now, July 18, 1895, the demurrer of the Philadelphia & Reading Railroad Company and the Philadelphia and Reading Coal and Iron Company, the demurrer of Thomas McKean, and the demurrer of Robert M. Galloway, Isaac N. Seligman, David G. Leggett, Simon Wormser and Emmanuel Lehman are overruled, with leave to the named defendants to answer the bill of complaint or or before the first Monday of September, 1895. C. B. T.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, AUG. 30, 1895.* [No. 29.

Supreme Court.

Jan. '95, 113. May 6, 1895.

Reynolds v. Reynolds Lumber Co.

Corporations—Personal property of, when subject to execution by creditor—Public and private corporation—Practice—Special fi. fa. under Act of April 7, 1870—Execution.

It is not the policy of the law of this State to prevent a vigilant creditor of a corporation from acquiring a lien by levy upon personal property belonging to said corporation.

If the purpose of the company is one in which the public is directly interested, the property necessary for its operation cannot be sold except with its franchises, and then only by virtue of special writ of fieri facias provided by the Act of April 7, 1870. But this exemption does not extend to property not reasonably essential to the exercise of its franchises.

The special fi. fa. provided by the Act of April 7, 1870, is not a substitute for an ordinary fi. fa., but is in lieu of the sequestration provided by the Act of June 16, 1836; before it can issue there must be an ordinary fi. fa. returned unsatisfied in whole or in part.

This Act of 1870 relates only to corporations in which the public has a direct interest. Where, however, the corporation is purely private its property may be sold without regard to the effect on its operation.

Where property of a private corporation is sold under an ordinary fi. fa. and the proceeds are paid to a *bona fide* assignee of the plaintiff in execution, the sheriff cannot be compelled to restore the money upon a subsequent petition by creditor alleging that his judgment was fraudulent.

Appeal of James Roy, sheriff, from the decree of the Common Pleas of Warren County, ordering him to pay money into Court.

The facts as disclosed by the record are substantially as follows: On August 8, 1893, the Reynolds Lumber Company, a corporation organized under the laws of West Virginia, and doing business in Warren and McKean counties, Pa., confessed judgments to its president, T. J. Reynolds, on notes as follows: One for $13,608, one for $12,000 and two others for $8000 and $4000 respectively.

Executions were issued in both Warren and McKean counties on the first two notes and all of the property of the company was sold. The company also assigned book accounts to its president.

A fi. fa. was issued August 23, 1893, on the judgment entered in Warren county. On the same day the Warren Savings Bank issued a foreign attachment against the Reynolds Lumber Company upon a claim for $5000. On September 11, 1893, the sheriff's sale on the fi. fa. took place and a fund of $4641 was produced.

On September 14, 1893, the Warren Savings Bank presented its petition alleging that the judgment confessed to T. J. Reynolds was fraudulent and praying that the fund be paid into Court. A rule to show cause was granted, but before the same was argued, the Warren Savings Bank on September 21, 1893, procured an assignment from T. J. Reynolds of his claim and right upon the money in the sheriff's hands.

The sheriff distributed the fund first to preferred labor claims, then paid the bank $2572.22 and presented a petition to pay the balance, $1123.74, into Court on the ground that he had been notified of various claimants for it. The Court granted this rule November 26, 1893, and appointed an auditor to distribute the same. Before the auditor a number of creditors appeared and claimed that as the corporation was insolvent and all its personal property was sold on the fi. fa., all the proceeds should be distributed *pro rata* among the creditors.

The auditor awarded the fund to the Warren Savings Bank as assignee of T. J. Reynolds.

Numerous exceptions were filed to this report and on March 12, 1894, J. B. Offerlee, a creditor of defendant, presented a petition, upon which a rule was granted on the sheriff, James Roy, and T. J. Reynolds, to show cause why the money paid by the sheriff to the Warren Savings Bank should not be restored to the custody of the Court.

Argument was heard, on this rule and upon the exceptions to the auditor's report.

The Court, MORRISON, P. J., of the 48th district, specially presiding, filed an opinion, in which he said, *inter alia*, as follows:

"[We have reached the conclusion that all of the sheriff's sale of the defendant's personal property ought to be brought into Court and distributed *pro rata* among the *bona fide* creditors, and we do not think either T. J. Reynolds, the plaintiff, or his assignee, the Warren Savings Bank, are entitled to any preference on account of either the judgment or execution, or the foreign attachment of the Warren Savings Bank. While the judgment is perhaps fraudulent, yet it was not objected to by the defendant, and it has resulted in the conversion of the defendant's assets into money, and now, in our opinion, justice requires that the money be distributed *pro rata*, as in the case of an insolvent corporation.]"

The Court also inadvertently added that a

Digitized by Google

rule to pay the proceeds into Court had been made in September, 1893, and that the sheriff had ample notice of the claims of other creditors and his payment to the bank was no excuse.

Upon petition of the sheriff, showing that the petition of September, 1893, had been discharged, the Court corrected the error but added, "And upon further consideration we are disposed to adhere to the former decision, and it is now ordered and decreed that upon notice hereof, the sheriff forthwith pay into Court the money which he alleges he has paid to the Warren Savings Bank."

The sheriff then took this appeal, assigning for error, *inter alia*, that portion of the opinion quoted.

D. I. Ball, (*C. C. Thompson* with him), for appellant.

The defendant company being a private corporation, its property was subject to levy and lien.

Foster *v.* Fowler, 60 Pa. 27.
Girard Storage Company *v.* Southwark Company, 105 Id. 248.
Guest *v.* Water Company, 142 Id. 610.
McLeod *v.* Normal School, 152 Id. 575.

All its personal property, except unpaid stock subscriptions and franchises, were liable to be taken in execution and the proceeds distributed among lien holders in order of priority.

Bank of Titusville *v.* Gibbs, 13 WEEKLY NOTES, 174.
Fairmount Coal & Iron Company's Appeal, 14 WEEKLY NOTES, 214.
Philadelphia & R. R. Company's Appeal, 2 Cent. Rep. 778.
Flagg *v.* Farnsworth, 12 WEEKLY NOTES, 500.
Prouty *v.* Prouty, 155 Pa. 112.

An insolvent corporation may prefer a creditor by confession of judgment.

Pairpoint Mfg. Company *v.* Watch Company, 161 Pa. 17.
Lowry *v.* Phila. Watch Company, 161 Id. 123.

General creditors have no right to question the distribution of or to participate in the fund.

Smith *v.* Reiff. 20 Pa. 364.
Artman *v.* Giles, 155 Id 410.
Kelly *v.* Herb, 157 Id. 41.
Greene *v.* Tyler & Company, 39 Id. 364.
Rudy's Appeal, 94 Id. 338.

As the claim of the savings bank upon the attachment is superior to all the other claims, except the prior execution, and large enough to take all the fund, it is immaterial to other creditors whether the amount was applied upon the execution of Reynolds or upon the attachment of the bank.

Wilcocks *v.* Waln, 10 S. & R. 379.
Manufacturers' etc. Bank *v.* Bank, 7 W. & S. 335.
Tomb's Appeal, 9 Pa. 61.
Loucheim Brothers' Appeal, 67 Id. 49.
Thomas' Appeal, 69 Id. 120.
Modes' Estate, 76 Id. 502.

The money having been paid to the bank under a claim of right, and upon an execution which had not been assailed, cannot be recovered back.

First National Bank *v.* Fair, 127 Pa. 324.
Federal Insurance Co. *v.* Robinson, 82 Id. 359.
Herring *v.* Adams, 5 W. & S. 461.
Mann's Appeal, 1 Pa. 29.
Boas *v.* Updegrove, 5 Id. 516.

The money having been paid over to the party apparently entitled to it under the process in his hands, the sheriff cannot be compelled to pay it into Court.

In re Bastian, 90 Pa. 472.
Franklin Township *v.* Osler, 91 Id. 160.

W. W. Wilbur and *Samuel T. Neill*, (with them *W. B. Chapman*, *Schnur*, *Perry D. Clark* and *Leon G. Ball*), for appellee.

The insolvency of this corporation can be shown without the preliminary return of *nulla bona* to a fi. fa.

Loudenschlager *v.* Bentley, 3 Grant, 384.
Lusk's Appeal, 108 Pa. 157.

All the personal property essential to carry on the business of the company was sold, hence there should be a *pro rata* distribution among all the creditors.

Bayard's Appeal, 72 Pa. 453.
Hopkins's App., 90 Id. 69.
Hogg's App., 88 Id. 195.
First National Bank *v.* Coke Co., 137 Id. 601.
McKee *v.* McKee's Rocks Oil Co., 41 Pitts. L. J. 59.

No preference could be given to the president of the company, even had his judgment been *bona fide*.

Kersteter's Appeal, 149 Pa. 154.

The rights of the appellant bank can rise no higher than those of Reynolds, its assignor, and he has none at all. It is, indeed, a close question whether or not the sheriff and the Warren Savings Bank in their conduct were not both guilty of a contempt of Court.

July 18, 1895. FELL, J. This appeal is by James Roy, sheriff of Warren County, from an order of the Court of Common Pleas directing him to pay into Court certain moneys, the proceeds of an execution against the Reynolds Lumber Company. Nearly a year before the order was made the sheriff had paid the money in question to the Warren Savings Bank, the assignee of the plaintiff in the execution. This payment was made after the return day of the writ of execution, at a time when no rule was

Digitized by Google

pending and before the claim of the appellees had matured. Rules to show cause why the money should not be paid into Court granted on the application of other creditors were discharged, and it appears from the record that the payment was made by the sheriff in the due course of a regular and orderly proceeding without notice of the appellee's claim. The payment was proper and relieved the sheriff of all responsibility unless the fund belonged to all the creditors, in which case it would have been his duty to pay it into Court for a *pro rata* distribution among them. The learned Judge of the Common Pleas, specially presiding, reached the conclusion that the plaintiff in the execution secured no preference by the levy under his writ, and that all the creditors of the defendant were entitled to participate in the distribution, and it is upon this view of the law that the order is based.

It would doubtless be more equitable if the property of insolvent debtors should be distributed among all the creditors in proportion to their claims, but it has not been the policy of the law in this State to forbid a preference, nor to prevent the vigilant creditor from acquiring a lien by levy upon personal property. There seems to be no ground for a distinction in respect to the distribution of the proceeds of a sale by execution of the property of an individual and that of a corporation which may be sold separate from its franchises. The special writ of fieri facias provided by the Act of April 7, 1870, is by its terms in addition to and in lieu of the proceeding by sequestration given by the Act of June 16, 1836. In the appeal of the Phila. & Baltimore Central R. R. Co., 70 Pa. 355, it was held that the remedies by sequestration and execution could not co-exist and that the later Act took the place of the former to the extent of superseding the writ of sequestration. The rule as to distribution, however, remains undisturbed: Bayard's Appeal, 72 Pa. 453. And the special writ given by the Act of 1870 under which the property, rights and franchises of a corporation can be sold can issue only after the personal property subject to the ordinary process of execution has been exhausted, and there has been a return of the writ. In the opinion in Guest *v.* Water Co., 142 Pa. 610, it is said by McCollum, J.: "The fieri facias allowed by this Act (1870) is not a substitute for the ordinary fieri facias under the seventy-second section of the Act of June 16, 1836, but is in lieu of sequestration under the seventy-third section. The process and procedure provided by the seventy-second section remain, and the process provided by the seventy-third section is superseded by the special fieri facias given by the Act of 1870. The condition precedent to sequestration was an ordinary fieri facias returned unsatisfied in whole or in part, and this must precede the writ which takes its place. By this precedent return on the ordinary fieri facias the insolvency of the corporation is discovered and the necessity of recourse to a sale for the benefit of its creditors of its franchises and property essential to its operation is demonstrated."

There has been no conflict in the decisions upon this subject. Hopkins and Johnson's Appeal, 90 Pa. 69, while apparently not in line with the cases, decides no question touching the distribution by law of the proceeds of the sale of corporate property. It arose under irregular and anomalous proceedings before a master who by agreement of the parties in interest was to determine the validity of certain judgments and award distribution as if the fund was held in trust for creditors. The judgments in question were found to be invalid, and distribution was made in accordance with the agreement, preference being given to creditors having valid liens. No question affecting the rights of creditors in distribution outside of the agreement was decided, or considered, and the statement in the opinion that the sale was for the benefit of all the creditors was evidently based upon the supposition that the franchises had been sold under the Act of 1870, and it is misleading because misapplied. In the Per Curiam opinion in Bank *v.* Coke Co , 137 Pa. 601, Chief Justice Paxson was speaking of the effect of a sale under the special writ which had been issued in that case.

When the operations of a corporation are matters of direct public interest and concern, its property reasonably essential to the exercise of its franchises is stamped with the character of a public trust. It cannot be aliened by the corporation, nor sold by its creditors piecemeal so as to stop its operations and defeat the object of its charter. Before the Act of 1870 such property could not be taken in execution in this State. The sequestration proceedings of the Act of 1836 were suggested by Chief Justice Tilghman in the opinion in Ammant *v.* New Alexandria & Pittsburgh Turnpike Co., 13 S. & R. 210, and after the passage of that Act it was held in Susquehanna Canal Co. *v.* Bonham, 9 W. & S. 27, that the franchises and corporate rights of a canal company and its property necessary to their exercise were incapable of being transferred or granted away by any act of the company itself or by any adverse process against it, and that sequestration was the only remedy consistent with the preservation of the public interests. The Act of 1870 provides a remedy by which the rights of creditors can be enforced without prejudice to the public interest, by the sale together of the franchises and the property necessary to their exercise.

Digitized by Google

When, however, the business of a corporation is purely private and the public has no direct interest in it, its property may be sold without regard to the effect upon its operations. Judge THOMPSON in the opinion in Foster *v.* Fowler, 60 Pa. 27, referring to the distinction between corporations which are agencies of the public and directly affect it, and those which affect it only indirectly by adding to its prosperity, said: "Of the former are corporations for the building of bridges, turnpike roads, canals and the like. The public is directly interested in the results to be produced by such corporations, in the facilities afforded to travel and the movements of trade and commerce. It is well settled that this use is not to be disturbed by the seizure of any part of their property essential to their active operations, by creditors. They must recover their debts by sequestering their earnings, allowing them to progress with their undertaking to accommodate the public. This direct benefit to and accommodation of the public very clearly distinguish this class of corporations from the second class, viz., private corporations, or those in which the public is but indirectly interested, such as mining and manufacturing or coal and iron companies, etc., or libraries, literary societies, schools, and the like. Whether they progress or cease the public is not directly affected, and hence liens are enforceable against them without, as a general thing, any regard to the effect upon their operations."

In the case above referred to it was held that a mechanic's lien could not be enforced against a water company, and this ruling was followed in Guest *v.* Water Co., 142 Pa. 610, while in the Girard Point Storage Co. *v.* Southwark Foundry Co., 105 Pa. 248, and in McLeod *v.* Central Normal School, 152 Pa. 575, it was decided that mechanics' liens could be maintained, as the defendants were not quasi public corporations.

The reason for the exemption of any of the property of a corporation from levy and sale by an execution creditor is that the interests of the public are involved. The exemption does not extend in any case to property not reasonably essential to the exercise of the franchises. If the charter is for a purpose in which the public is directly interested, and the grant is for a use which the public may assert and enforce as a right, the property of a corporation necessary for its operation in carrying out its public purpose cannot be sold except with its franchises under the special writ provided by the Act of 1870. If, however, the corporation is purely private and the public has no direct interest in its operations or rights concerning them, its property, although useful and necessary to the conduct of its business, may be sold under an ordinary writ of fieri facias in the same manner as the property of an individual.

The Reynolds Lumber Co., the defendant in the execution, is a private corporation, chartered in West Virginia and doing business in New York and Pennsylvania. Its charter confers upon it the bare right of corporate existence. It performed no public functions whatever. No public trust was committed to it or imposed upon its property, and the public had no interest in its operations and no rights connected therewith. Its business was of a private character and such as might have been and usually is carried on by individuals. Its property, which was sold under the ordinary writ of fieri facias, consisted of timber, lumber, merchandise, horses and personal goods and chattels. A part of this property was manufactured for the purpose of sale and the rest was used as a means of conducting its ordinary business, and all of it could have been sold by the corporation.

As the property sold by the sheriff was subject to seizure and sale under the ordinary writ of fieri facias and was so sold by him, the fund realized was properly paid to the assignee of the plaintiff in the execution. The order of the Court of Common Pleas of October 25, 1894, directing the sheriff to pay the money into Court, is reversed and set aside at the cost of the appellee.

W. M. S., Jr.

July, '95, 34. May 10, 1895.

Offerlee et al. v. Reynolds Lumber Co.

Equity Practice—Final and interlocutory decrees—No appeal from interlocutory decree.

A decree that claims of creditors be established according to the statements contained in their bill, leaves something to be done in the future, and therefore is not a final order from which an appeal can be taken.

A decree directing an accounting to be taken is purely interlocutory.

A direction in a decree that certain parties pay the costs might be regarded as final, but where a subsequent clause in the decree refers the whole matter of accounting and the conduct of further proceedings to a master, there is nothing from which an appeal can be taken.

A decree declaring certain judgments void and restraining distribution until the adjustment and satisfaction of certain claims is not a final decree.

Appeal of J. B. Offerlee *et al.*, creditors of the Reynolds Lumber Co., from the decree of the Common Pleas of Warren County, upon a creditor's bill.

The facts are stated in the following opinion by NOYES, P. J.:—

"The bill in this case was filed March 5, 1894,

Digitized by Google

by J. B. Offerlee *et al.*, in behalf of themselves and other creditors of the Reynolds Lumber Company against the Reynolds Lumber Company, T. J. Reynolds, W. W. Reynolds, George E. Colvin, E. E. Ostrander and D. R. Rooney, stockholders and directors of said company. The prayers were for a decree establishing the rights of the respective plaintiffs, and any others who may intervene, as creditors of the Reynolds Lumber Company, alleged to be an insolvent corporation; declaring certain judgments entered in this Court and the Common Pleas of McKean County, void as against the plaintiffs and other creditors of the corporation; for an injunction restraining T. J. Reynolds and his assignees from accepting any preference, advantage or benefit by reason of said judgments against the company, as against the other creditors; for a receiver, and for further relief.

"The answer of all the defendants, except E. E. Ostrander, was filed April 9, 1894, issue duly joined and the cause tried before the Court, June 22, 1894.

"On special motion, Leon G. Ball, Esq., was appointed temporary receiver of the property of the defendant corporation June 12, 1894.

"The following are the material facts in the case:—

"FINDINGS OF FACT.

"Prior to the 1st of January, 1892, the defendant, T. J. Reynolds, a resident of the city of Rochester, in the State of New York, was owner of two large tracts of timber lands, one lying in Warren and the other lying in McKean county, Pa. On each tract was a saw mill, and connected therewith a considerable amount of personal property, such as is usual in connection with a lumbering establishment, together with some logs and manufactured lumber. Up to that date or thereabouts said Reynolds carried on the business of manufacturing, buying and selling lumber in his own name.

"December 16, 1891, an agreement in writing, signed T. J. Reynolds, E. E. Ostrander, W. W. Reynolds, C. H. McNair and George E. Colvin was filed with the secretary of State of West Virginia, who certified on the same day that the subscribers were by virtue thereof duly incorporated as the Reynolds Lumber Company, in accordance with said agreement; a certified copy of said agreement and certificate is marked 'Exhibit A,' and made part of this finding.

"No meeting of the incorporators was ever held in the State of West Virginia; no subscriptions to capital stock had been made, nor had any payments of cash or property on account thereof been made at the time of the filing of said agreement and the issuing of said certificate. No payment of cash was ever made upon the stock.

"The statutes of West Virginia provide as follows:—

"'The stockholders or directors of any corporation formed under or accepting the provisions of this chapter, may hold meetings for the transaction of the lawful business of the corporation, including the first general meeting for the purposes of organization out of this State, and may keep their principal office in any State or Territory of the United States, or in the District of Columbia.

"'Five persons are required to form a corporation, and no person may be included as a corporator who has not in good faith paid in 10 per cent. of the par value of his stock.'

"The agreement above referred to recited that the capital stock of the company was $50,000, divided into shares of $100 each, held by the subscribers as follows: T. J. Reynolds, 385 shares; W. W. Reynolds, 50 shares; E. E. Ostrander, 10 shares; Charles H. McNair, 5 shares; George E. Colvin, 50 shares. W. W. Reynolds was a minor son of T J. Reynolds, Colvin was his nephew, and McNair and Ostrander were his employees. The evidence compels me to believe and I so find that they signed the agreement with no intention of becoming actual stockholders; but they were mere dummies introduced to simulate a compliance with the laws of West Virginia.

"The agreement fixed the principal office of the company at Rochester, N. Y., and a meeting of the subscribers was held there on the 5th day of January, 1892, for organization, at which time the five subscribers were elected directors, and at a meeting of the directors held on the 6th, T. J. Reynolds was elected president; McNair, secretary; Colvin, vice-president, and Ostrander, treasurer. The minutes contain the following entry of the subsequent action of the board:—

"'Mr. T. J. Reynolds retiring from the meeting, motion by W. W. Reynolds, seconded by Colvin, that this company purchase of Thomas J. Reynolds all of the property now owned by him in the State of Pennsylvania, and used in the wholesale lumber business, consisting of manufactured ties, tools, fixtures, stocks of merchandise in stores, mills, logs cut, bark, horses, wagons, machinery used in said business, and all other personal property now owned by said Reynolds, and used in said lumber business in said State of Pennsylvania; also the real estate consisting of timber lands in said State of Pennsylvania, as follows: about twelve hundred acres of land in Corydon township, McKean county, Pa., known as the Bailey lot, and about one thousand acres of land in Glade township, Warren county, Pa., known as the Hall tract.

"'Said personal property to be inventoried

Digitized by Google

and purchased by the company at the inventoried price. Said real estate to be purchased at a price not to exceed $20 per acre, and to be paid for as may hereafter be agreed, and carried by vote of all the directors present. Moved and seconded that the $50,000 now in the hands of the company be paid over to T. J. Reynolds as a payment on above purchase.'

"An inventory of the personal property was taken, which amounted to $61,451.03, which was the fair value of the property. T. J. Reynolds received a credit on the books for $11,451.03, the amount in excess of $50,000. The other stockholders gave to T. J. Reynolds their notes for the par value of the stock stated in the agreement as subscribed by them respectively; but these notes were never paid, and not intended to be when given. Except as above stated, there was no actual subscription to capital stock, and no payment on account of such subscription by any person.

"An office was opened at Rochester, N. Y., and business done in the name of the Reynolds Lumber Company. George E. Colvin resided in Warren, Pa., and an office was opened at Warren by him, and business transacted in the name of the Reynolds Lumber Company by him and others. The business of manufacturing lumber at the saw mills formerly operated by T. J. Reynolds was carried on in the name of the company, and in these operations timber in large quantities was taken from the two tracts owned by Reynolds, and mentioned in the minutes, and this was known to Reynolds and not objected to.

"The certificate required of foreign corporation by the laws of Pennsylvania was not filed until May 20, 1893. August 1, 1893, C. H. McNair transferred his stock to D. R. Rooney, who was elected secretary and treasurer in his place. In 1893 the company bought of O. W. and D. W. Beaty a tract of timber land in Glade township, Warren Co., Pa., which was needed to obtain the timber for certain special orders then in hand, the price being $2,625. The vendors refused to accept the notes of the company in payment unless endorsed by T. J. Reynolds, who endorsed them by request; but directed the deed to be made to himself, which was done. Nothing was paid by the company on the notes, and $400 was paid thereon by Reynolds. The remainder is still unpaid. By the method of doing business adopted, money paid to the company was received at the Rochester office, and a large amount of such receipts were paid over to T. J. Reynolds, or originally received by him. On the 7th of August, 1893, he had thus received the $11,451.03, which was due him at the organization of the company, and the books of the company kept in the Rochester office showed that he was indebted to the company in the sum of $22,302.79 on that day.

"In making this finding, I do not overlook the testimony of the defendant, Reynolds, to the effect that a part of this indebtedness was for notes given to him by the company, and subsequently paid by him. If the facts be as he states, the notes could easily be produced. The testimony of Colvin is not in harmony with that of Reynolds on this point, and the fact that the whole indebtedness was treated as subsisting by all the directors, including the defendant Reynolds, in the transaction of that day is wholly inconsistent with his statement. At No. 51, December term, 1893, Offerlee & Brown recovered a judgment in this Court on the law side against the Reynolds Lumber Company for $2,456.34 for lumber sold and delivered between October 1, 1892, and July 27, 1893. On this judgment a writ of fieri facias was issued and returned *nulla bona* before the beginning of this suit. In October and November, 1892, the Portland Lumber Company sold and delivered to the Reynolds Lumber Company lumber of the value of $1,539.36, which amount is still due and unpaid with interest.

"June 23, 1893, the Reynolds Lumber Company became indebted to the Kanona Lumber Company in the sum of $791.42, and in July to C. A. Doty, upon an acceptance for $60, dated July, 1893.

"A special meeting of the directors of the Reynolds Lumber Company was held at Rochester on the 7th of August, 1893, at which T. J. Reynolds, Ostrander and Colvin were present, and Rooney at least a part of the time. The minutes do not agree with the testimony of Colvin and Reynolds in all particulars, but I think are better evidence than the recollections of either as to matters actually recorded at the time.

"Following the minutes, I find that the directors, Reynolds, Colvin and Ostrander, being present, voted that Reynolds should receive $5,000 as salary for his past services as president, and $3,000 per annum for the future; also, that the price which the Reynolds Lumber Company agree to pay T. J. Reynolds for certain lands situate in the State of Pennsylvania, and mentioned in the minutes of a meeting of the directors of this company, held at their office on the 6th day of January, 1892, be fixed and agreed upon at the rate of $20 per acre.

T. J. Reynolds then retiring, D. R. Rooney was called to the chair, and the following resolutions were passed by the votes of Colvin and Ostrander, Rooney voting in the negative, and protesting against their passage:—

" 'That, whereas, the Reynolds Lumber Company is indebted to Thomas J. Reynolds in the sum of $ ——— for the property sold by him

Digitized by Google

to this company, for salary, and for money and expenses, and for contingent liability, as endorser for commercial paper for the accommodation of this company; therefore, resolved, that the Reynolds Lumber Company does hereby assign to T. J. Reynolds all the accounts owing to said company as collateral security to said indebtedness and liability; and assignments to be made and executed in the name of the company by Ed. E. Ostrander, the secretary of the company.

" 'Further resolved, that the said Reynolds Lumber Company transfer to the said Thomas J. Reynolds all the personal property of this company in the State of Pennsylvania by the execution and delivery of the proper papers, to carry out said transfer at the election of Thomas J. Reynolds, by giving a judgment note for the amount of said indebtedness and liability, and that George E. Colvin, the vice-president of said company, be and is hereby authorized to execute in the name of the company all papers necessary to carry said transfer into effect.'

"Colvin returned to Warren, and the next day, or at least within a very few days, was advised by telephone or telegraph, by T. J. Reynolds, that judgment notes were desired and the amount for which they were to be made. He thereupon gave to an attorney-at-law acting for Thomas J. Reynolds single bills presently due, dated August 8, 1893, in the name of the Reynolds Lumber Company, for $73,608. Two of these, namely, one for $13,608, and one for $8,000, were entered in Warren county, and two, namely, one for $12,000 and one for $4,000, were entered in McKean county. Executions were issued and all the personal property of the company levied upon and sold, realizing funds amounting to about $10,000, all of which was claimed by T. J. Reynolds on his executions. Either by purchase or assignment from the purchaser at the sheriff's sale, property of the company of the value of $2,500 came into the hands and possession of Reynolds after the sale. He had possession of more than this, but I cannot determine the value of it from the evidence. The accounts of the company were not formally assigned to him, but he collected considerable sums thereon and retained the same, at least of $3,000, in the aggregate. He took possession of the lands and mills, including the tract bought of Beaty, and cut and manufactured timber and lumber therefrom until about January 1, 1894, when he sold the entire property to J. E. Reynolds, his brother.

"At the meeting of the 7th of August the action taken by the directors was with knowledge that their action would render the company insolvent if it were not so already, and was for the express purpose of turning all the company's property over to T. J. Reynolds, a director and president, to prevent the same from being applied to the just debts of the company."

The Court, after reviewing the law of the case, reached the following conclusion:—

"Our conclusion upon the whole case is that the defendant must account for all the accounts and credits of the corporation which have come to his hands on and since the 7th of August, 1893; and for the value of all personal property of the company which he caused to be sold on the fraudulent judgments both in Warren and McKean counties, so far as the same may be necessary for the payment of the claims of the plaintiffs, and any other creditors who may be permitted hereafter to join in this proceeding; that the claims of the several plaintiffs be established as set forth in the bill and in the findings of fact, and that the defendant, T. J. Reynolds, be enjoined from receiving or claiming out of the funds in Court in Warren or McKean counties anything whatever on account of the judgments herein declared to be fraudulent, until the plaintiffs and any others hereafter admitted as plaintiffs shall have been paid in full."

Plaintiffs requested the Court to decree as follows: 1. That the plaintiffs were creditors of the defendants, T. J. Reynolds, G. E. Colvin, D. R. Rooney, E. E. Ostrander and W. W. Reynolds, stockholders of the Reynolds Lumber Company, individually, as well as against the corporation, and entitled to a decree for the payment by the defendants of the several sums found due the plaintiffs as parties to the bill.

2. That a decree be entered against T. J. Reynolds for the aggregate sum of $25,302.79, being the $22,302.79 admitted by him to be due the Reynolds Lumber Company, and the sum of $3,000 found by the Court to have been collected by him from the accounts of the company, and that the receiver be allowed to issue execution against him for the same.

The Court declined to so order and entered the following decree:—

"And now, November 14, 1894, this cause having been tried by the Court and duly considered, it is ordered, adjudged and decreed:—

"*First.* That the claims of each of the plaintiffs, as creditors of the Reynolds Lumber Company, be established according to the statements contained in their bill and the findings of fact.

"*Second.* That the defendant, T. J. Reynolds, account for all the property, money, accounts, rights and credits of the Reynolds Lumber Company which have come to his hands on or since the 7th day of August, A. D. 1893, and for the value of all the property of said corporation in Warren and McKean counties which he caused to be sold on execution issued by him out of the Court of Common Pleas of said counties, as

Digitized by Google

stated in the bill and findings, in excess of the amount produced by said sales and actually paid to the sheriffs of said counties. Also for any indebtedness from the said T. J. Reynolds to said Reynolds Lumber Company in excess of proper legal set-offs and counter-claims. And that the amount found due upon such accounting be paid by the said T. J. Reynolds and to receiver, or so much thereof as may be necessary to satisfy the claims of the plaintiffs and any other creditors who may hereafter intervene, (after crediting any dividend which they, or either of them may receive from the funds in Court in Warren and McKean counties), and the costs of this proceeding, including the fees and disbursements of the receiver.

"*Third.* That the defendants, except D. R. Rooney, pay the costs of this proceeding.

"*Fourth.* The plaintiffs, by their solicitor, S. T. Neill, Esq., and the defendants by the Hon. W. M. Lindsey and James O. Parmlee, Esq., their solicitors, being present in Court and so requesting, the cause is referred to William Harrison Allen, Esq., to take the account and conduct the further proceedings in accordance with this decree and the rules in equity.

"*Fifth.* It is further adjudged and decreed that the judgments entered in the Courts of Common Pleas of Warren and McKean counties upon single bills given by George E. Colvin in the name of the Reynolds Lumber Company to T. J. Reynolds, and the executions issued thereon by virtue of which the property of the Reynolds Lumber Company was sold are, as against the plaintiffs, and all other creditors of the Reynolds Lumber Company who may hereafter be permitted to intervene, fraudulent and void. And the said T. Reynolds is restrained and enjoined from claiming or accepting any benefit or advantage, dividend or distributive share in the distribution of the funds in Court, or otherwise, until the claims of the plaintiffs, and any others hereafter intervening are fully satisfied."

Samuel T. Neill, (*Leon G. Ball* with him), for appellants.

A Court of equity has power to set aside a fraudulent and collusive judgment.

Head *v.* Meloney, 111 Pa. 99.
Blood's Appeal, 164 Id. 95.

The plaintiffs, as requested by the Court in the opinion, submitted a decree in accordance with the facts for its adoption. They asked for a full declaration of their rights by the Court in accordance with their first prayer for relief, and also with their prayer for general relief, and for such a decree as they were entitled to on the whole case under the facts found and the pleadings. The *refusal* to allow the receiver to have a decree for Reynolds' debt to the company and process to enforce it, is a final decree.

Patterson *v.* Patterson, 27 Pa. 40.
Irons *v.* McQuewan, Id. 196.
Pontius *v.* Nesbit, 40 Id. 309.

A part of the decree at least was final, and hence an appeal lies.

Brotherton *v.* Reynolds, 164 Pa. 134.

The appeal is from a refusal to give adequate relief, and is in accord with the new rules of equity practice, 159 Pa., XXVIII.

W. M. Lindsey, (*J. O. Parmlee* with him), for appellee.

There is no final decree and no sufficient record here to enable the Court to review the case on its merits, and the appeal should be quashed for that reason.

If the Court should conclude there is merit on the first assignment of error the bill should be dismissed for want of jurisdiction in the equity side of the Court.

July 18, 1895. GREEN, J. The decree in this case consisted of five clauses or sections: (1.) That the claims of the plaintiffs as creditors of the lumber company be established according to the statements contained in their bill and the findings of fact. (2.) That the defendant, T. J. Reynolds, account for all the property, money, accounts, rights and credits of the lumber company which have come to his hands since August 7, 1893, and for the value of all the property of the corporation in Warren and McKean counties which he caused to be sold upon execution in excess of the amount produced by said sales and actually paid to the sheriffs of those counties; also for any indebtedness of Reynolds to the lumber company in excess of set-offs and counter-claims. And that the amount found due upon such accounting be paid by Reynolds to the receiver, or as much as may be necessary to pay the claims of the plaintiffs and certain other creditors, and costs and fees of receiver. (3.) That the defendants other than D. R. Rooney pay the costs.

(4.) That, counsel for both parties being present in Court and so requesting, the cause is referred to William Harrison Allen to take the account and conduct the further proceedings in accordance with the decree and the rules in equity. (5.) That certain designated judgments and the execution issued thereon are, as against the lumber company and certain other creditors, fraudulent and void. And that T. Reynolds is enjoined from claiming or accepting any benefit, dividend or distributive share of the funds in Court or otherwise until the claims of the plaintiffs and others intervening are fully paid.

It is not very clear what is meant by the decree that the claims of the plaintiffs shall be established, but as this decree does not actually

Digitized by Google

establish them, and certainly does not ascertain them in designated sums, something more remained to be done in the future to accomplish that result, and therefore the order was not final.

The accounting directed by the second clause, as a matter of course, had to be all done in the future, and that part of the decree was in no possible sense final, but purely interlocutory.

The direction that certain of the parties should pay the costs might be regarded as final, unless the subsequent proceedings should develop facts which might affect the propriety of such an order before final decree.

The appointment of a referee to whom the whole subject of the accounting, and the conduct of the further proceedings, was committed, necessarily involved, not only the taking of testimony, but the judicial determination of all disputed contentions of facts, of law and of equity, which might subsequently arise. As the hearing and decision of those matters devolved upon an officer of the Court, no further action of the Court itself could be had until his report should come in and be considered and decided upon. Neither the learned Court below nor this Court could be advised as to what should, or ought to be, the ultimate decree, until they are sufficiently informed by the report of the referee as to the several contentions of the parties, and of the matters of fact and law which affected them. While the fifth clause of the decree declares certain judgments void as to certain creditors, it also restrains a part of the distribution until the adjustment and satisfaction of certain claims has been accomplished. As we understand the matter, that adjustment and satisfaction have yet to be determined.

It is alleged in the counter-statement and not denied, that after the reference the accounting proceeded before the referee, a large amount of testimony was taken, and the referee made his report, which was filed on April 9, 1895, and pending a hearing on exceptions to the report, the present appeal was taken on April 13, 1895. The cause is therefore still open and undecided in the Court below. As a matter of course we know nothing about the proceedings subsequent to the decree, and we are very clearly of the opinion that the appeal is premature and must therefore be quashed.

Appeal quashed at the cost of the appellants, and record remitted for further proceedings.

W. M. S., Jr.

July, '94, 115. January 17, 1895.

In re Narrowing of Greenough Street.

Streets—Narrowing of—Acts of May 23, 1874, and June 8, 1881—Construction of.

The language of the Acts of May 23, 1874, and June 8, 1881, namely, "The municipal authorities and Courts having jurisdiction," is used as applicable to the general jurisdiction to decide on matters within the jurisdictional limits. They specify the subject of control, and, at the same time, confer jurisdiction.

These Acts confer not only a power of control and direction over streets and alleys, but also specify the manner of its exercise; in which is included by the express terms of the Act of 1874, the right to assess damages and benefits.

Appeal of John Donohue, from the decree of the Quarter Sessions of Philadelphia County, sustaining exceptions to the report of viewers, appointed to award damages and assess benefits sustained by reason of the vacating of ten feet on each side of Greenough street, between Mansion avenue and Hamilton street, Manayunk, in the Twenty-first ward of the City of Philadelphia, changing the width of said Greenough street from fifty feet to thirty feet.

The facts of this case are set forth in the opinion of the Supreme Court. The jury having awarded damages amounting to $1000, which were assessed as benefits on property owners on the same street, these latter filed exceptions thereto, denying the jurisdiction of the city councils and Court, either to narrow the street, or to assess damages and benefits resulting therefrom. The Court sustained the exceptions, Bregy, J., filing the following opinion:

"These exceptions raise the question as to the power of councils to pass the ordinance, and the Court to appoint the jury.

"It is an attempt to narrow a street from a width of fifty feet to a width of thirty feet by ordinance of July 2, 1890.

"It is contended by the petitioners that this proceeding is authorized by the Acts of 1874 and 1881. A consideration of these Acts leads me to the conclusion that a proper interpretation of their meaning is, that *whenever* any city in the Commonwealth had given to it (by its Courts or municipal authorities) the power to open, widen, narrow, vacate and change grades of the streets of the city, that such municipal authorities and Courts should have exclusive control and direction of the several things or acts which they were empowered by previous legislation to do.

"I find no Act which gives the Courts or municipal authorities of Philadelphia the right to narrow the highways of the city. The conclusion follows that the councils of the city did not

Digitized by Google

possess the power to narrow Greenough street, and everything based on the invalid ordinance falls.

"I fail to agree with the argument, that the power to vacate is a power to narrow. The Acts recognize the distinction between vacating and narrowing. When a street is vacated it disappears from the public plan. When it is narrowed it continues there.

"The subsequent Act of 1891 may also show that the Legislature recognized that the power to narrow did not exist before, and they created it. The exceptions are sustained, the report set aside, and the proceedings dismissed." Whereupon John Donohue, petitioner for jury, took this appeal, assigning for error this action of the Court.

Thomas R. Elcock, for appellant.

The several Acts of Assembly regulating roads and highways authorize these proceedings.

Act of June 13, 1836, Bright. Purd. Dig., page 1501.
Act of April 21, 1846, Bright. Purd. Dig., page 1502.
Act of April 21, 1858, Bright. Purd. Dig., page 1518.
Act of May 23, 1874, Bright. Purd. Dig., page 1216.
Act of June 8, 1881, Bright. City Dig., page 28.

The Act of June 8, 1881, expressly authorizes the narrowing of streets. The words "having jurisdiction in any city of this Commonwealth," describes simply the person to whom the authority is given, and does not refer to some jurisdiction hereafter to be given.

But even were this not so, the Acts give the authority to vacate a road, and this includes the right to narrow.

Madison and Harmony School House Road, 37 Pa. 417.
Swanson Street, 163 Id. 326.
In re Vacation of Henry Street, 23 WEEKLY NOTES, 60.

John Dolman, for appellees.

July 18, 1895. DEAN, J. About fifteen years prior to this proceeding, Joseph F. Greenough, who owned the land, laid out and dedicated to public use, Greenough street, in the Twenty-first ward of the City of Philadelphia. The width of the street was fifty feet; upon it, Donohue, the appellant, erected a three-story brick dwelling, eighteen feet front, also put up the usual back buildings. On the 2nd of July, 1890, the city councils, by ordinance, authorized the narrowing of the street to a width of thirty feet, by striking off ten feet from each side. This action of councils was at the instance of appellee and others of these exceptants, who filed bond conditioned for the payment of all damages resulting from the change of the street line. As Donohue had built on the line of a street fifty feet wide, this not only narrowed the street to almost alley dimensions, but enabled Donohue's neighbors, in the erection of new buildings, to extend to the line ten feet in front of him, obstructing the view from his house, and to some extent concealing it from observation.

On petition of Donohue, the Court appointed viewers, who awarded him damages of $700, and to another lot owner, in the same situation, $300, altogether $1000, which was assessed as benefits on other property owners on the same street. To this award, Isaac Wilde and others assessed with benefits, filed exceptions, denying the jurisdiction of the city councils and Court, either to narrow the street, or to assess damages and benefits resulting therefrom.

It does not seem to us important, in the determination of this dispute, to consider the scope of the Act of 21st of April, 1858, and prior statutes on the subject of opening, widening and vacating of roads, streets and highways; perhaps the proceeding had in this case, is, by necessary implication, authorized by these statutes; but whether this be so or not, it is expressly authorized by the Act of June 8, 1881, which is an amendment of and repetition in part of the Act of May 23rd, 1874. This first mentioned Act declares: "The municipal authorities and Courts having jurisdiction in any city of this Commonwealth, shall have exclusive control and direction of the opening, widening, narrowing, vacating and changing grade of all streets, alleys and highways within the limits of such city." It was contended by the exceptants, and their contention was sustained by the Court below, that no jurisdiction to narrow a street was given by this Act, except to Courts already having statutory authority to vacate and narrow streets; the words, "The municipal authorities and Courts having jurisdiction," it is argued, were intended to apply only to those cities where the Courts already had jurisdiction. We do not think so. Speaking generally, jurisdiction in a Court, is the power to hear and determine a cause. The power over roads and streets is confined to the counties where they are located; the same as ejectments, mechanics' liens and the like, no power over them exists outside the counties; the jurisdictional limits are the county lines, and the Courts of the county have jurisdiction to determine such matters by reason of the location of the Courts and the subject of litigation. If a new method of procedure, with reference to any of these subjects of litigation, were adopted, it would be carried on within the territorial limits of the Court where the subject was located, and we would say, "the Courts having jurisdiction shall make orders, issue writs, etc." While the words, "the Courts having jurisdiction," might

Digitized by Google

be referred to a special jurisdiction over the same subject, theretofore conferred by statute, the words in both the Acts of 1874 and 1881 were used as applicable to the general jurisdiction of the Courts to hear and determine matters within their jurisdictional limits. They specify the subject of control, and at the same time, confer jurisdiction. In the Act of 1850, regulating partition of decedent's real estate, "the Courts having jurisdiction," are authorized to allot to the heirs their respective shares; that is, jurisdiction within the territory where the land is located. Adopting the words in this general sense, the Acts of 1874 and 1881 confer not only a power of control and direction over streets and alleys, but also specify the manner of its exercise; the municipal authorities and Courts having jurisdiction, are authorized to open, widen, vacate and narrow streets.

While we think there was jurisdiction to institute the proceeding, we are further of the opinion that the assessment of damages and benefits was within the express authorization of section 13 of Act of 1874.

The case of exceptants is without merit; they asked the councils and Courts to do just what they did do, and gave bond to indemnify the city against damages; the purpose having been accomplished, and the advantage secured, they now deny the authority to do what they asked, which, if concurred in, would wholly relieve them from obligation or liability for benefits.

The decree is reversed, and the report of the jury is confirmed absolutely; costs to be paid by appellees.

S. H. T.

Jan. '95, 173. February 15, 1895.

Pennsylvania Hospital v. Delaware County.

Taxes — Exemption from—Public charity—Equity.

The property of a public charitable institution, which is used directly for the purposes and in the operation of the charity, although detached geographically from the main part of the institution, is exempt from taxation, though it may also be used in a manner to yield some return in the way of reducing expenses.

Donohugh's App., 86 Pa. 306; House of Refuge *v* Smith, 140 Id. 387, and Phila. *v.* Pennsylvania Hospital, 154 Id. 9, followed. Sunday School Union *v.* Phila., 161 Id. 307, distinguished.

Appeal of the Contributors to the Pennsylvania Hospital, from the decree of the Common Pleas of Delaware County, in equity, entered in dismissing a bill in equity, wherein appellant was plaintiff and sundry officials of Delaware County were defendants.

The facts of the case are fully set forth in the opinion of the Court, *infra.*

Arthur Biddle, for appellants.

The rules deducible from the principal cases exempting charities from taxation, where an income is derived from participators in its bounty, may be stated as follows:—

First. Where the fundamental structure of the institution is that of a public charity, the receipt of money from the participators of its bounty, used to sustain the operation and existence of the charity is not material, although such participators may derive a peculiar or individual benefit from its operation; and the charity is not taxable.

Donohugh's App., 86 Pa. 306.
Phila. *v.* Women's Christian Asso., 125 Id. 572.
Northampton Co. *v.* Lafayette College, 128 Id. 132.
Phila. *v.* Pennsylvania Hospital, 154 Id. 9.

Second. The same principles are true, where the revenue is derived through the agency of the participators of the charity by their manual exertions.

House of Refuge *v.* Smith, 140 Pa. 387.

But where a portion of the property or plant owned by the charity is severed therefrom, and is devoted to the business of strangers, and is not therefore essential to the operation of the charity, such property is taxable and is not exempt.

Examples of the first rule are had in Donohugh's Appeal.

Phila *v.* Barber, 160 Pa. 128.

The Pennsylvania Hospital is not merely a public charity, but is in the nature of an agency of the general government. It is not like a library, or a museum, or a university; but it is an absolute necessity in the organization of any civilized state, being more in the legal nature of an almshouse, prison, or reformatory home. In other words, it is an agency which could be perfectly well carried on, and almost universally is, by the general government. For the health of the community, in a public sense, comes almost as much within the purview of the government as their morals, or safety.

E. H. Hall, (with him *George E. Darlington* and *Isaac Johnson*), for appellees.

The object of the corporation is "The founding of a hospital for the reception and relief of lunatics and other distempered and sick poor within this province."

The lands in Newtown are entirely separated from the hospital and not used with it, and are therefore not exempt.

Phila. *v.* Ladies United Aid Society, 12 Pa. C. C. 346.

Digitized by Google

Sunday School Union *v.* Phila., 161 Pa. 307.

If this property is exempt from taxation it must be by virtue of one of the following Acts of Assembly:—

The Act of April 8, 1873, P. L. 64, is as follows:—

"All real estate within this Commonwealth shall be liable for taxation for all such purposes as now is, or hereafter may be provided by general laws, etc.

"Also excepting and exempting from taxation all lunatic asylums, almshouses, etc., supported by appropriations annually made thereto by this Commonwealth, together with the lands attached to the same.

"And also excepting and exempting from such taxation all charitable institutions, founded by charitable gifts or otherwise, the chief revenues for the support of which are derived from voluntary contributions, together with the lands attached to the same."

The Act of Assembly of May 14, 1874, P. L. 158, passed in accordance with the provisions of the Constitution, declares: that all hospitals, universities, etc., with the ground thereto annexed, and necessary for the occupancy and enjoyment of the same, founded, endowed and maintained by public or private charity, be and the same are hereby exempt, etc.

These lands are certainly not within the language of either of these Acts.

Com. *v.* Rolling Mill Co., 129 Pa. 360
Com. *v.* Westinghouse Co., 151 Id. 276.

Because the farm is managed by a superintendent and the greater part of the produce used at the hospital, will not exempt the property from taxation.

Sunday School Union *v.* Phila., 161 Pa. 317.

July 18, 1895. MITCHELL, J. This case comes to us in an unsatisfactory shape, as there is no finding of facts, and regularly we should send it back for the purpose of having them definitely ascertained, but as the evidence is in small compass we have examined it for ourselves. The fair result is that the farms in controversy were bought and are used for hospital purposes, as a part of the hospital plant, an open air sanitarium, and roaming ground for manageable and convalescent patients, very much as a playground might be used as an aid in the cure of sick children. And this present employment in this way is the first step in the ultimate devotion of the whole property to the same use. The testimony to the curative value of the farms in this respect is positive and uncontradicted. Dr. Chapin, the superintendent and physician in chief, says: "If we had accommodations we would have two hundred or two hundred and thirty patients there. Looking at it from a medical standpoint we would move all our patients there if we could." The farms, in actual operation as such, with live stock, and the various crops, are part of the attraction and usefulness for curative purposes. That they are also farmed for profit to reduce expenses does not vary their position as part of the plant. If there were any fair doubt of the good faith of such use, the case would be different.

The hospital as an institution is admittedly a purely public charity, Philadelphia *v.* Pennsylvania Hospital, 154 Pa. 9, but it is argued that these farms are not part of its exempted property, first, because they are farmed for profit; secondly, because they are separated from the main hospital building and not used with it; and thirdly, because the hospital or sanitary use of them is temporary, being confined to the summer months.

On the general question of what part of the property of a charity is exempted from taxation a plain distinction is to be observed in all our cases. Property which is not used directly for the purposes and in the operation of the charity, but for profit, is not exempt, and the devotion of the profit to the support of the charity will not alter this result. Of this class of cases Am. Sunday School Union *v.* Phila., 161 Pa. 307, is the exemplar and authority. But property which is used directly for the purposes and in the operation of the charity is exempt, though it may also be used in a manner to yield some return and thereby reduce the expenses: Donohugh's Appeal, 86 Pa. 306; Phila. *v.* Penna. Hospital, 154 Pa. 9; House of Refuge *v.* Smith, 140 Pa. 387.

The first objection that the farms are worked for profit is sufficiently answered by the evidence that they were bought and are used as part of the hospital plant, and the farming is incidental to reduce expenses.

The second objection that the farms are separated from the main building and not used with it, is ruled by House of Refuge *v.* Smith, 140 Pa. 387. What is there said by our brother WILLIAMS needs only the change of name to apply exactly to the present case. "Viewed with reference to its property and the question of taxation, the buildings and grounds legitimately used in its work are the House of Refuge. Originally this institution was confined to an enclosure in the city of Philadelphia which had become too narrow and confined. . . . . This land was purchased for the use of the male department. The female department remains for the present as now located in Philadelphia. The two departments, though separated by a county line, and some miles of distance, will nevertheless constitute one whole. . . . . Together they will

Digitized by Google

constitute the actual plant used in the reformatory work for which the House of Refuge was organized; and looked at from the property point of view they are the House of Refuge."

The third objection that the use for hospital purposes is temporary only is not sustained by the facts. It is true that such use is limited to the months of pleasant weather, in the summer and autumn, but this does not make it temporary. So far as appears the farms are regularly and permanently devoted to that purpose, though from its nature its enjoyment is only practicable during part of the year. But a church does not cease to be exempt because it is closed and the pastor has a vacation in the summer. It is the character of the use, not the amount of it, that determines the title to exemption. The cases cited on this point do not touch the real question. Moore *v.* Taylor, 147 Pa. 481, was a case of property undoubtedly exempt as a church at the beginning of the year, passing into private hands for use as a dwelling, and as such undoubtedly taxable. The only question was whether the year could be apportioned for purposes of taxation, and it was held that it could, and the exemption terminated as soon as the title changed and the use as a church ended. Phila. *v.* Barber, 160 Pa. 123, was the same question of the division of the year, from the converse position, the property having been taxable at the first and acquired by the church during the running of the year. It was held that the most the church could claim was exemption after its title accrued. The other question in the case, on which the decision was put, was that where part of the church was rented out for school rooms during the week, the use of it by the church on Sunday would not entitle it to exemption, as the use was concurrent and not exclusive. The use in that case was for purposes not connected at all with the church, and was for profit only, thus bringing the case clearly within the class of which Sunday School Union *v.* Philadelphia, 161 Pa. 307, has been already cited as the example.

This case therefore belongs to the second class above mentioned, where the property is used directly for the purposes and in the operation of the charity, though it is managed at the same time so as to secure some return and thus keep down the expenses. It may be that the acreage is larger than is necessary or really useful for the number of patients which the other facilities of the hospital enable it at present to treat there, but as the fact is not found by the learned Court below, and is not clear on the evidence, we do not assume it as true.

Decree reversed, bill reinstated, and injunction directed to be issued as to the farms not rented. Costs to be paid by the appellees.

W. D. N.

Jan. '95, 341. March 8, 1895.

Van Reed v. Jones et al.

Legacy—Charge upon lands—Apportionment.

Where part of land subject to a charge is sold by judicial sale, any apportionment which the owner of the charge and the party to pay agree upon is binding.

In the absence of such agreement, apportionment of the encumbrance should be based upon the respective values of the various portions.

Where an apportionment has been recognized by the life-owner of the charge for many years, it cannot be reopened and arrearages of the difference between what has been paid and what the legal rule would have required, be exacted by the life-owner's administrator; but his heirs, who claim in their own right as remaindermen, are not bound by past payments, and may claim for the future on the legal basis.

Carpenter *v.* Koons, 20 Pa. 222, followed.

Appeal of Jacob Van Reed, from the decree of the Orphans' Court of Berks County, entered upon a petition made by appellant and to which Samuel B. Jones, William H. Jones and Mary Agnes Getz made answer.

On May 28, 1894, Jacob Van Reed, the appellant, presented his petition to the Orphans' Court of Berks County setting forth that he is the owner of a tract of 251 acres and 22 perches, subject to its proportionate share of a charge of $2000 imposed upon a tract of 604 acres and 134 perches, amounting to $820.72, and asking leave to pay this sum into Court to be distributed to those entitled thereto. The answers filed alleged that the proportionate share of the charge upon the Van Reed tract is $1043.49. The charge arose in this way:—

Samuel Jones died, testate, on the 30th day of December, 1849, seized of a tract of land situate in Lower Heidelberg township, Berks county, containing 604 acres, 134 perches, upon which he charged $2000, directing that the interest thereon be paid to his son, John H. Jones, during his lifetime, and after his death to his sons, Samuel B. Jones and Thomas B. Jones, or the survivor of them; and if they died under age, without lawful issue, then over to the children of the testator. This tract of land was appraised at $48,387, or $80 an acre. Thomas H. Jones, the eldest son of the testator, accepted the tract at the appraisement, as provided under the will of his father. On May 16, 1850, Thomas H. Jones conveyed an undivided one-half interest in said tract of land to James Darrah, and shortly thereafter died.

John V. R. Evans and Reese Davis, the administrators of Thomas H. Jones, were authorized by an Act of Assembly, passed March 9, 1851, P. L. 282, to sell the interest of Thomas H. Jones and James Darrah in said tract of land,

Digitized by Google

subject to the charge of $2000, as aforesaid. Thereafter, on October 11, 1851, the administrators as aforesaid, under the supervision and approval of the Orphans' Court of Berks County, sold 189 acres, 129 perches of said tract of 604 acres, 134 perches to Tysher Stitzel, at $65.50 per acre, subject to a charge of $628, as the proportionate part of the whole charge of $2000. The sum was arrived at by subjecting each acre to its equal proportionate share of the total charged. This tract is now owned by Henry H. Yost, who took it subject to the original charge of $628.

On October 13, 1852, the remainder of the 604 acres, 134 perches was sold by the sheriff of Berks county, upon executions issued against James Darrah, in whom the title had vested through proceedings in partition, and sold a portion to appellant and a portion to William Strong, whose share afterwards was sold to divers persons.

Answers were filed by Samuel B. Jones, a surviving son of John H. Jones and Mary Agnes Getz, administratrix of the estate of John H. Jones, claiming that Van Reed's lands were charged with $1043.49, and that there was due to the estate of John H. Jones, on account of unpaid interest, $517.01, and interest on said unpaid interest amounting to $620.40, together with $21.21 interest on the original charge from January 1, 1894.

The petitioner asked leave to pay $820.72 into Court so as to free his portion of the land from the proportionate part of the legacy to which it was still subject.

The Orphans' Court adjudged as to the charge under the will of Samuel Jones on the tract of 251 acres and 22 perches now owned by Jacob Van Reed and which was part of the tract of 604 acres and 134 perches upon which said will charged $2000 to secure an annuity of the interest to John H. Jones for life, as follows:

1. That there is charged thereon, under said will, the sum of $1043.38, which is payable, with interest from the death of John H. Jones, May 3, 1894, to the present time, to Samuel B. Jones, son of John H. Jones, and William Jones, a son of Thomas B. Jones.

2. That there remain charged thereon any unpaid balances of interest on the said $1043.38, which accrued during the lifetime of John H. Jones, between the purchase of said land by Jacob Van Reed and the death of John H. Jones, with interest on such balances to this date, from the time they were payable in the lifetime of John H. Jones; and also the interest on said charge from January 1, 1894, to the death of John H. Jones, May 3, 1894; and that Mary Agnes Getz, administratrix of John H. Jones, is entitled to a decree for the sums due under this conclusion.

Exceptions were filed to this adjudication and dismissed, which was assigned for error and petitioner appealed.

W. K. Stevens, for appellant.

The Orphans' Court of Berks County, in which was vested the supervision of the sale of the whole tract of 604 acres and 134 perches, by the Act of 1851, having adopted the method of charging the $2000 upon each acre in equal proportions, subsequent purchasers would take subject to their proportionate shares to be computed upon the same basis.

Gibble's Estate, 134 Pa. 377.

In no event could the administratrix of John H. Jones recover interest upon arrears unpaid.

Brown *v.* Campbell, 1 S. & R. 176.
Bank *v.* Com., 10 Pa. 453.
Porter *v.* Com., 17 Id. 17.
Pass. Ry. *v.* Phila., 51 Id. 468.

Cyrus G. Derr, (*B. F. Dettra* with him), for appellees.

When an entire tract of land is subjected to a pecuniary charge and part of the land is sold subject to part of the charge, the remainder of the land remains bound by the remainder of the charge without regard to how the amount charged upon the land sold was ascertained or fixed.

Mere acceptance of a creditor of a less sum than due without any additional consideration, is not an extinguishment of the debt.

Fitch *v.* Sutton, 5 East. 230.

Where an annuity is charged upon a tract of land and the land is afterwards subdivided, coming under the ownership of divers persons, it is the duty of each owner to ascertain the proportion of the annuity which he is liable to pay, and to pay it, and if one of such owners knowingly pays the annuitant less than his share, representing to him that the sum paid is the correct amount, and the annuitant receives it upon the faith of such representation, the circumstances constitute a wrong and an injustice to the annuitant, and the landowner is, in consequence, liable for interest upon the deficits in his payments from the time of their maturity respectively.

July 18, 1895. MITCHELL, J. The testator charged the land as a whole with the payment of $2,000. That sum was due, therefore, from the six hundred and four acres, and from each and every acre equally with the rest. When the first sale took place, in 1851, to Stitzel, the parties, with the approval of the Orphans' Court, adopted an apportionment of the charge according to the acreage. This undoubtedly left the remaining acres subject to $1,372, likewise

Digitized by Google

charged on the whole, and equally on each acre of it. When this remainder was sold, in 1852, by the sheriff, it was divided, for reasons and by authority which do not appear, and two hundred and fifty-one acres sold to appellant at something over sixty-four and a half dollars an acre, while one hundred and seventy-one acres were sold to Strong at a trifle less than thirty dollars an acre. No mention was made of the mode of apportionment. Probably the sheriff or the Court controlling the execution could have fixed terms of sale which would have settled the question, but they did not do so. Nor did the parties, that is, the purchasers, and John H. Jones, to whom the interest on the encumbrance was payable, make any agreement on the subject, though each purchaser, on his own behalf, came to an understanding and agreement with Jones. Strong assumed the law to be that apportionment should be made according to the value of the parts as shown by the price paid at the sale, and he and his successors in title, down to the death of Jones, have been paying interest on that basis. Appellant, on the other hand, claimed that the apportionment should be by the acre, and Jones acquiesced in that arrangement and received the interest on that basis, for forty years, until his death. So far as the interest is concerned, this is conclusive. The interest was his, and there was no rigid rule of law as to the apportionment of it which would prevent his doing as he pleased with it. Any apportionment, therefore, which he and the party to pay agreed upon became binding. There is no evidence of any fraud or deception which would entitle his administratrix or the Courts to change it. The charge against appellant, therefore, of alleged arrearages of interest for forty years was erroneous, and must be struck off. Even if it had been correct to charge arrears at all, the earlier ones had long been barred, and it was not in any aspect a case for allowance of interest on interest: R. W. Co. *v.* Phila., 51 Pa. 465.

John H. Jones, however, was entitled only to the interest during his life, and at his death the principal became due to his children. They were not bound by his agreements with appellant and the other owners of the land. The question of apportionment as to the principal of the charge is, therefore, still open. The learned Judge below held that it should be by the ratio of the values of the lots as shown by the sheriff's sale, in 1852, and relied upon Carpenter *v.* Koons, 20 Pa. 222, as sustaining this mode.

The principal point decided in Carpenter *v.* Koons was that the rule that parts of land sold subject to a common encumbrance are liable in the inverse order of sale, did not apply to parts sold at sheriff's sale at different times though both subject to a paramount mortgage, but that both continued jointly liable. That was an action for contribution by the purchaser of the lot last sold, against the purchaser of the first lot, to recover the excess which he had been obliged to pay on the common encumbrance. The Judge, at the trial, had instructed the jury that the last lot was liable for the whole. This, as already said, was the main point in the case, and it was held to be error, but in the opinion, C. J. BLACK said: "Two purchasers at a sheriff's sale, subject to a mortgage which is a common encumbrance on the land of both, stand on a level. Neither of them has done or suffered anything which entitled him to a preference over the other. Equality is equity. They must pay the mortgage in proportion to the value of their respective lots." He also said that the bids at the sheriff's sale were only a circumstance which the jury would consider in arriving at the true value of the lots.

The rule of apportionment thus announced was, probably, the best that could be found for that case. The lots were city lots, the relative size or improvements of which do not appear. A difficulty, however, which the report does not clear, is suggested by the query, which time is to be taken for the valuation when the sales are with a considerable interval between. This and other questions which might arise give us some doubt whether, if the point were now to be decided as new, the relative value of the lots, particularly in cases like the present, where they represent a considerable acreage, is always the proper basis of apportionment. But as the rule announced, though somewhat *obiter* in Carpenter *v.* Koons, has stood unchallenged for forty years, we do not think it well now to depart from it, unless in exceptional cases, like Gibble's Estate, 134 Pa. 366, where the acts of the parties have made a different rule necessary to an equitable result. If the question here were, as the question of interest was, between appellant and John H. Jones, there would be strong equity for making an exception, as in Gibble's Estate, but as the remaindermen, as Jones' children may be called, are not bound by the course of conduct before their rights accrued, the case cannot be taken out of the rule on that ground.

Decree reversed as to arrearages, and interest thereon charged to appellant. Costs to be paid by appellees. W. D. N.

Price's Appeal.

For the syllabus of this case appearing on page 531 substitute the following:

A will which disposes of personalty only, and is invalid by the law of the testator's domicile, is not entitled to probate in this State.

Digitized by Google

Common Pleas.

C. P. No. 2. September, 1894, 154.

Underhill v. McManus.

Attachment under Act of 1869—Fractions of a day—Liens, priority of.

A writ of attachment under the Act of March 17, 1869, § 5, as between successive writs under that Act, is a lien from the time the writ comes into the hands of the proper officer for service; and as between it and a writ of foreign attachment served later upon the same day is a prior lien.

Rule for judgment against the garnishees upon answers to interrogatories.

A. F. Custis, for plaintiff; *John Weaver*, for garnishee; *Leoni Melick*, for foreign attachment.

July 2, 1895. PENNYPACKER, J. This suit was commenced by an attachment under the Act of March 17, 1869, Purd., Vol. 1, p. 70, which was issued September 10, 1894, left with the sheriff at 10.30 A. M., and served upon the garnishees at 10.55 A. M. upon the day that it was issued. Judgment was obtained against the defendant December 22, 1894, for $1334.77.

On the same day a writ of foreign attachment was issued at the suit of Halsey Fitch *et al.*, to use, against the defendant, in which bail was fixed at $2,566.68, and on the same day was left with the sheriff at 11.13 A. M., and served upon the garnishees at 2.50 P. M.

The answers of the garnishees set up these facts and admit that they have in their possession the sum of $1911.35 belonging to the defendant. The question to be determined is whether, in a case of this kind, the law will consider fractions of a day and give the preference in distribution to an attachment under the Act of 1869 over a foreign attachment, which went into the hands of the sheriff and was served at a later hour upon the same day.

In Long's Appeal, 23 Pa. 297, it was held that, as between several writs of foreign attachment served upon the same day, there was no priority of payment, and the decision is based upon the principle that in judicial and other public proceedings there are no fractions of a day, and that all transactions of the same day are in general regarded as occurring at the same instant of time.

In Baldwin's Appeal, 86 Pa. 483, it was held that the same rule applies to writs of attachment execution. In that case it was considered that the process of attachment execution had an approximate relationship to that under a writ of foreign attachment, and was to be distinguished from a writ of fieri facias, which the Act of June 16, 1836, provides shall be a lien from the time of its receipt by the officer executing it. We are urged to apply the rule of Long's Appeal and Baldwin's Appeal to the facts of the present case. The process under the Act of 1869 differs materially, however, from foreign attachment and attachment execution in one important respect, and in this respect is much more like the writ of fieri facias. The writ of foreign attachment under the Act of June 13, 1836, sec. 50, and attachment execution under the Act of June 16, 1837, sec. 37, are only liens from the time of service, while the attachment under the Act of 1869, at least as between successive writs under that Act, is a lien from the time the writ comes into the hands of the proper officer for service. Section 5 of the Act of 1869 provides: "In case two or more attachments are issued against the same party defendant, the one first in the hands of the proper officer for service shall have the prior lien, and so on as to other writs issued in pursuance of this Act, in the order of time in which they are issued to said officer."

While the language of this section, if looked at narrowly, is limited to "writs issued in pursuance of this Act," nevertheless its purpose appears to be to fix the time at which the lien of a writ issued under the Act shall commence. The first writ is to have a "prior lien." How can it have a prior lien unless its lien becomes fixed at the time the writ comes into the hands of the proper officer? The words imply that there is one lien which is earlier in time and another lien which is later. In case there are several writs under the Act they have priority "in the order of time in which they are issued to the said officer." That can only be the case upon the theory that each writ becomes a lien at the time the officer receives it.

In the case of The Bank *v.* Hilgert, 3 Pennypacker, 440, Judge LUDLOW, whose opinion was affirmed by the Supreme Court, says: "Upon the question of priority of lien we are also of the opinion that the lien of these attachments dates from the time the writs were issued and came into the hands of the proper officer for service and not from the time of service on the garnishee."

In the case of The Bank *v.* Hunter, 19 Phila. 486, Judge WILLSON says: "In its operation the Act of 1869 makes an attachment, though it is not a writ of execution, to resemble in respect of priority of lien the writ of fi. fa., which is made by the statute to bind the property of the defendant from the time when it is delivered to the sheriff." While the questions raised in those cases were different, these citations indicate that the learned Judges there entertained the same view of section 5 of the Act of 1869 which is here expressed. We think, therefore, that judgment should be entered for the plaintiff for the amount of his judgment and interest. F. B. N.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, SEPT. 6, 1895.* [No. 30.

Supreme Court.

July, '94, 42. May 20, 1895.

Seitz v. Seitz.

Evidence—Witnesses, competency of—Husband and wife—Act of May 23, 1887—Confidential communications—Divorce.

Under section 5 of the Act of May 23, 1887, where, in a proceeding for divorce, the respondent has been personally served with the subpœna, the libellant may testify to the conduct of her husband which she has witnessed, or to his statements made to her touching the ground of complaint.

Whether a communication is to be regarded as confidential depends upon its character as well as the relation of the parties; if not made because of the relation of the parties and in the confidence which that relation inspires and which it is the policy of the law to hold inviolate, it is not privileged.

Appeal of Susan Seitz, from the judgment of the Common Pleas of Lancaster County.

Susan Seitz, the appellant, presented her petition for a subpœna for divorce from the bonds of matrimony contracted with her husband, Christian Seitz, on the ground of adultery. The subpœna was obtained, was served personally on the respondent, an issue framed at his request and tried, the defendant appearing and defending. After eight witnesses had been heard for the plaintiff the Court directed a verdict for the defendant. On the trial the Court refused to permit the plaintiff to testify, either as to any admissions of the appellee to her of his adultery or adulterous contracts with other women, or as to any personal knowledge which she had of his adulterous acts, such refusal being based on the ground that as to his admissions she was incompetent to testify against him, because they were confidential communications, and as to her knowledge of his acts she was incompetent to testify to anything showing adultery.

Verdict for defendant and judgment thereon.

Plaintiff appealed, assigning for error the refusal to permit the plaintiff to testify as above noted and the direction to find for defendant.

John A. Coyle, (*H. M. North* with him), for appellant.

The plaintiff was competent to testify fully in a proceeding for divorce for any cause; she was competent to testify that she caught her husband in the act of adultery, or any other situation from which his adultery might be inferred; that he asserted, confessed and admitted it. She was competent to make out her whole case.

Act of May 23, 1887, clause (c), sec. 5.

The declarations of the husband in this case were not confidential within the rule.

Greenleaf's Evidence, §§ 334, 337, (14th Ed.)
1 Wharton on Evidence, § 427.
Cornell *v.* Vanartsdalen, 4 Pa. 364.
Robb's Appeal, 98 Id. 501.
Peiffer *v.* Lytle, 58 Id. 386.
Matchin *v.* Matchin, 6 Id. 338.

The question does not depend upon the importance of a communication, but on the character of it. It must contain an element of confidence and an intention that it shall never be disclosed.

Am. & Eng. Encyc. of Law, pages 131 and 136.

W. M. Franklin and *C. I. Landis*, (with them *B. F. Davis*), for appellee.

Communications between husband and wife are privileged.

Cornell *v.* Vanartsdalen, 4 Pa. 364.
Hitner's Appeal, 54 Id. 110.
Homan *v.* Homan, 12 WEEKLY NOTES, 86.
Brock *v.* Brock, 116 Pa. 109.
Cornelius *v.* Hambay, 150 Id. 359.

A charge of adultery against a husband in a libel for divorce is not sustained by the testimony of the wife to circumstances of suspicion alone.

Graham *v.* Graham, 153 Pa. 450.

"In a divorce case evidence of the confession of the defendant, especially when given only by the oath of the plaintiff, is of no value without proof of corroborating circumstances."

Edwards *v.* Edwards, 3 Pitts. R. 333.

"Mere admissions or declarations unsupported by any other proof, or by corroborating circumstances, are not sufficient to justify a decree of divorce on the grounds of adultery."

Eshbach *v.* Eshbach, 23 Pa. 345.
Matchin *v.* Matchin, 6 Id. 332.
Quick *v.* Quick, 6 Kulp, 137.

Even if an offence were committed, condonation may be inferred from great length of time either in commencing or prosecuting a suit.

"A condonation may be inferred from the party's neglecting to prosecute a suit for divorce which he has already commenced; and this circumstance, contrary to the general rule, has been held to press more heavily against the wife than the husband."

2 Bishop on Marriage and Divorce, sec. 48.

Condonation is always a bar.

Act of March 13, 1815, P. L. 150, sec. 7.

Digitized by Google

If the offers had been allowed, the evidence would have been of no avail, for they lacked corroboration. It will be seen that there was no sufficient evidence to justify a verdict for the plaintiff, and in such a case the Supreme Court will not reverse even though the ruling of the Court below was erroneous. As was held in Houser *v.* Lightner, 1 Lancaster Law Review, 374, by GREEN, J.:—

"Where the testimony produced by the opponents of a will at the trial of an issue *devisavit vel non* is insufficient to set the will aside, the Supreme Court will not reverse for an error of the Court below, in affirming a point of the proponent of the will."

July 18, 1895. FELL, J. On the trial of an issue in a proceeding for divorce in which the respondent had been personally served with the subpœna, the libellant was not allowed to testify to the conduct of her husband which she had witnessed, nor to his statements made to her touching the ground of her complaint. Clause (c), sec. 5 of the Act of 23rd May, 1887, makes either party in a proceeding for divorce competent to testify against the other when personal service of the subpœna or rule to take depositions has been made, or the opposite party appears and defends. The libellant was clearly competent to testify to anything she had seen. The Act removes all disqualifications on the ground of interest or policy of law except as provided in sec. 5, and she was within the exception which permits husband and wife to testify against each other.

It has been argued that the statements made by the respondent were properly excluded on the ground that they were confidential communications. Whether a communication is to be considered as confidential depends upon its character as well as upon the relation of the parties. It is essential that it should be made in confidence and with the intention that it should not be divulged. The privilege is based upon considerations of public policy, as in the case of husband and wife to preserve the peace, harmony and confidence of their relation, and in the case of attorneys and client to secure the unreserved communication which the ends of justice require. If not made because of the relation of the parties and in the confidence which that relation inspires and which it is the policy of the law to hold inviolate, it is not privileged. Ordinarily it might be inferred that communications made by a husband to his wife were made with the intent and in the confidence mentioned, but the circumstances and the nature of the statement repel such a presumption in this case. The disclosures sought to be made, as indicated by the questions objected to, did not relate to the confession of a penitent husband who had confided to his wife the story of his wrong-doing, but to a boastful and defiant declaration of his misconduct and of his intention to openly persist in his course, accompanied by insolent and brutal taunts. No considerations of domestic peace and harmony or of the sanctity of the marital relation forbid their disclosure to redress the wrongs of the injured party. They did not arise from the confidence existing between the parties, but from the want of it.

The question referred to in the first assignment might have been objected to because of its form, and the offer contained in the fourth assignment appears to have been admitted. These assignments are overruled, and the remaining assignments of error are sustained.

The judgment is reversed with a venire facias de novo.

W. M. S., Jr.

Jan. '95, 207. May 20, 1895.

Graybill v. The Penn Township Mutual Fire Insurance Association of Lancaster County, Pa.

Contracts—Fire insurance policies—Use of word "contents" in—How construed.

Words must be understood in the sense in which they are commonly used in the business to which the contract in which they are found relates.

The word "contents" in a contract of insurance is not a certain and definite description of any particular class of goods. Its meaning must be ascertained by considering the contract, the nature and methods of the business for which the building whose contents are to be insured is to be used, and the understanding and intentions of the parties as expressed at the time of the insurance contracted for.

Under a policy of insurance certain buildings, including a smokehouse, were insured with their contents. A fire occurred in which the smokehouse was not burned, but its contents, which had been removed to a storage room in one of the other buildings, were wholly consumed. In an action upon the insurance policy it appeared that when application for insurance was made the president of the insurance company was upon the ground and saw the buildings. He was told that the smokehouse would hold very little goods at one time, and that as fast as the goods were smoked they would be transferred to the other buildings. The president said that the smoked goods would be properly insured as "contents" of the smokehouse, and these words were inserted in the application and policy with that understanding. The plaintiff having claimed that he should recover the full amount of insurance upon the "contents" of the smokehouse, the jury gave a verdict in his favor:

Held, that the submission of the above evidence to the jury was not a reformation of the policy, but only a finding by the jury of the meaning of the word "contents" in the policy;

Held, also, that the verdict was sustained by the evidence.

Digitized by Google

Appeal of The Penn Township Mutual Fire Insurance Association of Lancaster County, Pa., defendant, from the judgment of the Common Pleas of Lancaster County, in an action of assumpsit, brought by Hiram B. Graybill against said defendant, to recover upon a fire insurance policy issued by the said defendant to Hiram B. Graybill.

Upon the trial, before LIVINGSTON, J., the following facts appeared: Hiram B. Graybill, on September 3, 1887, executed a written application for membership and insurance in the Penn Township Mutual Fire Insurance Association. In this application he asked for the following insurance: on his two-story frame house and attachment, twenty-four by thirty-four, twelve hundred dollars; contents, five hundred dollars; wood house, twenty dollars; ground barn and attachment and butcher shop and attachment, four hundred dollars; contents, four hundred dollars; smokehouse, five dollars; contents, five hundred dollars. In the barn and butcher shop were a steam engine and a boiler, with the apparatus necessary for handling dressed cattle and making sausages.

In pursuance of this application and conforming thereto the policy of insurance was issued to him by the defendant company.

The ground barn and attachment and butcher shop and attachment which, together, were insured for four hundred dollars, and the contents thereof, also insured for four hundred dollars, were destroyed by fire, and certain smoked meat which had been stored there. None other of the insured property being injured.

The insurance company offered to pay the plaintiff eight hundred dollars as the total amount of insurances on the property destroyed; but he claimed that he should also be paid an additional five hundred dollars for the contents of the smokehouse. On refusal this suit was brought. The plaintiff testified that the president of the insurance company, Jacob Hershey, came to his place, saw his buildings, including the barn, butcher shop and smokehouse, 8x7 feet in dimensions. He had pointed out to him the meat, of which "a couple of pieces" were then in the smokehouse, and the balance, consisting of two tons of bologna sausages, eighteen or twenty hams, shoulders, flitch, etc., were in the meat-room two feet distant; that he told Hershey that he wanted *the meat* insured, "not the smokehouse, because it would not hold that much. I had a separate room for smoking and would move it there."

This was denied by Jacob Hershey on behalf of the defendant.

The defendant submitted the following points:—

1. That by the terms of the policy the properties of the plaintiff were insured in the following words, viz.: "Two-story house attachment $1,200, contents $500, wood-house $20.00, ground barn attachment, butcher shop attachment $400, contents $400, smokehouse $5.00, contents $500; and that the uncontradicted evidence being that only the ground barn with attachment and butcher shop with attachment and the contents of these were destroyed, the verdict can cover these only, and cannot exceed the total amount for which these buildings and their contents were insured, viz: $800 with interest." *Answer.* This point is negatived.

2. By the terms of the policy the ground barn and attachment and the butcher shop and attachment were insured for $400, and their contents also for $400, and the verdict, therefore, cannot exceed $800 with interest, these being the only buildings destroyed. *Answer.* This point is negatived.

3. By the terms of the policy the smokehouse was insured for $5.00 and its contents for $500, and the uncontradicted evidence being that the smokehouse and its contents were not destroyed, there can be no recovery on account of these. *Answer.* This point is negatived.

4. The policy being a solemn written instrument is presumed to contain the whole contract and cannot be changed or overthrown by oral proof, unless the evidence be such as would move a chancellor to make a decree, and this is never done upon the uncorroborated evidence of a single witness. The only evidence of any other agreement than the terms of the policy in this case is the testimony of the plaintiff, which is contradicted by the only other person alleged to have been present, and also contradicted by the persuasive evidence of the policy itself, and, therefore, the jury may only consider the contract between the parties as contained in the policy of insurance. *Answer.* This point is negatived.

5. Under all the evidence in this case the verdict cannot exceed $800 with interest. *Answer.* This point is negatived. (First assignment of error.) The Court charged the jury, *inter alia*, as follows:—

"It appears from the policy, as well as from the evidence given in connection with it, that an application was made to this company for insurance by Hiram B. Graybill. Jacob H. Hershey, the president of the institution, came to Mr. Graybill's place, inspected the premises and took Mr. Graybill's application.

"Mr. Graybill says that at the time he took the application he told him: 'This meat I want insured, not the smokehouse, because it would not hold that much. I had a separate room for smoking and would move it in there. That's the way I always did.'

Digitized by Google

"[Now, having seen these premises and having heard that request, he went home and prepared the policy which has been presented here to you, and which neither Mr. Graybill nor the insurance company seem to understand; at least, they don't agree upon their understanding of it, and, therefore, it is brought here.

"They do agree to so much of it as covers the barn and the other buildings, you will find on the policy when it is presented to you, each of which were insured; two were insured for $400, and the contents, as they say, for $400. The other portion they deny having insured in those buildings. And they say the smokehouse, which was insured at $5, and, as they say, the contents at $500, was not burnt; and, therefore, they say they are not entitled to pay, not bound to pay for this meat and sausage, burnt in the other room where Mr. Graybill says he told Mr. Hershey it was to be placed after being smoked in the smokehouse.]

"There being then some difficulty with reference to the understanding and construction and the terms of this agreement they have brought it here.

"[With reference to the points that have been presented, I may say that if there were no ambiguities, no difference between them as to what the contents of this paper meant, what it was, if full and clear and easily understood, this first point would have to be affirmed. That is the law in cases where there is no ambiguity, where easily understood. So I shall not affirm that point.

"The second point. That is true. There must be a verdict for $800 according to their own statement. They ask me to say to you the verdict must be for $800 and interest and nothing more. I cannot say that, because that depends upon the construction put upon this policy.

"Were the meat and sausage which the plaintiff claims was destroyed, was it covered by this policy of insurance here presented or not? The testimony of Mr. Graybill is, he made application for its insurance and told the president of the company, who took the application, where it was to be put after it was smoked. He contends that under this policy it was insured; this company contend it was not. And as you find whether it was or was not from the evidence under this policy your verdict will be increased or remain firm at $800.] It cannot be less than that.

"[The policy has been admitted in evidence, and you have heard the explanations and the construction put upon it by each of the parties. They differ. The plaintiff and defendant differ; and the Court must not use its discretion to modify conditions or provisions of the contract entered into by the parties in order to effect what it might consider a more equitable arrangement than that resulting from the enforcement of the strict terms of the policy; but in the construction of an insurance policy it is to be observed, the language of the policy is not in all cases conclusively binding or effective. Grounds may sometimes exist for relief in equity. Thus, in a clear case of mutual mistake, where it plainly appears by the evidence outside of the contract, the real agreement of the parties is not correctly evidenced by the policy; or where there is a mistake on one side, or fraud in introducing it on the other. A written contract may be re-framed to correspond with the real agreement, if the language of the policy is ambiguous and fairly open to doubt. Oral evidence is admissible to explain the real meaning of the parties. Contracts of insurance having been framed by the insurers in their interest, and the insured being obliged to accept the form offered in order to secure insurance, any ambiguity as to the intent or meaning of its terms, what property it is intended to cover, or where situated, will be construed in favor of the insurer, and the contract will be sustained if possible and liberally construed to ensure indemnity. The object of the insurer being protection, that is indemnity against loss, such construction should be placed on their contract, as according to the nature of the transaction will effectuate that object.]

A policy of insurance may be re-framed by oral evidence on the representations made when the policy was delivered to the insurer. In this case Mr. Jacob Hershey, who was then president of the insurance company, visited the place where the insurance was to be effected and took the application himself from Mr. Graybill, who desired to be insured and saw the premises. Mr. Graybill was asked—at the time he got the policy, at the time the policy was delivered to him from Mr. Jacob Hershey, who went home as you remember and wrote out the policy and brought it back—whether Mr. Hershey informed him the meat he was testifying to here, was insured in this policy and his answer was: 'Yes, sir. Mr. Hershey told me. I told him this meat I want insured, not the smokehouse, because it would not hold that much. I had a separate room for smoking and would move it in there. That's the way I always did.' Then was asked the question: 'Please state whether or not he told you that was insured at the time he gave you the policy? A. Yes, sir; he said that is all right.' This Mr. Hershey denies.

"[You will have to judge between them which is most likely to be telling the truth, which is most likely to recollect. Both are interested, one on the part of the company, the other on his own part. This is about the only point in the case. If you believe from the evidence that

Digitized by Google

Mr. Graybill told Mr. Hershey, at the time he was there inspecting the premises to be insured, where these contents were to be, and that was understood by Mr. Hershey, and when he came back he told Mr. Graybill, upon inquiry, it was insured, that covered it, then that would bind the company. If that was not the case then it would not bind the company,] and you will have to say from the agreement whether it is covered by it or not."

Verdict for plaintiff for $1641.25, and judgment thereon. Whereupon the defendant took this appeal, assigning for error, the answers to the points, and the portions of the charge given above in brackets.

Eugene G. Smith and *A. F. Hostetter*, for appellant.

An executed written contract cannot be altered by the uncorroborated testimony of a single witness.

Rowand *v.* Finney, 96 Pa. 196.
Murray *v.* N. Y. Lack. & West. R. R. Co., 103 Id. 43.
North and West Branch Railway Co. *v.* Swank, 105 Id. 561.
Phillips *v.* Meily, 106 Id. 543.
Juniata Building & Loan Assoc. *v.* Hetzel, 103 Id. 507.
Sylvius *v.* Kosek, 20 WEEKLY NOTES, 152.
Frey *v.* Heydt, 20 WEEKLY NOTES, 196.
Cooper *v.* The Farmers' Mut. Fire Ins. Co., 50 Pa. 299.

J. Hay Brown, (*W. U. Hensel* with him), for appellee.

The case is not one of reforming or varying a written contract by parol testimony, but simply the interpretation of the contract by the Court in the light of the evidence offered.

It is the duty of the Court to interpret a contract.

Folsom *v.* Cook & Co., 19 WEEKLY NOTES, 544.

The contract being interpreted by the Court, it is the function of the jury "to determine whether it is established by proof." The whole question in issue here was one of fact, what was meant by the word "contents," the last subject of insurance, rated in the policy at $500. This was left to the jury, with proper instructions from the Court.

July 18, 1895. WILLIAMS, J. This case turns upon the meaning of the word "contents" as used in the policy of insurance sued on. A ground barn and a butcher shop were insured as one building for the sum of four hundred dollars and the contents were insured for four hundred dollars more. A smokehouse was insured for five dollars and its contents for five hundred dollars. The barn and butcher shop were burned with their contents. The smokehouse was not burned, but its contents which had been removed to a storage-room in one end of the butcher shop, were wholly consumed. The question presented on this appeal is whether the smoked meats in the storage-room, which were taken there as fast as they were cured in the smokehouse, were contents of the smokehouse within the meaning of the policy and were to be paid for by the company as part of the loss for which it was liable.

Words must be understood in the sense in which they are commonly used in the business to which the contract in which they are found relates. This contract was to insure the buildings, machinery and stock of a butcher. The president of the company proposing to insure was on the ground. The buildings and the property were examined by him. The evidence shows that in the barn and butcher shops there were a steam engine and boiler with conveniences for handling dressed cattle, machinery for chopping or grinding meat, and for making bologna and other sausages. These, as the plaintiff alleges, constitute the contents of the barn and butcher shop that were insured for four hundred dollars. The smokehouse and storage-room were also pointed out to the president and it was explained to him, as the plaintiff testifies, that the smokehouse could hold but a small amount of meat at one time while the process of smoking was going on, but the hams, sausage, bacon, or other meat was removed from the smokehouse when cured and stored in the storage-room, and that what was wanted was insurance on the smoked goods.

The plaintiff says that the president stated that the smoked meat would be properly insured as contents of the smokehouse, and these words were written in the application and policy with that understanding, viz., that they would include and cover the smoked meats taken out of the smokehouse for storage in the room used for that purpose.

The learned Judge of the Court below left this evidence to the jury for their consideration, telling them if they were satisfied by it the word "contents" used in connection with the smokehouse was understood and intended by both insurer and insured to cover the smoked meats in store whether actually in the smokehouse or not, the plaintiff would be entitled to recover to the extent of five hundred dollars for his loss on these goods. This is assigned as error, and the contention of the appellant is that it permitted an alteration to be made in a written instrument upon the uncorroborated testimony of the plaintiff. But the word "contents" is not a certain and definite description of any particular class of goods. Its meaning must be ascertained by considering the contract, the nature and meth-

Digitized by Google

ods of the business for which the building whose contents are to be insured is to be used, and the understanding and intentions of the parties as expressed at the time the insurance was contracted for. Thus we learn from the evidence in this case that the contents of the butcher shop were not made up of slaughtered cattle, but of a steam engine and various pieces of machinery; while the contents of the smokehouse included hams, bacon, bologna sausages, and other forms of smoked meat. This is, in the absence of a detailed description of the articles in the body of the policy, the only way in which the character and value of the contents of a building can be shown.

But the defendant alleges that as the building was not burned its contents could not be. This is a *non sequitur*. The contents might be destroyed while outside the building, and when that happens the question of the plaintiff's right to recover must depend on whether the purpose of the removal was such as to detach the goods permanently from the building and create a new or an increased hazard not contemplated when the contract for insurance was made.

The investigation of this question is not an attempt to reform the contract but to determine its meaning and extent. The rule in equity governing the reformation of contracts is not applicable therefore, but the jury is at liberty to determine the question presented to them in this case by the preponderance of the evidence. The evidence showing the capacity of the smokehouse, the necessity for the removal of the smoked meat as soon as it was properly cured to some place near by for storage, while a fresh supply of meat for smoking was put in its place, the location of the storage-room and quantity of smoked meats kept in store ready for sale, was relevant to the inquiry in this case and was properly admitted. So was the evidence tending to show that the attention of the insurer was called to the manner in which the smokehouse was used and the smoked meats stored; that he was informed that the smoked meats were what were to be insured in connection with the smokehouse; and that with full knowledge of all the facts he selected the word "contents" as a proper and sufficiently descriptive word to cover the smoked meats whether in the smokehouse undergoing the process of smoking, or in the store-room after its completion. The facts and circumstances thus brought to the attention of the Court and jury were helps to a correct exposition of the words the parties had employed. They tended to corroborate the plaintiff's version of the contract and to sustain his claim. They were persuasive in their character and, as we infer from their verdict, satisfied the jury the words "contents of the smokehouse" were understood and intended by both parties to cover the smoked meats passing through the smokehouse to the room near by in which they were stored till needed for the supply of customers. We see no error in the rulings complained of and the judgment is affirmed.

S. H. T.

Jan. '95, 213. May 8, 1895.

Mix v. Royal Insurance Company.

Deed—Spoliation of—Evidence—Insurance—Waiver—Agent.

Where it is alleged that words were added to a deed for the conveyance of land after it was acknowledged and delivered, the question is not of reformation of the deed but of its spoliation. The spoliation may be proved by either of the parties to the deed, and if it is established and found as a fact the deed may be taken as if the act had never been committed.

In a suit by a wife to recover on a policy of insurance taken out by her on property of which she was grantee in a deed in fee simple, she is competent to prove the introduction of the words "in trust for her husband" after the delivery of the deed, albeit her husband shall have died prior to the trial.

Notwithstanding that a policy of insurance contains a stipulation that nothing less than a written agreement endorsed on the policy shall suffice to establish a waiver by the insurer, yet a waiver may be shown by parol testimony of acts *in pais* of the agent of the company.

Ins. Co. *v.* Todd, 83 Pa. 272; Gould *v.* Ins. Co., 134 Pa. 570, and McFarland *v.* Ins. Co., Id. 590, followed.

Appeal of The Royal Insurance of Liverpool, from the judgment of the Common Pleas of Elk County, entered on a verdict in an action in assumpsit, wherein Cora E. Mix, widow, was plaintiff, and appellant was defendant. The facts of the case, appearing from the pleadings, are that Cora E. Mix, in the lifetime of her husband, by deed of Mary B. Wainwright, dated March 11, 1893, took title in fee simple to certain real estate. The deed was duly recorded. Plaintiff insured the property for $1,869 in appellant's company, and afterwards the property was entirely destroyed by fire. The refusal of the appellant to pay the insurance money was on the ground—*first*, that there had been no proof of loss filed with the company as required by a condition in the policy; and *second*, that the deed to Mrs. Mix contained the words "in trust for Warren Mix," who was at that time living and her husband. On behalf of plaintiffs it was alleged that proof of loss had been waived by the company's authorized agent by parol, and that the words in the deed alleged to constitute a trust for her husband were inserted after its acknowledgment and delivery.

Digitized by Google

At the trial, the Court (MAYER, P. J.), refused to charge that "The deed offered in evidence by the plaintiff, showing that the buildings destroyed were deeded to plaintiff in trust for Warren Mix, she cannot sustain an action on this policy which is in her own name, and the verdict must be for the defendant." Or that "Under the deed offered by plaintiff, there can be no recovery on this policy for any of the buildings destroyed by fire and claimed for in this action," which refusals were the subjects of the first and second assignments of error.

The admission of the evidence to prove the insertion of the words "in trust for Warren Mix" in the deed after delivery, was made the subject of the fifth assignment of error.

The portions of the charge of the Court: "Taylor says that he refused to make a settlement of the loss at that time, and gave as a reason that he had some misgivings as to the origin of the fire, and was not satisfied as to how the fire originated, and in consequence of that refused to settle the loss or make any adjustment of it at that time."

And, "Or if you believe from the testimony of Mr. Taylor himself, that he refused to adjust or make a settlement of this loss on the ground that he had some questions in his mind as to how this fire originated, then we say to you that it was a waiver on the part of the company of this condition in the policy requiring the assured to give sixty days' notice of the statement of her loss," were made the seventh and eighth assignments of error.

And the refusal to charge:—

"One of the conditions of the policy requires formal proofs of loss in a prescribed form to be furnished by the assured within sixty days after the fire, and it being stipulated in said policy that 'no officer, agent or other representative of this company shall have the power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement endorsed thereon, or added thereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached thereto,' and there being no evidence of proofs of loss having been furnished as stipulated, and no waiver in writing having been furnished to defendant, the verdict must be for the defendant," was made the ninth assignment of error.

C. H. Bergner, (with him *McCauley* and *Ames* and *Thomas H. Murray*), for appellant.

The admission of the evidence to prove the addition of the words "in trust for Warren Mix" was error. It was not rebuttal. Plaintiff's case had been made out in chief.

It is incompetent to reform in an action at law a paper upon which suit is founded.

Cadell *v.* Allen, 99 N. C. 542.

Where, in a common law proceeding, a written instrument is to be reformed the proceeding must not only be upon the paper in suit, but the evidence for that purpose should not be thrown into the jury box unless it would be sufficient to move a chancellor to decree reformation where a proceeding directly for that purpose was had before him.

Juniata Building Association *v.* Hetzel, 103 Pa. 514.

And it must be clear, precise and indubitable.

Lycoming Ins. Co. *v.* Sailer, 67 Pa. 115.

Mrs. Mix was an incompetent witness to reform the deed. Her husband was dead and his heirs not present.

Jackson *v.* Payne, 114 Pa. 81.

A total loss is not sufficient in itself to waive proof of loss.

German Am. Ins. Co. *v.* Hocking, 115 Pa. 403.

The doctrine of waiver is founded upon the doctrine of estoppel, and waiver will never be held as occurring unless the company has done something which has misled the insured.

Insurance Company *v.* Brown, 128 Pa. 386.
Welsh *v.* London Assurance Co., 151 Id. 618.

The binding effect of the clause that the interest of the insured must be truly stated is settled in Pennsylvania.

Diffenbaugh *v.* Ins. Co., 150 Pa. 270.

Harry Alvan Hall, for appellee.

If the equitable interest in an estate is in the insured, the fact that the legal title is in another does not amount to a misstatement of his interest or violate a policy which provides that it shall be void if the assured is not the entire, unconditional and sole owner for his own use and benefit.

American Basket Company *v.* Farmville Ins. Co., 3 Hughes, 251.

A representation of ownership is not rendered false by the existence of an equitable title.

Ins. Co. *v.* Fogelman, 35 Mich. 481.

A trustee may insure personal property held by him in trust in his own name.

Cal. Ins. Co. *v.* Union Compress Co., 133 U. S. 387.

Whether goods are owned absolutely by the insured, or held by him in trust, is a question for the jury.

Ins. Co. *v.* Engle, 52 Md. 468.
Pittsburgh Ins. Co. *v.* Frazee, 107 Pa. 521.

Digitized by Google

Whether a misrepresentation as to title is material is always a question for the jury.

Phœnix Ins. Co. *v.* Fulton, 80 Ga. 224.
Williams *v.* Buffalo German Ins. Co., 17 Fed. Rep. 63.
Bellatty *v.* Thomaston Ins. Co., 61 Me. 414.
Franklin Ins. Co. *v.* Coates, 14 Md. 285.
Mutual Ins. Co. *v.* Deale, 18 Id. 26.
Ins. Co. *v.* Chase, 5 Wall. 509 (U. S.)
Columbia Ins. Co. *v.* Lawrence, 10 Peters, 516.

It has been well settled by this Court that it is competent for insurers to waive performance of a formal condition introduced into a policy solely for their own benefit. Such waiver may not be express, but may be inferred from the acts of the insurers, evidencing a recognition of their liability, or *from their denial of liability for other reasons.*

Ins. Co. *v.* Todd, 83 Pa. 272.
Heath *v.* Ins. Co., 1 Cush. 257.
Clark *v.* Ins. Co., 6 Id. 342.
Francis *v.* Ins. Co., 1 Dutch. (N. J.), 78.
Buckley *v.* Garrett, 47 Pa. 204.
Ins. Co. *v.* Taylor, 73 Id. 342.
Bonnert *v.* Ins. Co., 129 Id. 558.
Ins. Co. *v.* Cochran, 88 Id. 230.
Ins. Co. *v.* Moyer, 97 Id. 441.
Snowden *v.* Ins. Co., 122 Id. 502.
Ins. Co. *v.* Dougherty, 102 Id. 568.
Thierolf *v.* Ins. Co., 110 Id. 37.
Ins. Co. *v.* Erb, 112 Id. 149.
Roe *v.* Ins. Co., 149 Id. 94.
Welsh *v.* London A. C., 151 Id. 619.
Fritz *v.* Ins. Co., 154 Id. 384.

Notwithstanding a stipulation in a policy of insurance that nothing less than an express agreement endorsed thereon shall be construed as a waiver of any of its conditions, parol testimony is admissible to show a waiver by acts *in pais* of the insurance company.

McFarland *v.* Ins. Co., 134 Pa. 590.
Gould *v.* Ins. Co., Id. 570.
Ins. Co. *v.* Todd, 83 Id. 272.
Elkins *v.* Ins. Co., 113 Id. 386.
Ins. Co. *v.* Brown, 128 Id. 386
Wachter *v.* Assur. Co., 132 Id. 428.
Ins. Co. *v.* McCrea, 41 Amr. R. 652.
N. W. Iron Co. *v.* Ins. Co., 26 Wis. 78.
Warren *v.* Ins. Co., 16 Id. 439.
Pechner *v.* Ins. Co., 65 N. Y. 195.
Ins. Co. *v.* Wilkinson, 13 Wall. 222.
Ins. Co. *v.* Norton, 96 U. S. 234.
Ins. Co. *v.* Slockbower, 26 Pa. 199.
Buckley *v.* Garrett, 47 Id. 213.
Wood on Ins., 496–7.

July 18, 1895. GREEN, J. The first five assignments raise practically but one question, and that is, the effect of the words, "in trust for Warren Mix," in the plaintiff's deed, upon her right to recover on the policy in suit. It was alleged and proved by the plaintiff, by the testimony of two witnesses other than herself, that these words were not in the deed when it was executed and delivered. One of the witnesses was the grantor in the deed and the other the scrivener who wrote it. The question raised by the proof was not a question of reformation of the deed, it was simply a question of spoliation. Of course the parties to a deed, or either of them, may prove the fact of spoliation without their knowledge or consent, and if the evidence is sufficient to establish the fact the deed is the same as if the spoliation had never been committed. The proof of spoliation in this case is ample without considering the testimony of the plaintiff. It would have been error to withhold it from the jury or to deprecate its sufficiency by comparing it with the kind of testimony which is required in the cases where attempts are made to reform and change written instruments by parol testimony.

There is no merit in the sixth assignment. The title to the real estate was not at issue in this case. No judgment that could be rendered would in any manner affect the right of persons claiming title in Warren Mix. It was an action to recover money due upon a policy of fire insurance made with Cora Mix, not with her husband. He had no interest in it. If she recovers, the money is hers, if she fails it is not his. He could get nothing in any event. She was clearly a competent witness.

On the question of waiver the proof was ample. Two witnesses swore positively to the declaration of the agent that it was not necessary to make out proofs of loss. It is true he denies using the language attributed to him, but that raises only a question of the credibility of the witnesses, which is exclusively for the jury. He was the adjuster of the plaintiff, and was sent as a special agent to adjust this loss and effect a settlement of the claim. He was therefore clothed with the full powers of the company for that purpose. He refused to settle because he had doubts as to the cause of the fire. This was a refusal at the time to pay anything.

On the question of waiver of the proofs of loss, it has been so many times decided that, although a policy of insurance contains a stipulation that nothing less than a written agreement endorsed on the policy will suffice to establish a waiver, yet it is admissible to show by parol testimony a waiver by acts *in pais*, that it is scarcely necessary to refer to the authorities. They have been collected in McFarland *v.* The Ins. Co., 134 Pa. 590, and Gould *v.* Ins. Co., Id. 570. In the case of State Ins. Co. *v.* Todd, 83 Pa. 272, GORDON, J., referring to the case of Ins. Co. *v.* Stauffer, 9 Cas. 397, said, "But in the opinion in that case, delivered by STRONG, J., it is held that it is competent for insurers to waive performance of a formal condition introduced into a policy solely for their own benefit. Also that such waiver need not be express, but

Digitized by Google

may be inferred from the acts of the insurers, evidencing a recognition of their liability, or even from their denial of obligation exclusively for other reasons." In this case as in the present the contention was that the defendant company was not liable because the proofs of loss were not furnished within the designated time, and we held the condition was waived on account of the interference of the secretary of the company with the adjustment.

In the present case the testimony of two witnesses is direct and positive that the special agent sent to adjust the claim expressly told the plaintiff and her husband that it was not necessary to make out the proofs of loss and swear to them and send them in. This was shortly after the fire and after the plaintiff had notified the company of the loss. It is true the special agent denied this, but there were two witnesses against one, and one of them was entirely disinterested, and, in any event, the testimony raised only a question of credibility, which was exclusively for the jury, and the jury gave credence to the plaintiff's witnesses.

The testimony of Taylor sustains the comments of the Court complained of in the seventh and eighth assignments, and we do not think there was any error in the answers of the Court to the second and third points of the defendant as expressed in the ninth and tenth assignments.

Judgment affirmed. W. D. N.

Common Pleas.

C. P. No. 3. September, 1892, 549.

Smith v. The Times Company.

Libel — Malice — Evidence of — Damages— Charge—Setting verdict aside.

It is not error to charge a jury that the amount claimed as damages by the plaintiff is the "utmost limit" to which the jury may go in their verdict.

Everything which a defendant in a libel suit does which tends to injure the plaintiff, may be considered by the jury as evidence of malice.

A failure to establish a plea of justification enhances the damages, because the plea is a reiteration of the libel.

No verdict should be set aside because, in the opinion of the Court, the damages are excessive, unless some obvious wrong produced such damages, and unless there be some rule by which the damages may be computed.

Rule for new trial.

This was an action of trespass for libel, and a verdict was rendered for the plaintiff for $45,000.

The facts are set out in the opinion.

James H. Shakespeare, P. F. Rothermel, Jr., and *A. K. McClure*, for the rule.

A. S. L. Shields, contra.

June 18, 1895. FINLETTER, P. J. From the earliest times, it has been considered the duty of Courts to set aside verdicts for proper cause. It is not easy to see how otherwise justice could be judicially administered.

The only reasons assigned in this case which we consider it necessary to discuss, are those relating to the misconduct of a juror, the charge of the Court and the damages.

Whatever may be thought of the conduct of the juror, the defendants refused to have it properly presented for the judgment of the Court, acquiesced in it, and did not then deem it important enough to be made a part of the record. It is too late now to complain.

The reasons which refer to the charge are:

"6. The learned Judge erred in charging the jury as follows: Let me beg you to consider this case as one of solemn obligation, and to render such a verdict as will satisfy the ends of justice. The plaintiff has fixed his damages in his statement at the sum of $50,000. That is the utmost limit towards which you may go. But between this amount and the smallest sum, your discretion is absolute."

Fairly considered, this should only be regarded as confining the jury to the limits which bound their actions. Those limits were the amount claimed by the plaintiff, and the smallest fraction of that amount. It was no more suggestive that the verdict should be $50,000 than that it should be one cent. In all the cases cited in the argument by the defendants, the jury were told that they could give the amount claimed.

It will be observed that the language used by the Judge was careful and guarded. The larger sum is a limit towards which the jury might go, and that their action must be confined between that and the smallest sum. It was virtually saying that, under certain circumstances, the jury might render a verdict for one cent, or any amount up to $50,000. This in no way indicated that the Judge regarded any fixed sum as a proper one, or that it would be satisfactory to him. In the cases cited, the language of the Judges clearly indicates that a verdict for the amount claimed would not be unsatisfactory to them. There was no admonition to carefully and conscientiously consider the whole extent of their duty in this regard. In the present case, such an admonition accompanied the words complained of, and pervaded every portion of the charge. They were calculated to impress upon the minds of the jury the serious responsibility of their duties, and lead them to a conscientious discharge of their duties. They could in no way

Digitized by Google

tend to lead the jury to a careless or unjust consideration of the case, or belittle or magnify the injuries of the plaintiff, and could therefore have no effect upon the amount of the verdict.

The effect that a fraction of the charge may have upon the jury can be estimated only by considering the whole charge, the circumstances of the case, and the purpose of that which is the subject of complaint.

The counsel for the plaintiff, in his address to the jury, read from the statement filed the sum of $50,000 demanded as damages, and expatiated at length upon its effect in the pleadings, and notified the jury that the insertion of this sum in the statement was not a mere formality, but that the plaintiff sought to recover the entire amount without abatement.

As the counsel for the defendants had abandoned the case, there was nothing to qualify this statement, and give a proper tone to the consideration of the question of damages, but the Judge's charge.

It would, indeed, have been a matter of grievous complaint, if he had not admonished the jury as he did, and thereby, doubtless, prevented a verdict for $50,000. The purpose, therefore, was a proper one, and the matter complained of was in the line of the Judge's duty and in the interest of the defendants.

"7. The learned Judge erred in charging the jury: And if the defendants have sought to prove that his character was bad, and have failed, you may consider the fact that they have persisted in impugning his character, and done so without sufficient evidence, if you should so find."

There can be no doubt that everything which a defendant in a libel suit does which tends to injure the plaintiff, may be considered by the jury as evidence of malice. A failure to establish a plea of justification enhances the damages, because the plea is a reiteration of the libel. An attempt to prove that the character of the plaintiff was bad, would certainly tend to injure him, and therefore success or failure therein was properly a matter for the jury to consider: Struthers *v.* Peacock, 11 Phila. 287.

It was contended in the argument that the Judge erred in calling the attention of the jury, in detail and at length, to the evidence on one side of the case without going equally into the evidence on the other side; and also erred in giving more prominence to the theories upon which one side of the case was tried, and upon the testimony favorable to such theories, than upon the theories and testimony upon the other side. The conclusive answer to this contention is, that the Judge did not at all discuss the theories of the plaintiff and defendants, and that he did not present the evidence, except upon the question of express malice. The only evidence as to express malice was that of the plaintiff and one of the defendants, Mr. McClure, and this was fully and fairly presented to the jury.

Is the verdict justified by the evidence? In considering this question, we must concede to the jury the right to determine what evidence shall be believed; that is, where the evidence is conflicting, they must decide which is worthy of belief; and as to all the evidence, the jury had a right to believe or disbelieve the witnesses. If they erred in this respect, there is no method by which the error can be ascertained or corrected. We must therefore consider the whole case from the standpoint of the jury, and assume to be true all the facts which were necessary to establish the verdict.

The verdict establishes express malice, the good character of the plaintiff, and the persistent persecution of the plaintiff for twelve years.

In addition to this, the jury had a right to consider the manner in which the defendants endeavored to obtain material for the articles—waking up his neighbors at night to question them about the plaintiff, visitations to his creditors and to the bank officers, and the deliberate preparation of the articles and the head-lines, which, as one of the witnesses for the defendants said, occupied three persons ten hours. The refusal of the defendants to disavow the articles might have had a very important bearing upon the question of damages. Perhaps the manner of the cross-examination of the plaintiff had the most damaging effect. The tone and tenor of all of it was to assert the truthfulness of the articles and to belittle and annoy the plaintiff. There was a persistent inquiry into the plaintiff's official and military life, which had nothing to do with the case, and a continuous fire of questions about "dishonored" and "bogus" checks. There was also an improper inquiry into the plaintiff's private business affairs, his bank account and his debts.

It appears from the evidence that, in 1883, the plaintiff was elected president of select council of the city of Philadelphia, and that Mr. McClure sent for him and commanded him to appoint a certain person as chairman of the railroad committee, to which the plaintiff answered, "I told him I could not make such an appointment on my own record, in view of my principles, and he then and there, vindictively and with venom and malice, said to me, I will drive you out of politics, and I will drive you out of town, and I will make you do what I want you to do," and from that day to this "he has lost no opportunity for assailing me and maligning me, and abusing me and traducing my dead father; and at times nothing but a consciousness of my honorable position in the city prevented me from doing violence to that man."

Digitized by Google

It is evident from this that the plaintiff keenly felt his wrongs, but sought no redress. There came a time, however, when the agony of his wife compelled him to forget his injuries and sink his manhood, in an appeal to the generosity of his enemy. He testified: "I said to him, in a manner and tone which made me feel more demeaned than I ever did before, and I hope I ever shall again, 'I trust, sir, that whatever differences, publicly and in malice, have been circulated between you and I, may end. My wife is in great distress; I am fearful of her death. She is anguished with the worriment of the publications that you have made, and I have come to you simply to say, that if you will let the bygones stand, I will be glad to join you,' and he then and there said, 'Smith, I will do nothing more to injure you.'" This was an appeal which should have softened the most obdurate and malignant heart. It was followed in a few months by the two libels now under consideration.

The first matters for the consideration of the jury were the libels. The headlines are as follows: The Dandy Mayor Skips. Col. William B. Smith Shakes Philadelphia Dust from His Feet. A Sudden Flight to the West. His Legacy of Bogus Checks, Protested Notes and Bad Debts. Escaping Prosecution. The Gallant Colonel is at last overwhelmed by his financial irregularities, and dares not wait to meet the issue. He starts for Chicago and Denver well supplied with money, while his protested checks are on every hand. Complications at the Luke Neild Saloon. A Flood of Protested Checks. Bogus Checks for License Fee. Billy's Last Grab. Plastered with Bogus Checks. A Trained Sharper's Great Work.

That these head-lines are libellous is evident; that they were premeditated and malignant may be inferred from the manner of their preparation. They do not, however, equal the malice of the articles themselves, which hold up for the jeers of the public not only the plaintiff, but also his wife, his widowed daughter, and his young son. Never, perhaps, in the annals of the press or in litigation, have there appeared more bitter or unrelenting libels. They spare none—husband, wife, children, the living and the dead, are, all alike, presented for public ridicule and execration. In this connection, the jury may well have considered the long persecution, the pathetic appeal of the plaintiff, the broken promise of the defendant, which so soon and so fearfully followed. The motive which induced all this could not but add to the enormity of the offence. It was the punishment and ruin of a high public official, for refusing to obey the commands of one of the defendants. There was added to this the extraordinary character of the defence and the conduct of the defendants and counsel in the trial of the cause. That it was insulting alike to the jury and the Court is to characterize it mildly. The melo-dramatic declarations of counsel, that they were instructed by their clients to retire from the case, and the departure, showed pre-arrangement. When it is considered that, before this was done, they had exhausted every means to villify the plaintiff, the jury may well have considered it an ignominious retreat which justified their condemnation.

In a case of this kind, it is the duty of the jury to consider the parties themselves. When the defendants began their attacks on the plaintiff, he was a prosperous business man, holding a high official position, and having an unblemished reputation. The defendants were and are the owners of an influential newspaper; the editor, Mr. McClure, for nearly forty years has been conspicuous as a statesman and editor, claiming by his published opinions to mould the policies of parties and the morals of the people. The jury had a right to consider how effective such a paper and such an editor might be in destroying the reputation and prospects of any citizen. And it was their duty to punish the wrongful exercise of this power. This necessarily produced large damages, compensatory and punitive. Doubtless, the jury considered that when, broken in fortune, the plaintiff exiled himself from the city which had so honored him, to build a happier home among far-off strangers, those terrible libels followed him and his family, *passibus aequis*, whithersoever they went.

The nature and character of this controversy was apparent to the jury. The defendant spoke daily to a hundred thousand people whom the plaintiff could not reach. He was excluded from using the only effective answer and remedy by a proper regard for the exalted trust with which the city had honored him.

The jury could not forget and condone the manifest purpose of the head-lines, which was to attract attention, to make a sensation, to sell the paper, to make money by defamation—the meanest of all avarice.

In McBride *v.* McLaughlin, 5 Watts, 375, GIBSON, C. J., said: "That corrective damages may be given for the sake of example, is as old as the law itself."

In estimating damages it may not be proper for a juror to put himself in the place of the plaintiff, and thus fix the measure of his injuries. But when a jury has, under the solemnity of their oaths, and after a due consideration of the evidence, arrived at a conclusion, he who questions their action may well be asked, "Would you consider, in your own case, the verdict excessive?" It is the duty of everyone who passes judgment upon a verdict of this kind to

Digitized by Google

put his own estimate upon the injuries, as he would regard them in his own case. In Hewlett *v.* Cruchley, 5 Taunton, 277, Chief Justice MANSFIELD said: "Could any one say that any rational man would for £2,000, put himself in this position."

Would any rational man, for $45,000, put himself in this plaintiff's situation?

Punitive and corrective damages have always been encouraged, not only because they tended to prevent bloodshed, and to curb the insolent oppression of the powerful, but, above all, to protect the personal rights and reputation of the citizen. Therefore it was that, when money had five times its present purchasing power, a verdict for $2,500 for knocking a man's hat off was sustained; $2,500 for treading down a man's grass; and $20,000 for saying "he is an unworthy man, and acts against law and reason;" and $50,000 for malicious prosecution. In these cases the personal injury was trifling, and the very large damages were sustained as a corrective punishment of the wrongdoers. In the light of these verdicts, and in view of the extraordinary character of the circumstances of this case, would any rational man say that a verdict for $45,000 was excessive? If it be conceded that the verdict was grossly excessive, have we the right, and is it our duty, to set it aside?

There is an unbroken line of English and American cases which establishes the principle, that, in cases of this kind, no verdict should be set aside, because, in the opinion of the Court, the damages are excessive. There must be some obvious wrong which produced excessive damages, and some rule by which the damages may be computed.

In Lehigh Valley R. R. Co. *v.* McKenn, 90 Pa. 127, Mr. Justice TRUNKEY said: "However severe the animadversions sometimes made upon juries, the Courts are bound to conserve their rights in the trial of causes. The organic law secures to the people trial by jury, as it was at common law, and nothing is more offensive in the administration of justice than for the Judge to usurp the disposition of facts."

What obvious wrong is there in the verdict? By what rule shall we measure the injuries and damages? How shall we estimate the compensation? How shall we judge with sufficiency the penalty for the offence? The defendants, in their reasons and arguments, have not pointed out in what respect the verdict is excessive, and have given no method by which it can be corrected. They said only, "If this verdict was in favor of the purest man in the community it would be excessive, but in favor of such a man as he is it is monstrous." This is simply conjecture and abuse, and adds to the injury inflicted by the defendants.

It should be remembered that a request to set aside a verdict in proceedings of this kind is an appeal to our equitable discretion. It should therefore appear that the defendants have at least done nothing to increase the injury resulting from the libels. The defendants in their paper, the day after the verdict, attack the plaintiff, villify the jury, and untruthfully accuse the Judges of this district of improperly drawing jurors. This course of conduct has continued to the present time. Surely it is not calculated to obtain favor or to lessen the evidence of express malice.

We cannot set this verdict aside, as we find no error on the part of the Court or the jury. The trial was conducted with impartiality and great forbearance.

Regarded merely as compensation for the plaintiff, or as punishment for the defendants, the verdict is not excessive.

Even if we were compelled to regard the damages as excessive, it is not a case in which we should exercise our discretion. If the damages are extraordinary, so was the wrong and the injury, so was the baseness of the motives which prompted the pursuit of the plaintiff for twelve years, so was the malignity of the pursuit, and the brutality of the libels, so was the wealth and power and capacity of the defendants to inflict injury, and so was the inability of the plaintiff to protect himself or punish his assailants.

To set aside this verdict would be to insult the honest indignation of the jury for such wrongs and such injuries. It would be to remind them that they had put too high a value upon the reputation of the citizen, and had condemned too harshly persistent traducers. This is not the way to maintain the rights of the individual.

It is manifest, for some reason, that the rights of persons are less regarded in this country than in any other. It is marvelous how tacitly we submit to their violation. Herbert Spencer has wisely said that the greatest danger to our liberties is the equanimity with which we consider the invasion of our personal rights. The most sacred of all rights is reputation and the undisturbed happiness of home. Far be it from a Court of justice to condemn a jury for vindicating those rights, and punishing their insolent invasion. We are not freemen for that we have the power to elect our rulers. He only is a freeman whose every right is protected by law, and whose every injury is fully compensated, and the wrongdoer amply punished by law; and this is justly left to the judgment of the jury, far more capable of estimating these rights and wrongs than the Judges.

The rule for a new trial is discharged.

F. B. N.

Digitized by Google

WEEKLY NOTES OF CASES.

VOL. XXXVI.] *FRIDAY, SEPT. 13, 1895.* [No. 31.

Supreme Court.

Jan. '95, 14. May 6, 1895.

Watterson v. Fuellhart.

Replevin—Claim property bond—Construction of—Sheriff's liability—Evidence—Replevin bond.

A claim property bond given by defendant in an action of replevin is not defective so as to render the sheriff liable for accepting the same because it does not contain the customary obligation that defendant "shall abide the judgment of the Court in all things relating to the premises," when it does show an undertaking that defendant "shall appear and make good his claim."

When the plaintiff in an action against the sheriff alleges that the sureties accepted by him on a claim property bond were insolvent at the time they signed the same, it is competent for the defendant to show that said sureties were then reported to be solvent among men having business with them.

Although in all counties of the State, except Philadelphia and Allegheny, (which are governed by special statutes) the sheriff is answerable to defendant in replevin, not only for the sufficiency of the sureties when the bond is taken, but for their sufficiency when the judgment has determined the property to be in the defendant, the Court will not extend the severe liability to the case of acceptance of sureties on a claim property bond.

If the sheriff, with the exercise of care and judgment, accepts a claim property bond with sureties at the time solvent, or that he has reason to believe solvent, and there was no apparent danger of future insolvency, and permits defendants to retain possession, he is not personally liable to plaintiff if such sureties are insolvent at the time judgment is given for plaintiff.

Appeal of A. V. D. Watterson, administrator of H. T. Knake, deceased, from the judgment of the Common Pleas of Warren County.

The facts of the case and the material assignments of error are set out in the opinion of the Supreme Court, *infra*. Verdict for defendant and judgment thereon, from which plaintiff appealed.

J. H. Donly, (*A. V. D. Watterson* with him), for appellant.

Reputation is not admissible to prove solvency.

11 Am. & Eng. Encyc., 172, and cases cited.

In every correctly written "claim property bond" a condition appears that defendant shall abide the judgment of the Court in all things relating to the premises. (That is, pay the judgment, if against him) or words of like import.

2 Tr. & H. Pr., sec. 1737.
Brewster's Pr., Vol. I., p. 127.
Leisenring's Forms, p. 187.
Morris' Replevin, App. 324-5.
Dunlap's Forms, 175-6.
Fred Schoening & Co.'s Forms.
Morris' Replevin, 305.

As this *sine qua non* was wholly absent from among the conditions of the bond, his Honor ought, as requested, to have declared the bond *in form* worthless to plaintiff.

The sheriff is liable for the ultimate sufficiency of the sureties.

Oxley *v.* Cowperthwaite, 1 Dal. 349.
Pearce *v.* Humphreys, 14 S. & R. 23.

W. W. Wilbur, (*William Schnur* with him), for appellees.

Evidence of general reputation as to want of credit will be received against the sheriff on a question of negligence.

Morris on Replevin, 277.
Scott *v.* Waithman, 3 Starkie's Ev. 168.
1 Greenleaf's Ev., sec. 101.

There is no case where sheriff has been held liable for taking sureties on a claim property bond who are afterwards found insufficient; all the reasons applied in the case of a replevin bond fail where it is attempted to apply them to a claim property bond.

July 18, 1895. DEAN, J. On May 26, 1891, H. T. Knake, plaintiff's intestate, issued a writ of replevin against one W. H. Thompson, for a piano valued at $600. The writ was placed in hands of defendant, Sheriff Henry Fuellhart, who on the second day afterwards, served it on Thompson, who gave to the sheriff a claim property bond, with two sureties, in penal sum of $1200, and retained possession of the piano. Thompson then entered appearance and plea, and on 25th of February, 1892, after trial, plaintiff got a verdict for $550, upon which judgment was entered. Upon this, he issued execution against Thompson, which was returned *nulla bona*. Then plaintiff brought this suit against the sheriff, averring that the property bond accepted from Thompson was defective in form, and the sureties insufficient, and for his neglect in accepting such bond, he was answerable to him in damages. The sheriff, by proper plea, denied his liability. When the case was on trial, the plaintiff offered in evidence the bond, to show it was insufficient in form, in that it did not contain an obligation that defendant "shall abide the judgment of the Court in all things relating to the premises." This, plaintiff argued, was the omission of any under-

Digitized by Google

taking on part of the sureties, that Thompson would pay the judgment against him in the action of replevin. The Court, however, held that the following stipulation in the bond was a sufficient undertaking to that effect: "That if the said W. H. Thompson shall be and appear at the County Court of Common Pleas to be held at Warren . . . . on first Monday of September next, then and there to make good his claim to the piano;" that this was an undertaking by the sureties that Thompson should be successful in his defence of the suit, and if not, the sureties would pay the judgment against him.

Plaintiff then offered evidence, tending to show that at the date of the judgment in the replevin suit, the sureties, J. R. Timmins and A. R. Blood, were insolvent; he further offered some evidence tending to show they were also insolvent when the bond was executed; to this, defendant replied, by evidence tending to show that at that date they were solvent, and worth far more than the amount of the bond.

As to these questions, the Court submitted the evidence to the jury, to inquire and find whether the sureties were sufficient when the bond was taken, instructing them, if they were, and there was a reasonable probability of their solvency at the end of the replevin suit, he had performed his duty; that he was not answerable, absolutely, for their subsequent solvency, but was bound to reasonable diligence, care and good judgment when he accepted them.

Under this instruction, there was a verdict for defendant, and plaintiff now appeals, assigning twelve errors.

The first four are to the ruling of the Court admitting certain evidence as to the solvency of the sureties on 6th of June, 1891, the date of the bond. The question put to the witnesses by defendant's counsel was whether A. R. Blood, one of the sureties, was solvent or insolvent. This was objected to by plaintiff's counsel, on the ground that witness could only testify to what the surety owned and what he owed, leaving the inference of solvency or insolvency to be drawn by the jury. The witness stated he was solvent. Appellant now argues this was proving solvency by reputation. An examination of the testimony, however, shows this to be a mistake. The witness was a brother of the surety, and the latter, previous to this trial, died. The witness knew his brother's affairs in his lifetime, and had assisted in the settlement of his estate. From his thorough knowledge he considered him amply solvent at the date of the bond, and for some time afterwards. He could not give a list of his debts, or a list and value of his brother's properties. But his own means of knowledge of his brother's affairs warranted a belief and this he testified to. As to the alleged error in admitting this testimony, we can only say there are no known means of ascertaining, with absolute certainty, the solvency of men engaged in business; it is seldom other than the owner knows, or can know, just what he owns; it is a rare case that other than the debtor knows, or can know, just what he owes. Still, men act in contracting and crediting on their judgment, because in most cases they can act on nothing else. If Courts, banks, public officers and business men did not move in important transactions until absolutely certain of the solvency of those with whom they dealt, the affairs of the world would stop. Partnerships, banks, corporations and individuals, believed to be solvent, sometimes fail, bringing loss and disaster to those who, in the exercise of judgment, trusted them; but this only shows that in a comparatively small percentage of cases good judgment and care have been at fault; so here, with the most intimate knowledge of his brother's affairs, the witness believed him solvent when the bond was accepted, and that he so continued for some time after. The testimony of the other three witnesses was of the same import; one was his banker, the other two his business partners; from their opportunities of knowledge they testified as to their judgment, and further said that he was reputed solvent among business men. It was proper to give his repute, not to prove solvency, but to negative any assertion of negligence on part of sheriff by accepting sureties reputed solvent. Of itself it was not evidence, but plaintiff had offered evidence which was claimed to show notorious insolvency, and this was in answer thereto.

The fifth to eighth assignments, inclusive, are to the refusal to affirm plaintiff's first to ninth, inclusive, written prayers for instructions to the jury as to insufficiency in form of the bond. The Court, in its general charge, had already interpreted the obligation of the bond as fixing the liability of the sureties for any judgment obtained by plaintiff when the bond was accepted; this was a distinct denial of each of these points, and plaintiff has an exception to the general charge, which puts the error, if error there was, in shape to be corrected on appeal. The interpretation of the written bond was for the Court, and not for the jury; after stating clearly the Court's view of the obligation to the jury, it would have been a wholly useless formality to have read and denied these nine points; the whole nine were but a repetition of the idea that the bond was not properly drawn, so as to fix the liability of the sureties in the event of an adverse judgment in the replevin suit.

We agree with the interpretation of the Court below. The condition that if the principal should appear in Court and there defend and make good his claim to the piano, then the bond

Digitized by Google

to be void, or else to be in full force and virtue, was a full assumption of liability by the sureties; he did appear but did not make good his claim to the piano; in that event the sureties undertook to pay the value, or which is the same thing, the amount of the verdict.

The several undertakings stipulated by a replevin bond constitute distinct and independent conditions, and a breach of any will constitute a forfeiture: Gibbs *v.* Bartlett, 2 W. & S. 33; Balsley *v.* Hoffman, 13 Pa. 603. The defendant, Thompson, having failed to make good his claim to the piano, there was a breach of one of the conditions, and therefore a forfeiture of the bond.

The Court did not err in its construction of the bond, nor was there any fatal error in negativing the points as a whole.

While the bond is entirely sufficient in form, it is doubtless satisfactory to plaintiff to know, even if it had not been, no particular harm would have resulted, for he has shown by abundant proof the insolvency of the sureties at the date of the judgment, so that, if the bond had been in form to meet his approval, it would not have availed to bring him his money from utterly insolvent sureties.

The controlling question in the case is raised by plaintiff's eleventh point, and answer of Court thereto, as follows:—

"It was not enough that the sheriff should have accepted a surety or sureties deemed by him fairly sufficient at the time. It was his duty to regard the fact that the final determination of the replevin suit might be delayed for months or possibly years, during which delay, by the accidents of business or fortune, the obligors thus deemed by him fairly sufficient when accepted might become utterly worthless."

To this the Court answered: "In this point the word 'fairly' is italicized, and I want to have it so understood. I affirm that point. I have already stated to you the same thing, that in determining the sufficiency of the surety the sheriff should have kept in mind the fact that his obligation was to run until the determination of the replevin proceedings. Did he have belief, in good faith and upon reasonable ground, that the surety was not only able at the time to pay the amount of the bond, but had such a credit as to be likely to be good to the determination of the proceedings?"

In effect this point and answer thereto are embraced in appellant's ninth and tenth assignments of error. The same instruction, but with more elaboration, was given throughout the general charge. The sureties at the date of judgment in the replevin suit were insolvent; it is established by the decided weight of the evidence that when accepted they were solvent. What was the measure of the sheriff's responsibility in the acceptance of the sureties?

In Oxley *v.* Cowperthwaite, 1 Dall. 349, and Pearce *v.* Humphreys, 14 S. & R. 23, it is laid down as a settled rule, that as to a replevin bond tendered by the plaintiff for the delivery of the property to him, the sheriff is answerable to the defendant, not only for the sufficiency of the sureties when the bond is taken, but when the judgment has determined the property to be in defendant. And so the law has stood. An examination of these cases will show that they followed the English rule, where the writ lay only in cases of goods distrained for rent in arrears. Oxley *v.* Cowperthwaite was decided in 1788; Pearce *v.* Humphreys, *supra*, follows it thirty-eight years after, and in the opinion, DUNCAN, J., regrets that the rule does not accord with his sense of justice, but considers it too firmly established to be set aside. But in all the cases since, the question was, as in that case, as to the sufficiency of the bond given by the plaintiff, the replevin bond. The liability of the sheriff for the acceptance of sureties in the claim property bond, who were solvent at the time, yet when the event of the suit worked a forfeiture of their bond, turned out to be insolvent, was not a question for decision in those cases. DUNCAN, J., in Pearce *v.* Humphreys, *supra*, says: "If I were to be guided by my own sense of justice, without regard to authority, I must own that it would seem to me that commutative justice would require a different criterion; for as the sheriff would be liable to an action of trespass for removing the goods and delivering them to the plaintiff, when the defendant offers sufficient pledges on the claim of property, and could not justify under the replevin; and that as the criterion there would be their sufficiency at the time, so it ought to be where he delivers up the goods to the plaintiff in replevin. Their apparent responsibility at the time when he accepted them, would have been the justest rule at first. The sheriff does all he can to make diligent inquiry; he ought not to be bound to know what nobody else knows." The intimation here, is, that the sheriff, in a claim property bond, is only answerable for the sufficiency of the sureties when accepted. Again, in Commonwealth *v.* Rees, 3 Wharton, 123, GIBSON, C. J., remarks, when speaking of the decisions in Oxley *v.* Cowperthwaite, and Pearce *v.* Humphreys, *supra*: "The construction in the case of a replevin bond, unjust as it is in its extreme breadth, which holds the officer to a measure of carefulness unprecedented in the case of any one else but a carrier, is founded, as in the case of a carrier, in policy alone; with this difference, however, that the carrier is a voluntary agent, and the officer an involuntary one." And again, in Myers *v.* Clark,

Digitized by Google

3 W. & S. 535, KENNEDY, J., says the decisions in the two leading cases, already cited, have placed "the sheriff under a most unreasonable, if not unjust responsibility." So, although the injustice of holding the sheriff to such a rigorous liability in case of a replevin bond, has been often remarked on by the Court, that responsibility has in no case been denied, and it exists to-day as in Oxley *v.* Cowperthwaite, *supra*, decided more than a century ago, except as to Philadelphia and Allegheny counties, where by the special Act of April 10, 1873, in Philadelphia, if the sureties justify before a Judge, the sheriff is relieved; and in Allegheny county, by Act of May 19, 1871, if they justify before the prothonotary, he is relieved of the absolute responsibility which otherwise the law casts upon him. But it never has been decided in this State, that he is answerable for the solvency of the sureties in a claim property bond, at the end of the trial of the replevin suit. As we have noticed, this Court, with much reluctance, has adhered to precedent in the case of the sheriff's liability on a replevin bond, but this is the first case, so far as we have found, where it was sought to hold him to the same liability on a claim property bond.

The cases cited in suits on replevin bonds, are not necessarily applicable to the claim property bond. The replevin bond is a statutory requirement; without it, the writ cannot be served; if the writ be executed, the situation of the parties is changed; the plaintiff has the possession of the disputed property, before his right is judicially determined; the defendant is deprived of the possession of what may afterwards be found to be rightfully his; the change of status is altogether in favor of plaintiff and prejudicial to defendant, during the pendency of suit. The tendency of the proceeding, if the utmost rigor in exercising sufficient sureties on the replevin bond, be not enforced, would be to tempt the unscrupulous to assert unfounded claims to chattels, and secure possession by the tender of worthless bonds to the sheriff. But if defendant tender a bond with sureties, at the time sufficient, then the suit is at once turned into a chose in action, resulting in a judgment in favor of plaintiff, if the right be in him. The parties, so far as possession of the disputed property is concerned, stand as before the writ, but, if the right be determined in favor of plaintiff, he has a personal judgment against defendant, ripe for execution, and also recourse to the property bond.

We are not inclined to extend a hardship only tolerated because of established precedent, to a case not clearly within the precedent. There is no imperative reason which requires us to hold that a faithful officer, when he executes a replevin writ, shall, at the same time, insure the plaintiff against loss from a contingency which by care he could not foresee; the loss should fall on the plaintiff, the party interested, and not on him who has no interest in the subject of the litigation.

We therefore decide in this case, that if the sheriff, in the exercise of care and judgment, accepted this claim property bond, with sureties, at the time solvent, or that he had reason to believe solvent, and there was no apparent danger of future insolvency, and permitted defendant to retain possession, he did all that the law required of him; the plaintiff can exact nothing more. This was, in substance, the law, as declared by the learned Judge of the Court below, both in his general charge, and in his answers to points; in so declaring, he committed no error. All the assignments are therefore overruled, and the judgment is affirmed.

W. M. S., Jr.

July '94, 30. April 30, 1895.

Evilhock v. Philadelphia, Harrisburg, and Pittsburgh Railroad Company.

Trespass—Negligence—Master and servant—Fellow-workmen—Railroad—Foreman.

In an action in trespass for damages for injuries received while working under the direction of a foreman appointed by the authority of the defendant, if the facts which would constitute the foreman a vice-principal are contradicted, the case must be passed upon by the jury, and must be presented to them free from assumption of proof of the relations being established.

Appeal of the Philadelphia, Harrisburg and Pittsburgh Railroad Company from the judgment of the Common Pleas of Cumberland County, entered in overruling a motion for a new trial in an action of trespass, wherein George W. Evilhock and Sarah, his wife, were plaintiffs, and appellant defendant.

The facts of the case appeared to be that in the early spring of 1891, the Philadelphia, Harrisburg and Pittsburgh Railroad Company, a company controlled by the Philadelphia & Reading Railroad Company, was engaged in building a single track railroad from Harrisburg to connect with the Harrisburg & Potomac Railroad at Bowmansdale, Pennsylvania.

Charles L. Evilhock, the son of the plaintiffs, was employed by one Jos. Taylor, section boss at Leesburg on the Harrisburg & Potomac Railroad, as a member of his gang about the 9th of April, 1891, and had worked with him on this track construction from then up to his death. The men were gathered up each morning and returned each evening by an engine and box or tool car set apart for that purpose.

Digitized by Google

On the morning of April 13, 1891, as was the custom, this engine and car had collected the men, among whom was Evilhock, and on the way to Bowmansdale, picked up one Evans at Boiling Springs, some ten or twelve miles west of Bowmansdale. After reaching Bowmansdale and loading up three open gondola cars with ties, railroad iron, spikes, etc., Evans inquired how many trucks or trollers were out at the end of the construction, and was told three. He then inquired if any more were at hand, as one more could be profitably used. Being told that one was sitting along the track a short distance from where the construction train stood, he directed that it be placed (being a heavy one) in front of the train and propelled in this fashion to the work, a mile or two further east.

The men placed the troller on the track, and it was found too low to reach the bull head of the gondola car, and at the direction of Evans, a railroad tie, about seven inches thick, was placed lengthwise on the bottom of the troller against the car, so as to afford a purchase whereby to propel the troller. Evans stood on the tie and troller, and Evilhock sat on the front end of the tie and troller. The train thus composed of engine, box car and three open gondolas loaded with construction material, with troller at the end, backed down the track at a slow rate not exceeding four to six miles per hour. After proceeding in this way for some three-fourths of a mile, the front end of the troller left the track for some cause unknown, and Evilhock was thrown under the train and killed.

Suit was brought January 14, 1892, by the plaintiffs, and recovery was had on the ground that Evans was a vice-principal and representative of the company defendant, and not the fellow-employee of the deceased.

The plaintiff asked the Court to charge (7th point): "The master is under an implied contract with those whom he employs, to adopt and maintain suitable instruments and means with which to carry on the business in which they are employed. This includes an obligation to provide a suitable place in which the servant, being himself in the exercise of due care, can perform his duties safely or without exposure to dangers, that do not come within the reasonable scope of his employment. If, therefore, the jury believe that the troller on which Charles L. Evilhock was stationed and from which he was thrown and killed was unsafe, or that the method of propelling the same was unsafe and improper, and that he was an inexperienced employee of the railroad company, then the defendant is liable in damages for his death."

To which the Court answered: "If Evilhock was killed by reason of the unsafe condition of the troller, or on account of the unsafe or improper means of propelling the same, and there was no contributory negligence on his part, we think the plaintiff may recover."

Also (10th point): "If the jury believe that the troller was furnished by the defendant, for use in the work of laying its railroad track, that it was unsafe or defective, and that by reason of its defects and unsafeness it was dangerous to use it in front of a train; that Charles L. Evilhock was without experience in railroading; that he took position on the troller, and by reason of its unsafeness was thrown therefrom and killed, then their verdict must be for the plaintiff."

To which the Court answered: "This point is affirmed, unless you find that Evilhock was made aware of the unsafe condition of the troller, or was directed by Mr. Evans to leave the troller and enter another car of the defendant."

The defendant asked the Court to charge (2d point) that "The fatal accident to the deceased did not occur while he was handling or using any of the machinery, tools or appliances supplied by his master, the defendant, for the purposes for which they were supplied, viz., track laying, but while on his way with the construction train to the place of work, and therefore no evidence exists in the case that he was killed whilst making legitimate use of any such tool or appliance for the purpose supplied by the defendant, and in the usual course of his employment at the time of the accident."

To which the Court replied: "This point is refused as stated. We leave it for you to determine whether he, Evilhock, was directed by Evans to ride upon the truck and whether the truck was in a safe condition, or whether it was defective and unsafe, and whether, if defective or unsafe, the accident resulted therefrom. In other words, if this company defendant undertook to carry its employees to the place of their work, they were bound to provide ordinarily safe conveyance for them."

Defendant also asked the Court to charge (11th point) that: "The evidence being undisputed that the company defendant was engaged in the undertaking of track laying and had furnished and supplied all tools, trollers and materials, and had actually entered upon and was in progress with the work when Mr. Evans arrived to act as foreman, and the evidence being also undisputed that Mr. Evans was a competent foreman, the company had performed the full measure of its duty; therefore, if the use of any such tool or appliance was out of his usual and ordinary employment, in the face of the apparent, manifest and obvious dangers connected with it, whether directed by the foreman or not, and his death arose from said act, the plaintiff cannot recover."

Digitized by Google

Which was refused, the Court saying: "We cannot instruct you that the facts are as stated in this point, to wit: that the troller had been used by and in the presence of the deceased for two or three days prior to his death. We cannot instruct you that that has been proven as a fact in this case. You will have to find what the facts are. If Evilhock was aware of the unsafe condition of this troller, and if he took his place in front of the train and he was advised that it was unsafe for him to take that position, because of the alleged bent axle of the troller, or because of the alleged unsafe means of propulsion the accident happened, and he did that with full knowledge of these facts, then he would not be entitled to recover.

"[One of the chief contentions between the parties on this case has been, what relation did Evans bear to the defendant company? Was he, as it is represented, delegated with such unlimited authority by the defendant, in the matter of construction of the railway as to make it, the company, responsible for his defaults, or was he merely a fellow-laborer, or employee, charged with the duty of putting down the track? If Evans held the position and had the authority contended for by the plaintiffs, then the defendant would be responsible if his duties were negligently discharged, and any one suffered harm thereby. In other words, if the accident in this case, was alone due to the manner in which he, Evans, moved the troller, so that Evilhock was killed thereby, and this conduct of his negligent and reckless, and the appliance unsafe, the defendant may properly be expected to respond in damages.

"But, if on the other hand, as is contended by the defendant that Evans was merely sent there as a track layer to direct or aid in putting down the track, and he was a mere fellow-servant, or co-laborer, or co-employee, then the defendant would not be responsible, although his, Evans', negligence may have been the cause of the accident which resulted in the death of Evilhock. A fellow-servant cannot look to his employer to be compensated for harm that may come to him from the negligence of his fellow-laborer, unless it appear that the employer was negligent in the discharge of his duties.

"Now, as we view this case, this question is not of the first importance. The duty of the company defendant, was to use ordinary care and diligence, to provide safe working places for those in its service. This duty rests upon the employer, and he cannot absolve himself from liability by delegating it to any agent. In other words, if the company defendant undertook to carry Evilhock to his place of work and provided a troller which had a bent axle, and which was unsafe and dangerous, then the question of co-employee is not important, because the duty of the railroad company was positive to furnish a reasonably safe truck or conveyance, and if it delegated it to one, however humble his position, he personally became the agent of the company or representative of the company, and the company would be bound to respond in damages for his defaults. The question as to whether Evans was really the representative of the company, or co-employee of the company defendant, becomes a subordinate one. The question is, as we view it, did the company defendant furnish a reasonably safe conveyance to carry Evilhock to his place of work? Did it provide a reasonably safe conveyance? If that way to propel it did not, and delegated it to another one, however humble, it must respond in damages for any default, because its duty was positive to furnish a reasonably safe conveyance, and it cannot be excused by claiming, if it was unsafe, that its agent was at fault, and that he held a minor situation in the company.]"

The answers to points and the portion of charge quoted were made the subjects of the third, sixth, seventh, fourteenth and seventeenth assignments of error.

J. W. Wetzel, for appellant.

A vice-principal is one to whom an employer delegates the performance of his duties, and therein represents the employer, so that his acts are the acts of his principal; but except when and so long as the acts of a foreman, are in the discharge of these duties, one from the employer to his employees, he acts as a workman, and not as a vice-principal.

Ross *v.* Walker, 139 Pa. 42.

The law is too well settled in Pennsylvania now to admit of question, that when the testimony shows no doubt or conflict, it is the duty of the Court to say who are and who are not fellow-servants.

The cases are numerous, not only in Pennsylvania, but in many other States of the Union. The latest are:

McGinley *v.* Levering, 152 Pa. 366.
Crawford *v.* Stewart, 19 WEEKLY NOTES, 48.
Dealey *v.* P. & R. R. R. Co., 21 WEEKLY NOTES, 45; S. C. 40; Leg. Int. 24.
Kinney *v.* Corbin, 132 Pa. 341.

The fact that Evans was foreman and Evilhock an ordinary laborer makes no difference. It is settled that a foreman is but a fellow-workman.

Lehigh Coal Co. *v.* Jones, 86 Pa. 432.
New York R. R. Co. *v.* Bell, 112 Id. 400.
Kinney *v.* Corbin, 132 Id. 341.
McGinley *v.* Levering, 152 Id. 366.

A plainer case of fellow-employee cannot be conceived than existed in this case between Evans and Evilhock.

Digitized by Google

In our view of the case, it would make no difference if the truck was defective or not. The company had no notice of it.

Reiser *v.* Pa. Co., 152 Pa. 38.

A. G. Miller and *John Hays*, for appellees. The foreman was a vice-principal.

Mullan *v.* S. S. Co , 78 Pa. 25.
Delaware and Hudson Canal Co. *v.* Carroll, 89 Id. 374–382.
Hass *v.* Philadelphia and Southern Steamship Co., 88 Id. 269–276.
Penna. and N. Y. Canal and R. R. Co. *v.* Mason, 109 Id. 296–300.
Lewis *v.* Seifert, 116 Id. 628.

The jury should pass on the question of relationship between the deceased and the foreman.

Hass *v.* Phila. & South. M. S. Co., 88 Pa. 268.
Lewis *v.* Seifert, 116 Id. 628.
Indianapolis, etc., R. Co. *v.* Morgenstern, 106 Ill. 216.
Indianapolis, etc., R. Co. *v.* Morgenstern, 12 Am. & Eng. R. R. Cases, 228.
Chicago & N. W. R. Co. *v.* Moranda, 108 Ill. 517.
Chicago & N. W. R. Co. *v.* Moranda, 17 Am. & Eng. R. R. Cases, 564.
Shedd *v.* Moran, 10 Ill. App. 618.
Holton *v.* Daly, 4 Id. 25.
Devine *v.* Tarrytown, etc., Co., 22 Hun (N. Y.) 26.

Agents who are charged with the business of supplying machinery, are not to be regarded as fellow-servants, but rather as charged with the duty which the master owes to the servant, and the neglect of such agent is to be regarded as the neglect of the master.

In line with these principles there are many cases, among which we cite:

Green & Coates Street Pass. R. Co. *v.* Bresmer, 97 Pa. 103.
Phila., Wil. & Balt., R. R. Co. *v.* Keenan, 103 Id. 124.
Tissue *v.* Balt. & Ohio R. R., 112 Id. 91.
Rummell *v.* Dilworth, 111 Id. 343.
Rummell *v.* Dilworth, 131 Id. 509.
Trainor *v.* Railroad Co., 137 Id. 149.

As a general rule, a question of negligence must be submitted to the jury. It should be where there is any substantial doubt as to the facts, or to the inferences to be drawn from them.

P. R. R. Co. *v.* Barnett, 9 P. F. Smith, 259.
Johnson *v.* Bruner, 11 Id. 58.
McKee *v.* Bidwell, 24 Id. 218.
Baker *v.* Fehr, 97 Pa. 70.
Penna. Railroad Co. *v.* White, 88 Id. 327.
Fritsch *v.* City of Allegheny, 91 Id. 226.
Schum *v.* Penna. R. R. Co., 107 Id. 8.
West Chester, etc., R. R. Co. *v.* McElwee, 67 Id. 311.

There was strong evidence to show that Bomberger (the superintendent) knew the troller was defective and unsafe. We have quoted some of the evidence on that subject, and that he informed Evans of the fact. True, Bomberger denied it, asserted that the troller was not defective, but that only made it a question of fact for the jury. If he knew that it was defective and unsafe, he being the superintendent, and Evans being the representative of Sweigard, the knowledge became that of the defendant company and made it liable.

Frazier *v.* Penna. R. R. Co., 38 Pa. 104.
Caldwell *v.* Brown, 53 Id. 453.
O'Donnell *v.* Allegheny Valley R. R., 59 Id. 239.
Ardesco Oil Co. *v.* Gilson, 63 Id. 146.
Patterson *v* Pittsburgh & Con. R. R. Co., 76 Id. 389.

July 18, 1895. FELL, J. As this case was presented at the trial in the Common Pleas, the right to recover depended upon the relation which the foreman in charge of the work and the laborer who was accidentally killed bore to each other. If they were fellow-workmen there was no ground for the action; if the foreman was a vice-principal the plaintiffs made out a case which entitled them to go to a jury. The question as to this relation was made subordinate, and expressly so, to the inquiry whether the defendant had provided safe means for carrying the workmen to their work. This inquiry did not arise in the case. The truck from which the deceased was thrown was not provided by the railroad company as a means of transportation for its workmen, nor was it used as such at the time of the accident. It was an implement or appliance used in laying rails, and the workmen were moving it from one part of the works to another for that purpose. Such trucks were generally carried on the cars, but because of its unusual weight this one was pushed on the track in front of the engine. At the time of his injury Evilhock was on the truck for the purpose of aiding in moving it, and not for the purpose of being carried to his work. The company had provided a train of cars, properly equipped and managed, to carry its workmen. No accident happened to this train, nor was anyone injured while riding on it. By the instruction complained of, the attention of the jury was diverted from the real issue and directed to a false one.

Whether, under the testimony, Evans was a vice-principal is not free from doubt. If the facts had been undisputed, it would have been the duty of the Court to decide the question and instruct the jury accordingly: McGinley *v.* Levering, 152 Pa. 366. As the testimony was not clear and uncontradicted, it was not error to submit it with proper instructions. It is to be hoped that upon a re-trial the relations of the parties will be more clearly defined. The answers to the plaintiffs' points, which are the subjects of the third, sixth and seventh assignments of error, assume either that Evans and

Digitized by Google

Evilhock were not fellow-workmen or that the truck was furnished as a means of conveyance for the workmen. These assignments, together with the fourteenth and seventeenth, are sustained, and the judgment is reversed with a venire de novo. W. D. N.

Jan. '95, 319. May 23, 1895.

Schroder v. The City of Lancaster.

Municipalities—Damages—Conflict of laws—Repeal—Act May 25, 1887, P. L. 267—Act March 21, 1836, P. L. 134.

Statutes which bestow repugnant rights are irreconcilable and the later ones must prevail; but different and distinct remedies may co-exist.

The Acts of March 21, 1836, and May 25, 1887, differ merely in matters of procedure; the latter is cumulative, giving additional powers, to be exercised in a different way than those given by the former Act

Appeal of Francis and Catharine H. Long, from the judgment of the Common Pleas of Lancaster County, entered in dismissing their exceptions to the report of a jury of view appointed by the Court to ascertain the damage, if any there were, sustained by appellants in the taking of their land for municipal purposes by the city of Lancaster.

The facts appear to be that the water department of the city of Lancaster entered upon the appellants' land for the purpose of establishing a pumping station in connection with the water supply of the city. On petition of appellants viewers, under the Act of May 25, 1887, (P. L. 267), were appointed, who made report awarding appellants $470 each.

Exceptions were filed by the city of Lancaster, the fifth of which was: "The water department of the city of Lancaster is regulated by the Act of March 21, 1836, (P. L. 134), which is not repealed by the Act of 1887, and the taking and entering upon land for laying pipes, etc., is subject to the provisions of said Act."

Upon argument (and re-argument) the Court sustained the exceptions, and appellants appealed.

D. McMullen (*W. H. Roland* with him), for appellants.

Article XVI., section 8 of the Constitution of the Commonwealth of Pennsylvania, provides that:

"Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury or destruction."

The Act of May 25, 1887, (P. L. 267), is a general law intended to regulate matters of this nature in all the cities and boroughs of the Commonwealth, and repeals or supersedes all special laws or parts of laws inconsistent therewith. In this case it conflicts with the local law applying to the city of Lancaster only.

A general law bearing upon the same subject matter supersedes previous special Acts, and therefore repeals them by necessary implication.

Best *v.* Baumgardner, 122 Pa. 17.
Nusser *v.* Commonwealth, 25 Id. 126.
Keller *v.* Commonwealth, 71 Id. 413.
Newbold *v.* Pennock, 154 Id. 591.

The Act of May 25, 1887, may be construed as not in conflict with the Act of March 21, 1836, but only as amendatory. The Act of 1836 does not provide for a fixed number of jurors, nor for cases where the owner cannot be found or where the parties are not *sui juris*. The Act of May 25, 1887, remedies these defects.

J. W. Brown, city solicitor, for appellee.

Act March 21, 1836, P. L. 134, is a special Act applying to the city of Lancaster; that of May 25, 1887, is general in its application.

General Acts are ordinarily held not to repeal the provisions of charters granted to municipal and other corporations, or special Acts passed for their benefit, though conflicting with the general provisions.

Endlich on the Interpretation of Statutes, section 228.
City of Harrisburg *v.* Sheck, 104 Pa. 53.

The Act of 1887 is not in conflict with that of 1836.

Quinn *v.* Cumberland, 162 Pa. 62.
Nusser *v.* Commonwealth, 25 Id. 126.
Keller *v.* Commonwealth, 71 Id. 413.

Nor has the Act of May 25, 1887, any repealing clause referring to the Act of March 21, 1836.

A general law on a subject matter which has been provided for in certain localities by special laws will not, although it contains a general repeal of Acts inconsistent with it, annul or alter the special provisions in those localities.

Brown *v.* County Commissioners, 21 Pa. 37.
Seifried *v.* Com., 101 Id. 200.
Dyer *v.* Covington Twp., 28 Id. 186.
Malloy *et al. v.* Com., 115 Id. 25.
Morrison *v.* Fayette County, 127 Id. 110.
Rymer *v.* Luzerne County, 142 Id. 108.
Murdock's Petition, 149 Id. 341.
Bell *v.* County of Allegheny, 149 Id. 381.
Endlich on Interpretation of Statutes, sec. 223.
McCleary, Appellant, *v.* Allegheny County, 163 Pa. 578.

Digitized by Google

July 18, 1895. FELL, J. Proceedings under the Act of May 25, 1887, to recover damages for injuries to the plaintiffs' land caused by the city of Lancaster in extending its water works were set aside on the ground that the Act does not apply to the city, and that the only remedy is that provided by the Act of March 21, 1836. The earlier Act authorizes the city to enter upon and occupy such lands as may be necessary for erecting and maintaining its water works, and provides that if the parties cannot agree upon the compensation to be paid the owner they shall appoint six persons to assess the damages, and in the event of their failure to agree in the selection of suitable persons the Court shall issue a venire and the sheriff shall summon a jury. The Act of 1887 is "to authorize cities and boroughs to condemn property and rights inside and outside their limits for the purpose of obtaining and securing water," and it provides that the parties shall first attempt to agree upon the damages to be paid, and if they fail to do so the Court shall appoint five viewers to assess damages.

The Act of 1887 is general, and relates to all of the cities and boroughs of the Commonwealth. The remedy provided by it is for an injury for which the right to compensation is undoubted, and we see no reason why the defendant should be exempt from its provisions. It does not, however, follow that it furnishes the only remedy open to the plaintiffs. The Acts may both apply and the remedies be concurrent. There cannot be different standards of rights, but there may be different methods of remedy. Statutes which give repugnant rights are irreconcilable, and the later must prevail; but different and distinct remedies may co-exist. The Acts of 1836 and 1887 upon this subject differ in mere matters of procedure. There is no substantial difference in rights or results. They differ only as to the preliminary proceedings which may lead to a settlement or a jury trial. There is no reason why they may not be concurrent and the proceedings be under either. The Act of 1887 has no repealing clause; it is clearly cumulative. It takes away no powers already existing, but gives additional powers to be exercised in a slightly different way but for the same purpose and to the same end.

In Commonwealth *v.* Macferron, 152 Pa. 244, the question was whether when a city passes from one class to another it becomes subject to all the laws governing the class which it enters, and it was held in the opinion by WILLIAMS, J., that it did become subject to them so far as its legislation conflicted with the uniform plan of municipal government provided for cities of the class of which it became a member, and that so far as its former legislation was not in conflict with the legislative plan of the new class it remained in full force. In Quinn *v.* Cumberland Co., 162 Pa. 55, two Acts of Assembly providing different and irreconcilable methods for the performance of a corporate power were under consideration, and it was decided that the repealing clause of the later Act operated upon the former. No question decided in either case arises in this. We have here different methods of procedure provided by different Acts, and no repealing clause in the later Act, and the rule that a previous local statute is not repealed by a subsequent general statute inconsistent with it unless words of repeal are employed for that purpose applied.

The order of the Court of Common Pleas setting aside the report of the viewers and all proceedings is reversed, and the record is remitted with a procedendo. W. D. N.

Jan. '94, 42. May 21, 1895.

In re Denlinger's Estate.

Benham's Appeal.

Orphans' Court—Wills—Construction of—Bequest to a class—Intention.

A bequest to a number of persons not named but answering a general description is a gift to them as a class, and as to who shall be the constituents of this class the intention of the testator must be first sought.

So where a testator devised a portion of his estate to "all the children of my brothers H. and D., share and share alike," M., a granddaughter of H., whose mother died before testator, was held to be entitled to a share of the estate under that devise.

Appeal of Mary C. Benham, from the decree of the Orphans' Court of Lancaster County, in dismissing her exceptions to the report of the auditor appointed to audit the account of the executor of the will of Martin Denlinger, deceased.

The facts, as appeared by the auditor's report, were that Martin Denlinger died on February 10, 1893, having made his will on September 2, 1888, with two codicils, dated respectively November 11, 1889, and December 7, 1892.

In item 5 of this will, after giving one thousand dollars to his brother David, he directed that the balance of one-half of his estate should be equally divided among *all* the children of his brothers Henry and David, share and share alike, and the other half to be divided among the children of his wife's brothers and sisters. At the end of this item he provides, "and in case of the death of any of said children and legatees aforesaid leaving issue, then said issue to take the share or part that the parent would have

Digitized by Google

taken, if living." His wife and both of his brothers David and Henry were deceased at the testator's death, Henry having died in July, 1884, leaving surviving him three children; six children of a deceased daughter, Elizabeth Scott; one child of another deceased daughter, Ann Githens; and one child of still another deceased daughter, Catharine Burnett. All these children of Henry Denlinger had died in the West, intestate, prior to the date of Martin Denlinger's will.

The auditor distributed the portion of the estate given to "all the children" of the testator's brother, Henry, to the three surviving children, and excluded the eight children of his deceased daughters, on the ground that they were not "of the class among whom testator directs distribution of one-half of his estate," and that the intention of the will was to limit the distribution of this portion of his estate to his nephews and nieces only. Exceptions were filed to his report by Mary C. Benham, the child of Ann Githens, and upon their dismissal by the Court she appealed, assigning as error the action of the Court.

John A. Coyle, for appellant.

The relevant item of the will is written, spelled, punctuated and constructed as follows, to wit:—

"5th. After the payment of the Colateral inheritance Taxes and the other incidental Expenses, all the rest, residue and remainder of my Estate, I do order and direct Shall be divided into two equal parts, or shares, and out of the one of Said Shares or parts, I do give and bequeath to my brother David the sum of one thousand dollars, and the remainder of the Said Share or part I do order and direct shall be equally divided amongst all the Children of my brothers Henry and David, Share and Share alike.

"And the other Share, or one-half part of my residuary estate, I do order and direct shall be equally divided and distributed Share and Share alike, to and amongst the Children of the brothers and Sisters of my wife Susan, Viz: Sarah Book, George Spiehlman, and Eliza Hildebrand, who are now deceased, and Henry Spiehlman, Maria Stall, and Hetty Foulk, and in Case of the death of any of said Children and Legaties aforesaid leaving issue, then said issue to take the Share or part that the parent would have taken if living."

It will be observed that the punctuation of the will is bad throughout, and that the testator's provision for the issue of deceased children is not contained in a different item or section from that containing the bequest to the brother's children, but in the same item. It must be taken to refer to both sets of children.

Horwitz *v.* Norris, 60 Pa. 261.
Patrick's Estate, 162 Id. 175.

The decease of appellants' mother prior to testator's death cannot bar her from sharing in the distribution of his estate.

Minter's Appeal, 40 Pa. 111.

If any other construction is put upon this will, the testator will be found to intend to exclude his own heir. The heir-at-law is not to be disinherited by anything less than a clearly apparent intention to pass the estate to another line of succession. To doubt, is to resolve that doubt in favor of the heir.

Cowles *v.* Cowles, 53 Pa. 175.
Faulstich's Estate, 154 Id. 188.
1 Jarman on Wills, 465.

An heir can be disinherited only by express devise, or by necessary implication of such strong probability that an intention to the contrary cannot be supposed.

Rupp *v.* Eberly, 79 Pa. 141.

"If the construction of the will be doubtful the construction is to be as conformable as possible to the general rules of inheritance."

France's Estate, 75 Pa. 220.

The main intent of a testator should govern, and, if possible, all parts of his will be made to harmonize with it.

The words in the bequest to "all my children" entitle appellant to her share in the estate.

Bradley's Estate, 166 Pa. 300.

George Nauman and *J. W. Denlinger*, for appellees.

A bequest to children will not include grandchildren.

Hallowell *v.* Phipps, 2 Wh. 376.
Hunt's Estate, 133 Pa. 260.

July 18, 1895. WILLIAMS, J. The general rule was correctly stated by the learned Judge of the Orphans' Court. A bequest to a number of persons not named, but answering a general description, is a gift to them as a class. What persons constitute the class is to be ascertained when the time comes at which the gift takes effect: Gross's Estate, 10 Pa. 360; Hunt's Estate, 133 Id. 260. Those persons only take in such case who are in being when the gift vests. But we have said on several occasions that this rule of construction is intended to settle the testator's intentions where they do not sufficiently appear in the will itself. It is not to be followed if the will of the testator shows how he intended the class should be made up: Sarver *v.* Berndt, 10 Pa. 213.

In the search after the intention of the testator the first thing to be considered is the language he has selected to express his intention: Horwitz *v.* Norris, 60 Pa. 261. All his words

Digitized by Google

are to be considered, and they are to be given their natural effect if this can be done without violating any rule of law. Our question is therefore whether the will of Martin Denlinger shows how the two classes of residuary legatees to whom he has given practically the whole of his estate are to be made up, or whether this is left to be settled by the application of the general rule referred to and adopted by the Court below?

The scheme of the will is simple. The testator provides for his own burial. He gives to his wife the use of his dwelling house and furniture and the income of his entire estate, real and personal, during her life. He then provides that upon her death his estate shall be divided into two equal parts, one for his own relatives and the other for the relatives of his wife. He describes the two classes in the same paragraph or item of his will, which is No. 5. His own relatives who are to take as residuary legatees are "all the children of my brothers Henry and David, share and share alike." His wife's relatives are described as "the children of the brothers and sisters of my wife Susan, viz., Sarah Book, George Spiehlman and Eliza Hildebrand, who are now deceased, and Henry Spiehlman, Maria Stoll and Hetty Foulk." He then concludes item No. 5 with the explanatory words, "and in case of the death of any of said children and legatees aforesaid leaving issue, then said issue to take the share or part that the parent would have taken if living." The intention of the testator is left in no doubt by his words. The class of residuary legatees who are to take by reason of their relationship to him is made up of "all the children of my brothers Henry and David," and to obviate all doubt about what is meant by the words "all the children," etc., he adds the final clause of item No. 5, expressly providing that if any of these children be dead, "leaving issue, then said issue to take the share or part the parent would have taken if living."

This, as we have said, is a very simple will. It is also a just will. The estate accumulated by joint labor and economy is in the name of the husband, but he recognizes his wife's agency in its accumulation. He is about to let go of it forever. He turns the use of it all over to his wife while she lives, and at her death provides for its division into two equal parts. One to descend to his heirs, the descendants of his brothers. The other to go to her heirs, the descendants of her brothers and sisters, and he provides for a distribution among these heirs-at-law of each, in accordance with the provisions of the intestate laws. Item No. 5 must be read together, and so read the meaning of the testator is so clear that the resort to any artificial rule to ascertain his intention is unnecessary. The contention of the appellant is well grounded. The decree appealed from is reversed, and the record remitted, that distribution may be made in accordance with this opinion. W. D. N.

Orphans' Court.

April, 1895, 116.

Whelen's Estate.

Wills — Codicils — Construction — The words "request" and "desire."

A codicil is to be interpreted in the light of the circumstances surrounding the testator at the time of its execution, and of the reasons which induced it—especially where they appear upon its face; and as its purpose, ordinarily, is merely to modify or add to and not to revoke, it is only permitted to change the will to the extent that it is inconsistent with it.

A clear gift cannot be cut down by subsequent words, unless such words show an intention equally clear.

It is the rule in Pennsylvania that when words of request or desire follow an absolute gift and the benefit contemplated in favor of another is to be accomplished, not by the direct "request or desire" of the testator, taking effect at the expiration of a prior limitation, but through the agency of the original legatee, invoked by the testator's request, the person or class in whose favor it is invoked cannot assert the existence of a trust which can be enforced by decree.

Exceptions to adjudication.

The facts are stated in the opinion of the Court.

Charles B. McMichael and *William Drayton*, for the exceptions.

J. Willis Martin and *W. R. Smith*, contra.

July 6, 1895. PENROSE, J. A codicil is to be interpreted in the light of the circumstances surrounding the testator at the time of its execution, and of the reasons which induced it — especially where they appear on its face; and as its purpose, ordinarily, is merely to modify or add to, and not to revoke, it is only permitted to change the will to the extent that it is inconsistent with it. "It is the established rule" (1 Jarman on Wills, *160) "not to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil." See also, 2 Greenl. Ev. sec. 681; Doe *v.* Hicks, 8 Bing. 479; 2 Williams on Executors, 220, etc., etc., etc. In Quincy *v.* Rogers, 9 Cushing, 291, it was held that a codicil and will are "to be construed in reference to each other, to determine, from

Digitized by Google

change of circumstances or otherwise, what it is intended to alter, and what to retain and confirm; the codicil changing the will so far only as is manifest. . . . . And where the testator *expresses in a codicil a determination to alter his will in one particular, he thereby negatives, by implication, any intention to alter it in any other respect.*" Our own cases of Wetter's Appeal, 20 WEEKLY NOTES, 499; Reichard's Appeal, 1 Crumr. 232, and Sheetz's Appeal, 1 Norris, 213, are decided in accordance with these principles, and very many other illustrations are found in the text books.

In the present case, the testator, reciting that his sons and certain of his daughters had been advanced, after giving to two of his other daughters $30,000 each, and to another, who had received $10,000, $20,000, in order that the shares of the daughters at the time of his death "may be equal,"—giving to them also, for life, the house in which he lived, gave all the rest of his estate to his executors in trust to pay $2,000 per annum, for life, to a son, $1,000 per annum, for life, to a daughter-in-law, $1,000 per annum, for life, to her daughter, and $3,000 per annum, for life, to each of the three daughters and to another daughter-in-law; the entire surplus income in each year, while the estate is so held, being given to seven grandchildren, there named, in equal shares—and at the death of the survivor of the daughters and daughter-in-law, the principal to be divided among these seven grandchildren, equally, subject to the annuities to the son, the other daughter-in-law, and her daughter.

A codicil executed the day after the execution of the will revoked, for reasons there stated, "any legacy," to one of the residuary legatees, and "in place and stead thereof" gave $50,000 to the Women's Christian Association of Philadelphia "for the support of the Whelen Home in Bristol . . . . the capital to be safely invested in good city mortgages by the managers of the board of the parent society."

If this codicil is to be understood as giving to the charity designated a legacy of $50,000, presently payable, it works a most radical change in the provisions and general scheme of the will. The principal of the estate, the whole of which after payment of legacies given to the daughters to equalize them with the other children who had been advanced was, in the opinion of the testator, required to be held in order to properly secure beyond all contingencies the annuities of $3,000 to his daughters and daughter-in-law—as shown by the provision that it should not be divided until the death of the survivor, is at once reduced by the payment of $50,000, and a priority over the annuities thus given to the legatee; the surplus income, of which the six grandchildren who had not incurred his displeasure were each to receive one-seventh, is reduced by the withdrawal of a portion of the principal exceeding one-half of the amount of the pecuniary legacies to the three daughters; and each of them is also subjected to a reduction of over $7,000 (one-seventh of $50,000) from his or her ultimate share of the *corpus* of the residue. And yet it is said to be a canon of construction "that a clear gift cannot be cut down by any subsequent words unless they show an equally clear intention" (Kiver *v.* Oldfield, 4 DeG. & J. 30; Wetter's Appeal, 20 WEEKLY NOTES, 499; Sheetz's Appeal, 1 Norris, 213.)

These results are avoided if the taking effect of the bequest is postponed until the expiration of the trust for the protection of the daughters and daughter-in-law, and payment made—when the estate under the provisions of the will is to be divided among the grandchildren, out of the share of the residue originally given to the one whose participation in the distribution the codicil revokes. The will is thus undisturbed by the codicil except as it affects the grandchild whose action induced it; the legatee will be paid at the time that the superseded beneficiary would have received her share (which is ample for the purpose) had she not incurred the displeasure of the testator; and effect is given to the assertion in the codicil that the legacy is "in place and stead of" the original gift. This we think, under the authorities referred to, is what the testator intended.

With regard to the exceptions relating to the furniture, plate, etc., but little need be said; for while it is not always easy to determine whether words of request or desire, used by a testator, are to be understood in a mandatory or in a precatory sense, it seems to be settled in Pennsylvania that when they follow an absolute gift and the benefit contemplated in favor of another is to be accomplished, not by the direct "request or desire" of the testator, taking effect at the expiration of a prior limitation, but through the agency of the original legatee, invoked by the testator's request, the person or class in whose favor it is invoked cannot assert the existence of a trust which can be enforced by decree. And it is significant here that while the interests of the grandchildren in the residuary estate are protected by a trust, and while the residence is devised to the daughters expressly for life, the gift of the furniture, etc., as to which the "request" is made, is without limit or restriction in point of duration.

The exceptions with regard to the award of the furniture are overruled; the other exceptions are sustained, and the adjudication modified accordingly. The necessary decree will be prepared by counsel. F. B. N.

Digitized by Google

INDEX

OF

ALL THE CASES REPORTED IN THIS VOLUME

BY

HENRY BUDD, Esq.

ABANDONMENT. Abandonment is a mixed question of acts and intention and is ordinarily for the jury. Bartley *v.* Phillips, 19.

ABSENCE. Where a person is absent for many years without being heard of, a presumption arises not only of his death, but of his death without issue. (O. C.) Duffy's Estate, 199.

ABUTTING OWNER. An abutting owner has such an interest in the highway that he may obtain a bill for an injunction against its obstruction by a mere wrong-doer. Thomas *v.* The Inter-County Street Ry. Co., 176.

ACCEPTANCE. Payment of freight and receipt of goods are not necessarily an acceptance of the goods. Davis *v.* Koenig, 51.

ACCELERATION. The refusal of a widow to accept the provisions of her husband's will accelerates the gifts therein taking effect at the expiration of her estate to this extent, only, that the legatees are in being or can be ascertained or have reached the age or fulfilled the conditions prescribed by the will as requisite to their taking. If a *hiatus* be thus caused the estate in the meantime will pass under the intestate laws or to the residuary legatee, if there be one, as, for the time being, not specifically disposed of. (O. C.) Keys's Estate, 231.

ACKNOWLEDGMENT. Validation of deed defectively acknowledged. See EVIDENCE. New York & Ontario Land Co. *v.* Weidner, 461.

Under the Act of February 24, 1870, a certificate of a justice of the peace to an acknowledgment by a married woman to the conveyance of her interest in real estate is conclusive, except in cases of fraud or duress. Carr *v.* H. C. Frick Coke Co., 493.

ACTS OF ASSEMBLY.

1718, February 22.	Feme Sole Trader, 325.
1721, August 26.	Fireworks, 281.
1770, February 24.	Conveyance of Wife's Estate, 493.
1772, March 21.	Action against Justice, 389.
1810, March 10.	Fees of County Officers, 297.
1814, March 28.	Fee Bill, 507.
1830, February 6.	Peddling of Clocks, 1.
1834, February 24.	Decedent's Estate, 95.
1836, June 13.	Common Schools, 348.
1836, June 16.	Sheriff's Sale, Advertising, 41.
1836, June 16.	Municipal Liens, 261.
1836, June 16.	Sequestration, 537.
1842, July 12.	Abolition of Arrest on Civil Process, 215.
1844, May 6.	Lapsed Legacies, 71.
1846, April 20.	Use of Lien as Money at Sheriff's Sale, 265.
1848, April 11.	Married Women, 378.

ACTS OF ASSEMBLY—*Continued.*

1851, April 15.	Recovery in Case of Death by Violence or Negligence, 69, 325.
1854, May 8.	Civil Damage Act, 238.
1855, April 26.	Recovery for Death from Negligence or Violence, 69.
1855, May 4.	Feme Sole Trader, 325.
1855, April 26.	Charities, 369.
1856, April 22.	Limitation of Actions, Trust, 92.
1857, June 9.	Paving by Street Railway Company, 138.
1860, March 31.	Burglary, 115.
1860, March 31.	Perjury, 447.
1863, April 22.	Housebreaking, 115.
1866, February 14.	Appeal from Appointment of Receiver, 128.
1866, March 23.	Municipal Liens, 108.
1868, April 2.	Fee Bill, 507.
1868, April 15.	Insurance for Benefit of Wife, 380.
1869, March 17.	Attachment, 552.
1870, April 6.	Partnership, 111.
1870, April 7.	Sale of Corporation Property, 537.
1871, April 6.	Fees of County Officers, 303.
1872, March 6.	Fees of County Officers, 303.
1873, March 27.	Street Railway, 428.
1874, April 22.	Submission of Case to Court without Jury, 26.
1874, April 29.	Corporation Act, 55.
1874, May 23.	Streets, 545.
1874, June 13,	Bills of Lading, 242.
1876, May 1.	Municipal Improvements, 457, 489.
1876, February 17.	Assigned Estates, 265.
1876, March 31.	Fees of County Officers, 297.
1877, March 23.	Mortgage of Land in two Counties, 260.
1878, May 22.	Change of Venue, 198.
1879, June 4.	Charities, Taxation, 482.
1879, June 11.	Fire-escapes, 121.
1881, June 8.	Streets, 545.
1883, May 17.	Investigation by City Councils, 89.
1883, June 1.	Fire-escapes, 121.
1885, June 1.	Bullitt Bill, 89, 236.
1885, June 3.	Fire-escapes, 121.
1887, May 13.	Liquor Law, 363.
1887, May 19.	Execution, 279.
1887, May 23.	Evidence, 447, 553.
1887, May 24.	Streets, 457.
1887, May 25.	Procedure Act, 32, 124, 276.
1887, June 3.	Married Woman's Property Act, 10, 378.
1889, April 23.	Bicycles, 233

Digitized by Google

ACTS OF ASSEMBLY—*Continued.*

1889, May 9. Embezzlement by Banker, 503.
1889, May 14. Street Passenger Railways, 153. 160, 173, 317.
1889, May 23. Municipal Assessment, 457.
1891, May 12. Cure of Defective Acknowledgment, 461.
1891, May 12. Lien for Wages, 140.
1891, May 16. Road Law, 219.
1891, May 16. Municipal Improvements, 525.
1891, June 8. Taxation, 137, 291.
1891, June 9. Liquor Law, 367.
1891, June 9. Election Law, 385.
1891, June 19. Election Law, 385.
1893, May 23. Boroughs, 102, 179.
1893, June 10. Quieting Title, 444.
1893, June 10. Election Law, 385.
1893, June 12. Contract for Making and Repair of Public Roads, 160.

ACT OF CONGRESS.

U. S. R. S. § 5219, 291.

ADMINISTRATOR. An administrator, appointed by a register of wills in Pennsylvania, will not be surcharged on account of expenditure of funds of the estate in an effort to preserve assets in another State, but he takes the risk of failure should he expend funds in a speculative manner, albeit he act in good faith and on the advice of those upon whom decedent relied. Estate of Shinn, Shinn's Appeal, 33.

Although in respect to certain conduct of an administrator the court surcharge him, yet, if it appear that, in all other respects, his management of the estate shows sagacity and industry, an allowance of full commissions by the Orphans' Court will not be reversed. Estate of Shinn, Appeal of Trenton Iron Company, 36.

Action by or Against. Set-off as applicable to. See SET-OFF. Hicks *v.* National Bank of Northern Liberties, 424.

ADMISSIONS. Effect of submission to court as admission of fact. See PRACTICE. Collins *v.* The London Assurance Corporation, 26.

ADVANCEMENT. Where a testator by his will directs his executors "to advance by way of loan" to a son a sum of money on the arrival of the son at a certain age, and, the son reaching said age in the father's lifetime, he himself gives to the son the said sum and takes the son's note therefor, which, by a codicil to his will, he directs shall bear interest to be deducted from the son's income given him by the will during the life of the testator's widow, and, at her death, the principal to be deducted from the share then payable to the son the transaction is a loan, although made payable in a specified way, and not an advancement. Assigned Estate of Edward S. Handy, 265.

ADVERSE POSSESSION. The fourth section of the Act of June 13, 1836, relating to common schools, confers no power on school directors to take the possession of real estate, held by trustees for the general use of the neighborhood as a school house and its appendages, except by conveyance to the said trustees. The possession of such property by the school directors with the assent of those interested, while jointly occupied for Sunday-school purposes, church meetings and public gatherings, is not such adverse possession as would confer an absolute title or raise a presumption of a grant to them. (C. P.) *In re* Old Eagle School Property, 348.

D. and A. inherited from their father and became seized as tenants in common of a certain tract of land. Without a definite partition of record, by mutual consent they occupied several portions of the land in severalty. J., a son of D., went to live with his uncle A. Several years afterward, A., who was unmarried, died intestate, leaving as his sole heir at law his brother D. J. continued to occupy a part of the tract of land belonging to A. Two years afterward, D. conveyed by deed the coal under the whole tract to R., and by mesne conveyance it passed into the possession of the F. Company. No question was raised as to the possession of J. during the lifetime of his father D., who died thirteen years after the conveyance of the coal to R.; but, fifteen years after the death of D., his other children, claiming that the whole tract belonged to their father, began proceedings in partition against the widow and heirs of J. The defence set up was (1) a parol gift from A. to J. and (2) adverse possession in J. and his heirs for more than 21 years. In this action the verdict and judgment were in favor of J.'s widow and children, the evidence being as to the question of possession of the surface only. Subsequently the F. Company began to mine coal under the tract belonging to the widow and heirs of J., who brought an action of trespass therefor. It appeared that J. knew of the sale of the coal and received some of the proceeds of the sale, and that the surface and coal were assessed for taxes separately from the time of sale; *held*,. (1), that the proceedings in partition being between the children of D., who claimed under their father, and J.'s widow and children, who claimed under their uncle A., the judgment in that case was not even persuasive evidence against the title of a purchaser for value of the coal; (2), that there was nothing in the evidence to show adverse and hostile possession of the coal in J. or a gift from his uncle A. Moreland *v.* H. C. Frick Co., 496.

ADVERTISEMENT. Advertisement necessary for sheriff's sale. See SHERIFF SALE. Hollister *v.* Vanderlin, 41.

AFFIDAVIT OF DEFENCE. While the construction of an affidavit of defence should be in favor of the plaintiff and against the party making it, the defendant is under no duty to deny a liability not fairly arising from the statement. Barker *v.* Fairchild, 358.

Where an affidavit of defence, while not full, is as full as the statement and meets all its allegations and inferences, fairly to be drawn from it, imposing liability, it is sufficient. Id.

Where an affidavit of defence states with sufficient clearness facts which entitle the defendant to a trial by jury, it must be assumed that he is prepared to introduce testimony tending to prove at least all material averments. National Bank of Jamestown *v.* Scofield, 361. Scofield's Appeal, 362.

The statements of an affidavit of defence are to be taken as absolutely true and judgment must be refused where the terms of the affidavit are a positive denial of the plaintiff's claim or show facts that, *prima facie*, amount to a defence. Bryson *v.* Home for Disabled and Indigent Soldiers, 362.

Where a defendant in an action for rent alleges that an injunction, issued to restrain him from interference with the work of a railroad company, prevents his possession and use of the demised premises and that this amounts to an eviction, the case should be sent to a jury. Friend *v.* Oil Well Supply Co., 18.

In an action to recover against defendants who are charged in the statement as members of an association, for coal furnished to said association, an affidavit of defence that affiant "is not now and has not been connected in any way with the defendant association since December 13, 1892; that he is not indebted to plaintiffs in any sum whatever for coal sold and delivered, or for any other account whatsoever;" that plaintiffs never dealt with said association while deponent was a member, and that one of the plaintiffs knew that deponent was not a member of said association, is sufficient. Rhoads *v.* Central Coal Dealers' Association, 48.

Digitized by Google

AFFIDAVIT OF DEFENCE—*Continued.*

When an affidavit of defence alleges that goods were not of the quality contracted for and that there was a warranty in writing and annexes two letters of the plaintiff, which do not in themselves show a positive warranty, but which might have that effect if taken in connection with a letter of the defendant, which is presumably in the plaintiff's possession, and which is not set out by the defendant, but is alluded to in one of the letters of the plaintiff attached to the affidavit, the court is not in position to pass upon the effect of the plaintiff's letter, and, a warranty having been alleged, the case must be sent to a jury. Baugh & Sons Company *v.* Mitchell, 228.

See PLEADING; PRACTICE.

AGENT. Where two parties appoint an inspector to pass upon the quality of material furnished by one to the other, he is the agent of both parties and it is not necessary to render his action binding that it be expressly agreed that he shall be able to so bind them by his decision. Park Fire Clay Co. *v.* Ott, 105.

ALTERATION. If an alteration in a written instrument is material and in the interest of the party producing the writing, it gives rise to a suspicion which it is incumbent upon him to remove. Lilly *v.* Person, 382.

Any alteration of negotiable paper, which increases the liability of the maker without his knowledge, is a forgery. If the alteration be apparent on the face of the note, it is notice to an endorsee and the latter is not an innocent holder for value. Gettysburg National Bank *v* Chisolm, 472.

AMENDMENT. A declaration in trespass may be amended six years after the right of action accrues, if no new cause of action be introduced by the amendment. Fillman *v.* Ryon, 391.

When the gist of an action is extortion of money and the statement charges the extortion as brought about by a conspiracy, an amendment striking out the charge of conspiracy does not change the cause of action. Id.

AMICABLE EJECTMENT. A judgment by confession against a lessee, in an amicable ejectment for breach of covenant, contains no element of damages in the nature of mesne profits, and so far as the costs of action may be regarded as a species of damage, they are merely a debt arising from a breach of contract and a capias ad satisfaciendum for costs will, therefore, not lie. Lang *v.* Finch, 61.

APPEAL. An appeal from an interlocutory order of the court in equity practice is not a supersedeas and when the jurisdiction of the court attaches the orders of the court are peremptory upon the party on whom they are made and he must obey. An attachment for contempt will lie upon disobedience. The proper practice when a supersedeas is desired is to apply to the Supreme Court for a special order. Haught *v.* Irwin, 128.

Pending disposition of an appeal from an interlocutory order it is proper for the court, in cases in which a receiver has been appointed, to appoint a depository where all books and papers necessary for the receiver's compliance with the order of court may be held and access given thereto to both parties subject to such restrictions as the court may think best. Id.

An order was made by the Orphans' Court opening a decree of confirmation of an executor's account, upon application promptly made by one who was a minor when the account was filed and unrepresented by guardian or otherwise, *held* as the order was interlocutory, no appeal lay therefrom. Long's Estate, 331.

There can be no appeal from an interlocutory decree. For examples see EQUITY PRACTICE, Offerlee *v.* Reynolds Lumber Co. 540.

APPORTIONMENT. Where part of land subject to a charge is sold at judicial sale, any apportionment

APPORTIONMENT—*Continued.*

which the owner of the charge and the party to pay agree upon is binding, but, in the absence of such agreement, apportionment of the encumbrance should be based upon the respective values of the various portions. Van Reed *v.* Jones, 549.

Where an apportionment has been recognized by the life owner of the charge for many years, it cannot be reopened and arrearages of the difference, between what has been paid and what the legal rule would have required, be exacted by the life owner's administrator; but his heirs, who claim in their own right as remaindermen, are not bound by past payments and may claim for the future on the legal basis. Id.

ARBITRATION. Where parties to an executory contract agree that all disputes arising in relation thereto shall first be submitted to the arbitrament of one or more named persons they are bound by the agreement and cannot seek redress elsewhere, until the person or persons so chosen have been discharged by having made an award or otherwise; *aliter* where the agreement is to submit to persons to be afterwards agreed upon. Gowen *v.* Pierson, 5.

Where parties to an executory contract agree to submit any differences which may arise to certain named arbitrators and a dispute having arisen, the arbitrators meet at the request of one party, and the other, though properly notified of the meeting and given full opportunity to attend, neglects to attend and an award is made against him, he cannot afterwards, in an action on the award, raise as a defence matter which he could have presented before the arbitrators. Id.

ASSIGNMENT FOR BENEFIT OF CREDITORS. An assignment of property by a debtor to a creditor, as security for a debt due him, is not such an assignment in trust for the benefit of creditors as must be recorded within thirty days, but is valid without record at least so far as it concerns personalty. Assigned Estate of Edward S. Handy, 265.

Where a debtor owns an undivided interest in remainder in an estate, which embraces several pieces of realty, and the assessed values of the properties show a small margin in the favor of the debtor after the payment of his debts, yet, as his interest is not to be determined until after a life estate, there is a sufficient element of uncertainty to justify a court in granting an order of sale under the Act of February 17, 1876, P. L. 4, on the petition of an assignee for benefit of creditors. Id.

While the Act of 1876, in terms, applies only to real estate, yet, as it is a remedial statute, it is to be interpreted liberally and where an estate in which the debtor has an interest is composed of both realty and personalty and it is within the discretion of the trustees of said estate to distribute the same in any way they may see fit, so that the share of the debtor may be assigned to him either in personalty or realty or partly in each, the Court may make an order of sale of the debtor's share. Id.

The fact that such a sale deprives a lien creditor of his right, under the Act of April 20, 1846, P. L. 411, to use his lien as money in bidding at the sale does not prevent a sale by order of court under the Act of 1876. Id.

Before ordering a sale under the Act of 1876, it is the duty of the Court to ascertain and fix the priority of the liens which will be discharged by the sale. Id.

A releasing creditor, who has received his proportionate share of the sum realized from the assets of an estate assigned for the benefit of creditors, has no further claim upon that sum and may not participate in a distribution of the shares of other creditors who failed to accept the

Digitized by Google

ASSIGNMENT FOR BENEFIT OF CREDITORS—*Continued.*
terms of the assignment, or who, having accepted the terms of it have not claimed their dividends, or can not be found, nor has he any standing to contest the payment of such dividends to the assignors or their personal representatives. Ralston's Appeal, 521.

ATTACHMENT. After seizure, and prior to the dissolution of an attachment, the property represented by bills of lading is in *custodia legis* and cannot lawfully be sold, without an order of Court, but, after the attachment is dissolved, the rights and powers of the pledgee are the same as before the seizure, subject only to the duty of retention, imposed by the bond given on the dissolution of the attachment. Richardson *v.* Atlas National Bank, 242.

An attachment execution issued on a judgment more than five years old must be accompanied by a scire facias to revive judgment. (C. P.) Sweeting *v.* Wanamaker, No. 2. 279.

A writ of attachment under the Act of March 17, 1869, section 5, as between successive writs under that Act, is a lien from the time the writ comes into the hands of the proper officer for service and, as between it and a writ of foreign attachment served later upon the same day, is a prior lien. Underhill *v.* McManus, 552.

See PRACTICE.

BANKS AND BANKING. A bank, acting as clearing house agent for another, is only bound to act, in the matter of collecting checks, through the clearing house and is not required to present them at the bank on which they are drawn. Farmers and Mechanics Bank *v.* Third National Bank, 47.

The question of the extent of the power of a bank cashier to bind the bank by his action, apparently within the scope of his duty, is one of fact for the jury. Id.

When a bank officer, after known insolvency, receives money over the counter and does not mingle it with the general funds, but keeps it separate with the intention of returning the identical money, this does not amount to a receipt of money as a bank deposit. Commonwealth *v.* Junkin and Sponsler, 503.

See CLEARING HOUSE.

BENEFICIAL SOCIETY. A stipulation, assented to by a member of a beneficial society, that benefits should be paid to those named by him as beneficiaries after his death, only upon execution by them of a release of all claims against a certain contributor to the benefit fund is not contrary to public policy and, if contained in the regulations of the company, the execution of the release becomes a condition precedent to any payment by the company. Kinsloe *v.* Davis, 258.

A member of a beneficial society, who survives the beneficiary he has nominated and has not availed himself of his right to substitute another, is presumed to have intended that a by-law of the society, governing the matter of the right to the fund, should operate. Fischer's Appeal, 380.

There is a material distinction between beneficial societies and life insurance companies, the philanthropic element in the former being absent from the latter. Id.

BICYCLES. The Act of April 23, 1890, has established the character of the bicycle as a two-wheeled carriage and the rider of a bicycle has the same rights of travel on a turnpike as the owner of a two-wheeled carriage, drawn by a horse, and is subject to the same restrictions. Geiger *v.* Perkiomen & Reading Turnpike Co., 233.

When a turnpike company is allowed to collect toll upon carriages of burden or other character according to the number of wheels and horses drawing the same, it

BICYCLES—*Continued.*
may charge the toll of a two-wheeled carriage upon a bicycle. Id.

The only restriction upon the right to demand toll for a bicycle is that it must be reasonable. The Act of April 23, 1889, P. L. 44, was passed for the benefit of the bicycler, prevents him from being excluded from the highway and gives him the same right as owners of other carriages, to insist that the highway shall be maintained in a reasonably safe condition of repair. He must, therefore, bear his fair share of the burden imposed upon the public for the use of the turnpike. Id.

BILL OF DISCOVERY. An assertion that documents inquired for in a bill of discovery are reports made by agents or employees of a railroad company to their superior officers for the purpose of being submitted to counsel for use in the preparation of a defence to a pending action for damages, is a good answer and the same objection to their production may be taken advantage of when set up in answer to interrogatories. Davenport Company *v.* Pennsylvania R. R. Co., 132.

BILLS OF LADING. After delivery of bills of lading without endorsement made and accepted as a pledge of the property as security for the sum advanced on the draft to which the bills are attached the holder must be deemed and taken to have been the owner of the property for the accomplishment of the purpose for which they were pledged and a sale of the property, or so much thereof as may be necessary to satisfy liens for the advance and for freight and storage charges, is evidently contemplated by the Act of June 13, 1874. Richardson *v.* Atlas National Bank, 242.

BOND. A bond to C. for her interest in a fund as trustee for others, payable to C., her attorney, executors, administrators or assigns is a private agreement to be enforced according to its terms and not like a recognizance in the Orphans' Court; hence, in an action on the bond of C.'s administrator, the obligor cannot set up an agreement with the others interested in the bond that it was only intended to secure C.'s interest and that at her death the principal was to be paid directly to the others interested in the fund. Young *v.* Patterson, 100.

BONDHOLDER. Rights of, under railroad mortgage. See CORPORATION MORTGAGE. (U. S. C. C.) Pennsylvania Co. *v.* Phila. & Reading R. R. Co, 534.

BOROUGH. The right of a burgess to sit in borough councils as presiding officer and to vote upon measures there introduced, although derived from an Act of Assembly which especially confers it upon him, is removed by the repealing clause of the Act of May 23, 1893, P. L. 113, which Act by section 2, provides he shall not preside at councils' meetings. Commonwealth *v.* Schneipp, 102.

Where an ordinance is passed at a called or special meeting of a borough council and is placed in the hands of the burgess on the day of the next regular meeting and but a short time before the assembling of the council, it does not become operative without the approval of the burgess simply because his veto is not received before the adjournment of the meeting, but the veto is in time if sent the next day. McMichael *v.* The Inter-County Street Ry. Co., 179.

Dubitatur, whether an ordinance adopted at a called meeting is within the provision of the Act of 1893 which requires a burgess to return an ordinance, to which he objects, at the next regular meeting of Councils. Id.

Semble, an ordinance passed at one regular meeting should be promptly placed in the hands of the burgess who would then have until the next regular meeting for examination and decision. Id.

BRIBERY. The consent of a supervisor to the occupation of a township road when obtained by bribery

Digitized by Google

BRIBERY—*Coutinued.*
will not bind the township. The Tamaqua and Lansford St. Ry. Co. *v.* Inter-County St. Ry. Co. 166.

It is bribery in effect to secure the action of a public official by a promise of a reward to him as an individual, and a court of equity will not recognize a contract so obtained. This rule applies in the case of a borough ordinance. Thomas *v.* The Inter-County Street Ry. Co. 176.

BRIDGE. A county bridge is within the control of the county commissioners and cannot be occupied without their consent, but that consent cannot be arbitrarily withheld. County of Berks *v.* Reading City Pass. Ry. Co. and Reading Traction Co. 173.

A street railway company obtained permission to use a bridge; before anything was done in consequence of the permission it was withdrawn and the company notified of the withdrawal; the company seized the bridge by night; it appeared that the strength of the bridge was not sufficient for the railway without some changes; *held*, that for these reasons the company should be enjoined from placing its railway upon the bridge. Id.

The decree modified so far as to permit the railway company, under the general supervision of the commissioners, to make the changes found by the Court of Common Pleas to be necessary to permit the safe use of the bridge for railroad purposes upon a report of a competent engineer appointed by said court and directing said court upon the completion of such changes and the giving of a bond by the company to abide by the terms and conditions relating to the manner and use of the bridge, etc. to disolve the injunction. Id. 175.

BROKER. A broker cannot claim commissions on a conditional promise by a purchaser where the offer is withdrawn by the principal before actual accep'ance. In such case the minds of the vendor and vendee fail to concur on the subject of the sale or agreement. Vincent *v.* Woodland Oil Co. 52.

BUILDING RESTRICTIONS. A restriction in a deed that "all buildings upon the said lot shall be erected not less than fifteen feet back from the fence line" means all substantial parts of all buildings. Merely incidental encroachments on this space by steps or eaves or ornamental projections may not amount to violations of the agreement, but a porch extending the whole width of the house as a substantial and integral part, is clearly a violation. Ogontz Land and Improvement Co. *v.* Johnson, 307.

A restriction was as follows: that A., his heirs and assigns shall and will not erect or cause to be erected any building or other obstruction "except bath houses and privy and walls or fences not exceeding 8 feet in height from the level of the ground on the said above described and granted lot." *Held*, the restriction to 8 feet applied to all the structures mentioned. (C. P.) Meigs *v.* Milligan, 406.

A. filed a bill to enforce a building restriction. At the time of the creation of the restriction, the neighborhood in which the premises were situated was used exclusively for residential purposes; at the time of the filing of the bill, several houses therein had been converted into stores: *held*, A. having been guilty of no laches, equity would enforce the restriction. Id.

BURDEN OF PROOF. The burden of establishing a fact by proof rests upon the party asserting it. Burford *v.* Fergus, 43.

A. made a note under seal to order of B.; on the same day B. assigned it to C. who assigned it to D.; in an action by D. against A., the latter offered in evidence, under plea of set-off, an overdue note of B. to order of F. and assigned to A.; *held*, that, by producing the note, A. had established a valid set-off; he was not bound to establish that he had no notice of assignments of B.'s original note

BURDEN OF PROOF—*Continued.*
to plaintiff; (2), to defeat the right of set-off, thus established, the onus was upon the plaintiff to prove the assignment to him and that defendant had notice of the same. Id.

BURGESS. A burgess who claims that an act which is justified under color of an ordinance, is illegal, because the ordinance had been returned by him with his veto is a proper party to a bill to restrain the commission of the act. McMichael *v.* The Inter-County Street Ry. Co. 179.

See BOROUGH, Commonwealth *v.* Schneipp, 102.

CAPIAS. A capias ad satisfaciendum may issue in execution of a judgment recovered in an action of trespass by an employee against his employer for negligence in supplying dangerously insufficient means for carrying out the work at which he was employed. Romberger *v.* Henry, 215.

CARRIER. See COMMON CARRIER. See NEGLIGENCE, Dennis *v.* Pittsburgh and Castle Shannon R. R. Co. 81.

CASES FOLLOWED, DISTINGUISHED OR COMMENTED UPON.

American Brewing Co.'s License, 161 Pa. 378, followed, 367.
Angier *v.* Eaton Co., 98 Pa. 594, followed, 276.
Bucknor's Estate, 136 Pa. 23, followed, 13.
Carpenter *v.* Koons, 20 Pa. 222, followed, 549.
City of Allegheny *v.* Millvale Ry. Co., 33 WEEKLY NOTES, 397, followed, 317.
Cochran *v.* Pew, 159 Pa. 184, followed, 19.
Collins *v.* Cronin, 117 Pa. 35, followed, 391.
Commercial Union Ins. Co. *v.* Hocking, 115 Pa. 407, distinguished, 476.
Com'th *v.* Beneficial Association, 137 Pa. 412, followed, 380.
Com'th *v.* Carey, 151 Pa. 368, followed, 363.
Com'th *v.* Weir, 165 Pa. 284; 35 WEEKLY NOTES, 556, followed, 102.
Dickinson *v.* A. O. U. W., 159 Pa. 258, followed, 381.
Donohugh's Appeal, 86 Pa. 306, followed, 547.
Ehrisman *v.* East Harrisburg Ry. Co., 150 Pa. 180, followed, 84.
Estate of Potter and Page, 54 Pa. 465, followed, 521.
German-American Ins. Co. *v.* Hocking, 115 Pa. 398, distinguished, 476.
Gilmore *v.* Ry. Co., 153 Pa. 31, followed, 84.
Gould *v.* Ins. Co., 134 Pa. 570, followed, 558.
Grevemeyer *v.* Southern Ins. Co., 62 Pa. 342, followed, 454.
Griswold *v.* Gebbie, 126 Pa. 353, distinguished, 75.
Gross's License, 161 Pa. 344, followed, 367.
Hardwick *v.* Galbraith, 147 Pa. 333, distinguished, 276.
Hoff's Appeal, 24 Pa. 200, followed, 514.
House of Refuge *v.* Smith, 140 Pa. 387, followed, 547.
Jauretche *v.* Proctor, 48 Pa. 466, followed, 144.
Johnson's License, 156 Pa. 322, followed, 367.
Larimer Railway Co. *v.* Larimer Street Ry. Co., 137 Pa., 533, followed, 176.
Laverty *v.* Vanarsdale, 65 Pa. 507, followed, 391.
Lithgow *v.* Supreme Tent, 165 Pa. 292, followed, 380.
Lockhart *v.* Craig St. Ry. Co., 139 Pa. 419, distinguished, 176.
MacConnell *v.* Lindsay, 131 Pa. 476, followed, 378.
McFarland *v.* Ins. Co., 134 Pa. 590, followed, 558.
Mayer *v.* Walter, 64 Pa. 285, followed, 391.

Digitized by Google

CASES FOLLOWED, DISTINGUISHED OR COMMENTED UPON—*Continued.*
Mellor *v.* Philadelphia, 160 Pa. 114, distinguished, 182.
Mentz *v.* Lancaster Fire Ins. Co., 79 Pa. 475, followed, 454.
Middleton *v.* Thompson, 163 Pa. 112, distinguished, 52.
Morewood Ave., 159 Pa. 20, commented upon, 525.
Munroe *v.* Armstrong, 96 Pa. 307, distinguished, 19.
Oil City *v.* Oil City Boiler Works, 152 Pa. 348, distinguished, 525.
Pennell *v.* Grubb, 15 Pa. 551, distinguished, 43.
Penn. Schuyl. Valley R. R. Co. *v.* P. & R. R. R. Co., 33 WEEKLY NOTES, 272, followed, 441.
Peters *v.* Grim, 149 Pa. 163, referred to, 475.
Philadelphia *v.* Ridge Ave. Ry. Co., 28 WEEKLY NOTES, 388, followed, 428.
Philadelphia *v.* Penna. Hospital, 154 Pa. 9, followed, 547.
Pratt *v.* Waterhouse, 158 Pa. 45, followed, 16.
Prough *v.* Entriken, 11 Pa. 85, followed, 391.
R. R. Co. *v.* Plank Road Co., 71 Pa. 350, distinguished, 210.
Rauch *v.* Dech, 116 Pa. 157, distinguished, 73.
Real Estate Co. *v.* Roop, 132 Pa. 496, followed, 10.
Renninger *v.* Spatz, 128 Pa. 524, followed, 98.
Rushton *v.* Lippincott, 119 Pa. 12, distinguished, 73.
Schlecht's Appeal, 60 Pa. 172, followed, 128.
Schmidt *v.* Weidman, 63 Pa. 173, followed, 391.
Schofield *v.* Ferrers, 47 Pa. 194, followed, 391.
Snyder *v.* Lancaster, 20 WEEKLY NOTES, 185, distinguished, 182.
Snodgrass *v.* Gavit, 28 Pa. 221, followed, 476.
Sparhawk *v.* Union Ry. Co., 54 Pa. 401, distinguished, 176.
State Ins. Co. *v.* Todd, 83 Pa. 272, followed, 558.
Sunday School Union *v.* Phila., 161 Pa. 307, distinguished, 547.
Taylor *v.* Smith, 2 Whart. 432, followed, 73.
Township *v.* Watson, 3 Atl. 869, followed, 78.
Venture Oil Co. *v.* Fretts, 152 Pa. 451, distinguished, 19.
Wachter *v.* Phœnix Ass. Co., 132 Pa. 428, followed, 454.
Willock *v.* R. R. Co., 166 Pa. 184, followed, 210.
Wills *v.* Gas Co., 130 Pa. 222, followed, 19.
Woodburn *v.* Bank, 5 W. & S. 447, followed, 73.
Work's Appeal, 59 Pa. 445, followed, 391.

CERTIORARI. A writ of certiorari does nothing beyond producing the record of the court below and the merits of the case are not reviewable thereon by the Supreme Court. The fact that the record shows certain interlocutory proceedings to be undisposed of, except as they are involved in the final decree, is not fatal to the regularity of the proceedings. Commonwealth *ex rel.* Whitman *v.* Ramsay, 142.

CLEARING HOUSE. The clearing house association is merely an agreement among all the national banks to make their daily settlement at a fixed time and place each day; it is not a business organization or corporation, a partnership or an artificial person of any sort. Philler *v.* Patterson, 416.

A clearing house committee consisted of persons selected by the members of the association in whose hands the banks agreed to deposit a sum of money or its equivalent in securities at a fixed ratio to their capital stock, to be used for the payment of balances against them. For these sums, receipts or certificates were issued by the committee in convenient sums for the purpose of settlement and the cash or securetes were held by the committee

CLEARING HOUSE—*Continued.*
pledged for the payment of the certificates. In an action by the committee against the maker of a note deposited by one of the banks for such purpose: *held*, (*a*) that the committee having issued certificates for the note was a *bona fide* holder of the same and not affected by equities between the maker and the bank; (*b*) That the plan of issuing such certificates involved no element of speculation and no business undertaking on behalf of the associated banks and hence in no way violated any of the statutes of the United States relating to national banks. Id.
See BANKS AND BANKING.

CLERK. See LIEN. Mulholland *v.* Wood, Brown & Co., 140.

CLOCKS. The Act of February 6, 1830, P. L. 36, forbidding the peddling of clocks except by persons who have obtained a license is constitutional. Commonwealth *v.* Harmel, 1; Commonwealth *v.* Coon, 5.

CHANGE OF GRADE. An agreement was entered into in pursuance of a city ordinance between the City of Philadelphia and the Philadelphia and Trenton Railroad Company, for the purpose of abolishing grade crossings, in which it was provided that the railroad company should at its own cost and expense change the elevation of its road. In carrying out the undertaking the tracks of the railway company were so elevated as to interfere with the access therefrom to plaintiff's property. It was conceded that the change in the streets had no effect upon the property: *held*, that plaintiff had no cause of action against the city. Plumb's Appeal, 182.

In an action to recover damages for change of grade of a street the jury cannot consider the matter of opening future streets through the plaintiff's property, so far as concerns damage that may be occasioned by such future change. J. G. Brill Co. *v.* Philadelphia, 217.

See ROAD LAW. Huckestein *v.* City of Allegheny, 66. *In re* Sandusky Street, 68.

CHARGE OF COURT. A charge of a judge is inadequate when it does not fairly present the whole case to the jury on the facts. It is also inadequate when it fails to furnish the jury with a clear statement of the rules of law, applicable to the questions involved. Tietz *v.* Philadelphia Traction Co., 469.

Where the court presents facts that are relied on by plaintiff to establish his case, it is error not to call the attention of the jury to those presented by the defendant in reply thereto. Howell *v.* Mellon, 484.

It is not error to fail to refer in the charge to particular testimony of defendant, when the question upon which he gave testimony is fairly submitted to the jury. Shaw *v.* Philadelphia, 510.

It is not error to charge a jury that the amount claimed as damages by the plaintiff is the utmost limit to which the jury may go in their verdict. (C. P.) Smith *v.* Times Co., 561.

CHARGE UPON REALTY. Where a testator has made a loan to his son and has directed the interest to be deducted from the son's income under the will during the widow's lifetime and the principal from the son's share at the death of the widow and has blended his entire estate, until partition be made by the trustees, and has bequeathed to the son a share in the blended estate, the loan becomes a charge on the whole share of the son, including the real estate. Assigned Estate of Edward S. Handy, 265.

The question whether an annuity is a charge upon real estate is one of intention. If the actual intention appear no form of words is necessary. Dickerman *v.* Eddinger, 327.

A charge cannot be created by the mere gift of an annuity, but it may be created without express words and

Digitized by Google

CHARGE UPON REALTY—*Continued.*
by implication from the whole will that such was the intention. Id.

While the mere fact that the testator left no personal estate from which an annuity can be paid is not conclusive of an intention to charge it upon the realty, yet it is to be taken in connection with other facts in arriving at a conclusion and is of more weight when, from the age of the testator and his circumstances in life, it is improbable that he contemplated any change in the character or amount of his estate. Id.

The blending of real and personal estate in the residuary clause of a will binds the real estate for the payment of the legacies, theretofore given, by implication, since the "residue and remainder" can only be ascertained after the payments of the debts, legacies and expenses. Watt's Estate, No. 1, 369.

Where part of land subject to a charge is sold by judicial sale, any apportionment which the owner of the charge and the party to pay agree upon is binding, but, in the absence of such agreement, apportionment of the encumbrance should be based upon the respective values of the various portions. Van Reed *v.* Jones, 549.

CHARITY. A testator by his will gave a bequest to a public charity. Some fifteen months later and within one calendar month of his death, he executed a codicil in which he said: "I hereby annul and revoke the bequest to" said public charity "and instead thereof I give and bequeath" the same amount in trust for certain annuitants and after their deaths to pay the bequest to the same public charity for the purposes mentioned in the will; *held*, that the Act of April 26, 1855, did not apply. Watt's Estate, No. 1, 369.

A company of the State national guard is a purely public charity and its armory and the lot upon which it is located, being owned by the organization, are public property and exempt from taxation. Philadelphia *v.* Keystone Battery A., 482.

The property of a public charitable institution which is used directly for the purpose and in the operation of the charity, although detached geographically from the main part of the institution, is exempt from taxation, although it may also be used in a manner to yield some return in the way of reducing expenses. Pennsylvania Hospital *v.* Delaware County, 547.

CHARTER. It is not a valid ground for rejection, that the advertised notices of an intended application for a charter contain more than the law would permit in the charter, provided they state enough to constitute notice of the object proposed. (Exec. Dept.) *In re* Sowego Water & Power Co.; *In re* Martic Water & Power Co.; *In re* Lower Chanceford Water & Power Co., 148.

When the application is materially changed, a new notice will be required but that a notice is too broad is not a sufficient reason for rejection. Id.

Upon an application for the charter of certain companies for the purpose of supplying, storing and transporting water and water power for commercial and manufacturing purposes along the Susquehanna River, protests were filed by the commissioners of fisheries that the purposes of incorporation would injure the fishery rights; *held*, that the executive department would not refuse a charter because of fear that the applicants contemplate doing something in violation of law, *ultra vires* and hurtful to the public. Id.

A water company having purchased the franchises of another water company, which had been incorporated under the act of 1874 with the exclusive privilege of supplying water to a certain district, may rightfully object to the incorporation of a third water company for the purpose of supplying water in the same district. (Exec. Dep.) *In re* South Side Water Co. 55.

COAL. Title to the surface, either by deed or under the statute of limitations, carries with it the right to the coal beneath, but this may be rebutted by evidence of a severance of the coal and such evidence is not contradictory of that which shows title, by deed or adverse possession, to the surface. Moreland *v.* H. C. Frick Co. 496.

When a severance takes place and the holder of a stratum of coal or other mineral records his title or enters into possession of his sub-surface estate, he is not affected by the state of the title to or possession of the surface. Id.

CODICIL. A residuary gift by codicil revokes a residuary gift by will. (O. C.) Richard's Estate, 264.

The doctrine that the court, whenever possible, will reconcile two dispositions, which are apparently inconsistent, does not apply as between a will and codicil. Between a will and codicil the argument is stronger in favor of revocation and the words of revocation need not be as clear as the words of the original gift. Id.

A codicil is part of the will; therefore, when in a later codicil a testator refers to his will, he will be held to have referred to an earlier codicil as well. Id.

A codicil is to be interpreted in the light of the circumstances surrounding the testator at the time of its execution and of the reasons which induced it, especially where they appear upon its face, and as its purpose ordinarily is merely to modify or add to and not to revoke, it is only permitted to change the will to the extent that it is inconsistent with it. (O. C.) Whelen's Estate, 575.

Revocation of. See WILL. Watt's Estate, No. 1, 369.

COMMISSIONS. When a person, engaged to sell goods on commission, has procured a customer, who has been accepted as a purchaser by the employer, who receives the customer's order and undertakes to execute it, the commission has been earned. Restein *v.* McCadden, 64.

One who has engaged another to sell for him on commission cannot relieve himself from liability for the commission by setting up that it was not to be paid until the goods were delivered and paid for, when the controversy between himself and the purchaser, which led to the withholding of the price, was only upon the question of a defective execution of the order. Id.

Although in respect to certain conduct of an administrator the court surcharge him, yet, if it appear that in all other respects, his management of the estate shows sagacity and industry, an allowance of full commissions by the Orphans' Court will not be reversed. Estate of Shinn, Appeal of Trenton Iron Company, 36.

Commissions to accountants are allowed as compensation for labor and responsibility and, as these vary in each case, there can be no fixed rate. Five per cent. is about the maximum and where there has been no labor or responsibility there is nothing to be compensated. (O. C.) Freed's Estate, 88.

Where a trustee takes charge of securities which cannot be transferred without an order of court, an allowance of 2½ per cent. on an estate of $24,000 is liberal compensation. Id.

COMMISSION. A generous compensation will be allowed to executors and other trustees whenever, through their skill, personal service and unusual endeavors, a large and unexpected profit is earned for the estate; and this is so, even when the executor or trustee has an undivided interest in the estate, for his management has inured to the benefit of the other parties interested. (O. C.) Brolasky's Estate, 263.

COMMON CARRIER. In an action against a common carrier for loss arising from delay in delivery of perishable goods, the question of whether such delay was caused by the failure of the carrier to provide proper conveyance for the goods is for the jury to pass upon and

Digitized by Google

COMMON CARRIER—*Continued.*
the fact that the delay occurred beyond the line of the company which issued the bill of lading, is not material where the contract was to carry the goods to a point beyond the terminus of the contracting company. Ruppel *v.* The Allegheny Valley Ry. Co. 210.

The measure of damages in case of negligence on the part of the common carrier is the market value of the goods at the point of destination at the time when, under ordinary circumstances, they should have arrived. Id.

See NEGLIGENCE.

CONDITION PRECEDENT. A stipulation, assented to by a member of a beneficial society that benefits should be paid to those named by him as beneficiaries after his death, only upon execution by them of a release of all claims against a certain contributor to the benefit fund, is not contrary to public policy and, if contained in the regulations of the company, the execution of the release becomes a condition precedent to any payment by the company. Kinsloe *v.* Davis, 258.

Where a condition is to be performed by a defendant personally, it cannot be performed for him by a creditor, who has attached the sum which would become payable to the defendant upon his performance of the condition. Id.

CONDITIONAL VERDICT. In an ejectment by a mortgagor out of possession against a mortgagee in possession, if it be shown that the debt has been fully satisfied before suit brought, the plaintiff will be entitled to an unconditional verdict and if it be not so shown he may obtain a verdict conditioned on the payment of the balance. Crouse *v.* Binkley, 312.

CONFLICT OF LAW. A will, invalid by the law of the testator's domicile, will not, though valid in this State, be sufficient to pass title to real estate acquired after the execution of the will. Price's Appeal, 531, 551.

A will invalid by the law of testator's domicile which bequeaths personalty only is not entitled to probate in this State. Id.

CONFIDENTIAL COMMUNICATIONS. See EVIDENCE. Seitz *v.* Seitz, 553.

CONTEMPT. Where there is no supersedeas a refusal or neglect to obey an interlocutory order which has been appealed from is contempt and may be punished as such. Haught *v.* Irwin, 128.

CONTESTED ELECTION. In a contested election a writ of certiorari does nothing beyond producing the record of the court below, and the merits of the case are not reviewable by the Supreme Court. The fact that the record shows certain interlocutory proceedings to be undisposed of, except as they are involved in the final decree, is not fatal to the regularity of the proceedings. Commonwealth *ex rel.* Whitman *v.* Ramsay, 142.

CONTRACT. Plaintiff wrote to defendants, after a dispute as to the character of leather furnished by the former, "our leather is now thoroughly tanned, will reship Saturday," to which defendant replied, "if your leather is thoroughly tanned now and all right in other respects we would take it as before:" *held*, these letters made a contract that the leather to be sent must be thoroughly tanned leather. Groetzinger *v.* Kann & Co. 9.

An offer of sale of land at a certain price, without more, is in the present only and may be withdrawn at the next moment unless accepted. There is given by the offer no time for consideration, which the jury may find reasonable or otherwise, unless by the agreement or concession of the party making the offer. Vincent *v.* Woodland Oil Company, 52.

Where a contract provided for monthly settlements, at the middle of the month, for all coal delivered before the first of the month, it cannot be held that, although these monthly settlements were actually made and the amounts

CONTRACT—*Continued.*
to be paid definitely ascertained and actually paid, preceding deliveries remained open, subject to any kind of controversy which either party might choose to subsequently set up. Armstrong *v.* Latimer, 45.

To annul or alter a contract, mistake or fraud must be shown. Id.

Where a manufacturer of bricks agrees with a contractor for borough work to furnish bricks of the size and quality stipulated for by the borough, with a knowledge of the use for which they were intended, and subsequently, after objections by the borough to the quality, agrees with the borough authorities that an inspector shall be appointed, such inspector becomes the agent of both the manufacturer and the borough, and in an action by the manufacturer against the contractor the former cannot complain that the inspector threw out as bad bricks some of which were, in fact, good. Park Fire Clay Company *v.* Ott, 105.

Where there is a contract with a municipality for certain work in which bricks of certain kind and quality are to be furnished, and the manufacturer undertakes to furnish bricks of the kind required to the contractor, and subsequently the manufacturer and the municipality appoint an inspector of the bricks, such appointment relieves the contractor from any further duty than to furnish and use bricks which had passed inspection. Park Fire Clay Company, *v.* Ott, 105.

In an action to recover for bricks furnished by plaintiff to the defendant, where the defendant sets up that certain bricks did not comply with the contract, it is proper to admit evidence to show that the bricks were to be furnished to the contractor for certain prospective work, and were to be of a certain kind and quality, and that the plaintiff and manufacturer agreed upon the appointment of an inspector to pass upon the bricks furnished. Id.

A., a water company, agreed in writing to furnish B., an iron company, with "pure water" for the "generation of steam for fire hydrants and hydraulics and for stores and dwellings" for a fixed sum per annum, and expressly stipulated that the contract did not include water for tuyers, boshes or condensers, or for any other purpose than those mentioned in the agreement. A. also stipulated for free access to B.'s works, and reserved the right to put in meters if deemed necessary. Subsequently, A. further agreed to supply from the Lackawanna River or Roaring Brook, "such other water as may be required" by B. for the excluded purposes, for which a rate of payment was arranged: *held*, that B. had a right to call upon A. after reasonable notice for a supply of river water for such other purposes, but it had no right to demand pure water or to take it without demand from any connection within its control. Scranton Gas & Water Co. *v.* Lackawanna Iron & Coal Co., 185.

An agreement to sell is not necessarily testamentary because it is not to be performed until the death of the vendor, and, even if testamentary, it may be enforced as a contract, if founded upon sufficient consideration, and this is so, even though the contract is unilateral and without reciprocal engagement on the part of the vendee. (O. C.) Parker's Estate, 400.

Where at the time of a conveyance by plaintiff to a railroad company there is a condition in the deed that the latter shall maintain a station and siding, but the deed is silent as to the character of the station to be maintained, the question of how far a station of a given character is a compliance with the contract, is to be determined by the needs of the company and of those who use the station. Caldwell *v.* East Broad Top R. R. & Coal Co., 405.

Where there is a contract to convey three houses, the failure or inability to convey two of them, is non-performance, to that extent, of the purpose of the contract, and

Digitized by Google

CONTRACT—*Continued.*
there can be no recovery for the price of the one. Martin *v.* Fridenberg, 464.

A contract was entered into between plaintiff and defendant, the first clause of which was as follows: "That R. sells and A. purchases all the dry ore of usual quality which sellers can collect from the mine San Anisetto during the rest of this year up to 10,000 tons or thereabouts at the price of six shillings per ton, of 2240 pounds f. o. b. Cartagena, guaranteed to contain a yield of 50 per cent. of iron in the natural state, with a sliding scale at the rate of 3 pence per unit additional for every unit over 50 per cent., and with a deduction at the rate of 4 pence per unit for every unit under 50 per cent. Final settlement to be made on output weights and assays found at port of discharge." The contract further provided that vendor should advise vendee of quantities ready for shipment, whereupon the latter should provide vessels for shipping the same. Vendee having failed to provide vessels as stipulated, vendor brought an action to recover damages laid at $3,750, with interest thereon from January 1, 1888: *held*, that it was competent for plaintiff to introduce evidence showing that by custom of the iron trade in the district of Cartagena, such a contract meant that the ore was to approximate 50 per cent. of iron, and to be settled for according to the sliding scale referred to in the contract. Martinez *v.* Earnshaw, 498.

In the contract above quoted, the word "guaranteed" did not constitute a technical guarantee, and the intent of the parties as to the words used by them in the contract could be shown. Id.

Until a delivery of ore on vessels furnished by the vendee, the vendor retained the property, and, if a breach of the contract occurred owing to vendee's failure to furnish vessels, the measure of damages was the difference between the contract price and the market price at Cartagena, when vendor discovered definitely that vendee would not receive the ore. Id.

After such breach, the vendor had the right to sell the ore, and the terms and conditions of the sale were not material. Whether through mixture with other ore the price which he secured was less than he could have got for the contract ore, was a matter of evidence for the consideration of the jury in determining the true market price of the latter. Id.

Words must be understood in the sense in which they are commonly used in the business to which the contract in which they are found relates. Graybill *v.* Penn Township Mutual Fire Insurance Association, 554.

CONVERSION. An equitable conversion is not to be presumed beyond the intention shown in the will. (O. C.) Worsley's Estate, 247.

Where real estate is converted into personalty by trustees, in pursuance of powers granted to them by will, such conversion is actual and legal, and upon the death of the *cestui que trust* the property passes according to its actual status at that time. Ingersoll's Estate, Maury's Appeal, 249.

I., by will, gave one-eighth of his estate to trustees for his grandson C. until he reached the age of 21. He gave his trustees power to sell and convey all or any part of his estate and to purchase real estate and sell and convey the same. He further authorized his daughter, A., at any time before C. became 21, to revoke the devises and bequests for his said son and to declare trusts for their lives. This A. did. Subsequently C. died, having executed his will leaving certain pecuniary bequests but not disposing of his real estate. J., the trustee of C., having filed his account, it appeared at the audit that the purchase and sale of real estate belonging to the account left a small balance of personal property converted in-

CONVERSION—*Continued.*
to real estate; *held*, that this balance was real estate and did not pass under the will of C. Id.

Equitable Conversion only arises by operation of law or by the intention of the testator. Ingersoll's Estate, Lindenberger's Appeal, 251.

While sale and conversion by executors or trustees under an authority in a will, even though merely discretionary, are equivalent to a sale by the testator and work an actual and legal conversion, unless the will show the testator's intention to the contrary, such is not the case where the conversion is effected by the act of a stranger in the exercise of some legal right. Id.

Where a ground rent in the hands of trustees is paid off and extinguished, there is no conversion by the exercise of the powers of the trustees and the money so received retains its character of real estate for the purposes of devolution. Id.

Where a testator effects a conversion, it is competent for the devisees to relieve against the conversion by agreement and restore the property to its original character as real estate. Howell *v.* Mellon, 484.

CORPORATION. The property necessary for the operation of a company, whose purpose is one in which the public is directly interested, cannot be sold, unless with its franchises and then only by virtue of the special writ provided by the Act of April 7, 1870, but this exemption does not extend to property not reasonably essential to the exercise of its franchises. Reynolds *v.* Reynolds Lumber Co, 537.

The Act of April 7, 1870, applies only to corporations in which the public has a direct interest. The property of a purely private corporation may be sold without regard to the effect on its operation. Id.

Where the property of a private corporation is sold under an ordinary fi. fa. and the proceeds are paid to a *bona fide* assignee of the plaintiff of the execution, the sheriff cannot be compelled to restore the money, upon the oath of the creditor alleging that the judgment was fraudulent. Id.

Applications for charter. See CHARTER. (Exec. Dept.) *In re* Sowego Water and Power Company; *In re* Martic Water and Power Company; *In re* Lower Chanceford Water and Power Company, 148.

See CONSTITUTIONAL LAW, Commonwealth *v.* Merchants and Manufacturers National Bank, 291.

CORPORATION MORTGAGE. Where a corporation mortgage, securing the payment of a series of railroad bonds, with interest coupons attached, provides that before foreclosure, demand for payment of interest shall be made in writing, no particular form of demand is necessary, any writing warning the company that the holder of coupons for such interest expected payment is sufficient. (U. S. C. C.) Pennsylvania Co. *v.* Philada. & Reading R. R. Co. 534.

Where it appears that default in the payment of interest upon such bonds has taken place at a certain time and that subsequent defaults have followed thereon and that the company has passed into the hands of receivers, who have repeatedly announced their inability to pay this accrued interest and that the company was without means to pay it, the bondholders may compel a foreclosure of the mortgage. Id.

The purpose of such a mortgage is as well to secure the payment of the interest as the principal thereof and default in the payment of the interest on the appointed day is as much a breach of the condition of the mortgage as is a like default in the payment of the principal. Id.

Semble, that a provision of the mortgage requiring the co-operation of other bondholders before suit can be brought does not deprive any one bondholder of his right where there is a general default in the payment of interest. Id.

Digitized by Google

CONSPIRACY. A plaintiff may recover against one of two or more defendants where conspiracy is alleged, if the wrongful act could have been committed by that one. Fillman *v.* Ryon, 391.

CONSIDERATION. A license to manufacture patent articles is in the nature of monopoly and he who enjoys this right must pay the agreed consideration for it, though the patent may not be valid in law, but when it ceases to be a monopoly and others participate in the manufacture of the goods there is a failure of consideration and he is no longer obliged to pay. Edison Co. *v.* Thackara Mfg. Co. 276.

See HUSBAND AND WIFE. Commonwealth Title Ins. and Trust Co. *v.* Brown, 190.

CONSTITUTIONAL LAW. The Act of February 6, 1830, P. L. 36, forbidding the peddling of clocks, except by persons who have obtained a license, is constitutional. Commonwealth *v.* Harmel, 1; Commonwealth *v.* Coon, 5.

The division of corporations by the Act of June 8, 1891, into classes, viz., those which elect to pay a tax of eight mills upon each dollar of the capital stock and those which do not so elect, and the subjection of the stock of the said classes to different methods of taxation does not constitute such inequality or lack of uniformity of taxation as renders the Act unconstitutional as a violation of the Constitution of Pennsylvania, Art. IX., sec. 1. Commonwealth *v.* Merchants and Manufacturers' National Bank, 291.

The act of 1891 is not in conflict with Amendment XIV., sec. 1, of the Federal Constitution, as a denial of equal protection of the laws to any person within its jurisdiction. Id.

The 6th and 7th sections of the Act of 1891 do not establish a system whereby the shareholder in a corporation is deprived of his property without due process of law, in violation of Art. XIV. of the Constitution of the United States. Id.

Under the provisions of Article XVII., sec. 9, of the Constitution the consent of the local authorities is a prerequisite to the construction of a passenger railway and, if such consent be given upon conditions, the railway company must take it subject thereto or not at all. Township of Plymouth *v.* Chestnut Hill and Norristown Ry. Co. 317.

The Legislature cannot interfere with the constitutional right of the local authorities to give or refuse consent to the erection of a passenger railway. Id.

The title of the Act of June 10, 1893, expresses nothing which carries notice in any way of the intention to include the subject of the increase of municipal indebtedness and so much of that Act as relates to elections, other than those for public officers, is unconstitutional. Evans *v.* Township of Willistown, 385.

The Act of June 19, 1891, is defective for the same reason. Id.

The Constitution of Pennsylvania positively prohibits any attaint of treason or felony by the Legislature and any corruption of blood or any forfeiture of estate except during the life of the offender. Carpenter's Estate, 516.

CONSTITUTION OF PENNSYLVANIA.
Art. I., § 18, 516.
Art. III., § 21, 69.
§ 54, 461.
Art. IX., § 1, 291.
Art. XVII., § 9, 317.

CONSTITUTION OF UNITED STATES.
Art. XIV., § 1 of Amendments, 291.

CONTRIBUTION. The Orphans' Court is powerless to compel contribution by a legatee who has been overpaid either under the decree of a foreign court or voluntarily by a foreign executor. Wheeler's Estate, 296.

COSTS. A capias ad satisfaciendum will not lie for costs in an amicable ejectment by confession. Lang *v.* Finch, 61.

The defence of the title of a school board against proceedings to establish, by conveyance not of record, a trust for religious and burial, as well as educational uses, is justifiable and warrants a division of costs. (C. P.) *In re* Old Eagle School Property, 348.

COUNCILS. Right of to transfer appropriation. See PHILADELPHIA. Bailey *v.* Philadelphia, 236.

Investigation of. See INVESTIGATION. Petition of Clerks of Councils, 89.

COUNSEL. Improper use of language by, how to be taken advantage of. See CRIMINAL LAW, PRACTICE. Commonwealth *v.* Weber, 193.

COUNTY COMMISSIONERS. If a street railway company seeks the use of a county bridge for its purpose, it is the duty of the commissioners to refuse permission for such use if it will jeopardize the travelling public, using it in the ordinary manner, but if it can be made safe for use both by the public and the railway it is the duty of the commissioners to consider what is necessary for that purpose and in what way it can best be accomplished. County of Berks *v.* Reading City Pass. Ry. Co. and Reading Traction Co., 173.

A county bridge is within the control of the county commissioners and cannot be occupied without their consent but that consent cannot be arbitrarily withheld. Id.

See COUNTY TREASURER.

COUNTY TREASURER. The balance under the Act of 1891, providing for the payment of liquor licenses, is not county money in any sense and the county commissioners have no control over it. They cannot modify or abrogate in any degree the duties of the county treasurer, as the statutory receiver of the license money, nor is their order or warrant an indispensable voucher for him. He may, upon settlement of his accounts with the county auditors, make proof in any competent way of the payment of the money he holds for others by the receipts, properly executed, of those entitled to receive it. Commonwealth *v.* Martin, 479.

CRIMINAL LAW. In the offence of housebreaking under the act of April 22, 1863, section 2, it is the intent with which the entry is made which is controlling and not the manner or hour of making it. Commonwealth *v.* Carson, 115.

Where a court gives a definition sufficiently comprehensive to direct the attention of the jury to the nature and the distinction between consignment for sale on consignor's account, and purchase where the title passes although the goods are not paid for, there is no error. Commonwealth *v.* Harris, 343.

Looseness of method is not fraud and upon a failure of the Commonwealth to prove false misrepresentations by a consignee or factor the court should direct a verdict of not guilty. Id.

The place of an act is not material, except as matter of evidence bearing on the intent. It is the nature of the act, not the place where it is done, that determines its character as lawful or otherwise. Commonwealth *v.* Heckler, 363.

To secure a conviction under the Act of May 9, 1889, making the receipt of a deposit by a banker, who knows at the time that the bank is insolvent, embezzlement, punishable with fine and imprisonment, the Commonwealth must prove beyond reasonable doubt: (1) Actual insolvency when the money was received; (2) Knowledge of the insolvency; (3) The receipt of the money as a bank deposit. Commonwealth *v.* Junkin and Spousler, 503.

When a bank officer, after known insolvency, receives money over the counter and does not mingle it with the general funds, but keeps it separate with the intention of

Digitized by Google

CRIMINAL LAW—*Continued.*
returning the identical money, this does not amount to a receipt of money as a bank deposit. Id.

Where evidence shows that both partners in a bank were in poor health when the fact of insolvency became known, and that they instructed the cashier not to receive any deposits, or, if he did, to mark them specially and return to the depositor, and it appears that he received a small amount at the end of banking hours which he neglected in the hurry of business to keep separate, which sum, however, was afterwards returned to the depositor, it is error to charge the jury that it was immaterial whether the money deposited was to be returned or that it afterwards was returned. Id.

Criminal Law—Pleading. An indictment charging felonious entry into a dwelling, without stating that it is by night, cannot be sustained as an indictment for burglary, but may be as for housebreaking under the Act of April 22, 1863, section 2, P. L. 531. Commonwealth *v.* Carson, 115.

The words of a statute should be used in drawing an indictment for an offence under it, but the substitution of "feloniously" for "maliciously" is not fatal. Id.

Where one count charges that defendant broke into a house with intent to steal, and a second count charges on the same day the destruction of a window of the same house there is no misjoinder of counts, as the latter charges part of the same affair to which the former referred. Id..

Criminal Law—Practice. The wife of the prisoner having been present at the killing and being competent as a witness in her husband's behalf, counsel for the Commonwealth is not unwarranted in commenting upon the failure of the defence to call her as a witness. Commonwealth *v.* Weber, 193.

The Commonwealth having offered the wife as a witness for the prosecution and the offer being objected to and overruled, it is not error for the Court to refuse to strike the offer from the record. Id.

Counsel for the defence having allowed the language, used by counsel for the prosecution in arguing to the jury, which it is claimed was not sustained by evidence, to pass unchallenged, cannot take exception thereto on appeal upon the report of the same taken down by their own stenographer. Id.

The character of a defendant cannot be attacked by inference, from the fact that he called no witnesses to testify to good character, but advantage of such error must be taken by objection at the trial and will not be considered if not taken until upon appeal. Id.

Language of the prosecuting attorney in addressing the jury, which is intemperate, but not without foundation in the evidence is not ground for reversal. Id.

Eleven jurors having been selected, a twelfth was chosen from those who had been previously stood aside, a jury from the same panel being at that time engaged in the trial of another case and therefore not called. The prisoner's right of peremptory challenge not having been exhausted: *held*, such action was within the discretion of the Court. Id.

Before indictment found, the defendant was brought handcuffed into the Court room in the presence of the grand jury: *held*, not to warrant the inference that the grand jury were prejudiced against him in finding the bill of indictment. Id.

DAMAGES. No verdict should be set aside because, in the opinion of the Court, the damages are excessive, unless some obvious wrong produced such damages and unless there be some rule by which the damages may be computed. (C. P.) Smith *v.* Times Co., 561.

DEATH, Action to Recover for. By Act of April 15, 1851, section 18, P. L. 674, an action, begun for injuries to the person, does not abate by reason of plaintiff's death, but survives by substitution of his personal representatives, and, by section 19 of the same Act, if an injured person's death was caused by negligence or violence, and no action for damages was brought by him, his widow or, in case there be no widow, his personal representative is given a right of action. The earlier section was intended to regulate a common law right of action by securing to it survivorship, and the latter gave a new cause of action, in cases where the injured person had not begun suit. Birch *v.* Pitts., Cin., Chicago & St. Louis Ry. Co., 69.

The first section of the Act of April 26, 1855, designating four separate persons, to one of whom, according to the circumstances of each case, the right of action is given, does not affect section 18 of the Act of 1851, but an action brought to recover for personal injuries will still survive and may be prosecuted by the personal representatives, although it appear in the pleadings that the death of the plaintiff, occurring after action brought, was due to the act of the defendant, to recover the damages occasioned by which the action was brought. Id.

Where a husband has deserted his wife and family and has ceased to contribute to their support, the wife may maintain an action under the Act of April 15, 1851, P. L. 674, to recover damages for the death of a minor child of the husband and herself without joining the husband as a party to the action. Kerr *v.* Pennsylvania Railroad Co., 325.

DEBTOR AND CREDITOR. The receipt by a creditor of debtor's note for a debt does not extinguish the debt, unless it be specially agreed that the note be taken as payment. Dougherty *v.* Bash, 420.

Consideration not sufficient. See HUSBAND AND WIFE
Commonwealth Title Ins. and Trust Co. *v.* Brown, 190.

DECEDENTS' ESTATES. Where a married woman gives to her father a bond for money loaned, at his death it becomes part of his estate in her possession. She cannot render it valueless by disaffirming it and repudiating her contract, as by so doing she would defeat the purpose under the will to give her only an equal share with the other children who are beneficiaries. Willock's Estate, 13.

A preference in the distribution of a decendent's estate cannot be obtained by a landlord by distraint, or otherwise than is provided in the Act of February 24, 1834, P. L. 77. Gandy *v.* Dickson, 95.

The primary fund for the payment of debts, legacies and annuities, is the personal estate of the testator, but the testator may direct otherwise by express declaration, or his intention to exempt the personalty from such charges may appear by implication. (O. C.) Nathan's Estate, 184.

Partnership creditors, after exhausting the fund in the lifetime of all the partners, cannot come *pari passu* with separate creditors against the separate estate of one who subsequently dies. Rights of partnership creditors, as against separate creditors, are not affected or enlarged by the fact that a firm debt was reduced to judgment. (O. C.) Stauffer's Estate, 150.

The creditor of a decedent may sue in the Common Pleas, and the judgment thus obtained against the executor or administrator will not only continue the lien, but be *prima facie* evidence of the debt as against heirs or devisees, and impose upon them the duty of disproving it. (O. C.) Schmidt's Estate, 152.

The validity of such judgment cannot be impeached collaterally, except on the ground of fraud. Id.

Under an order of the Orphans' Court, or by an authority given to him by the will, an executor may sell

Digitized by Google

DECEDENTS' ESTATES—*Continued.*
real estate for the payment of debts and legacies, and the proceeds then become assets in his hands for that purpose, but, until the sale is actually effected, the title to the real estate descends to the heir under the intestate law or by gift to the devisee, and until a sale the heir or devisee is entitled to the rentals. Watt's Estate, No. 2, 372.

In an action by the administrator of a solvent estate, the defendant may set off, against the claim of the plaintiff, a debt due by the decedent when the suit was brought. Hicks *v.* National Bank of Northern Liberties, 424.

In the case of an insolvent estate, the debts of the decedent maturing after his death are not admissible as set-off in an action by the administrator of the estate. Id.

See TRUST. Estate of Ellen J. Harker, 207.

DECEIT. To sustain an action of deceit against a principal upon a misrepresentation of his agent, the fraud should be clear, and there should be, in addition, some evidence of participation or knowledge on the part of the principal or circumstances which should have put him on inquiry. Freyer *v.* McCord, 75.

M. authorized her agent O. to sell a piece of property. The land was divided by a public road, and O. advertised it by putting up a sign board on the portion above the road. F. agreed to buy, and a deed was prepared by C., which called only for portion above the road. The deed was executed and delivered to F., who raised a part of the purchase money by a mortgage, prepared by a building association, which followed the lines of the deed. F. brought an action of deceit against M., and testified that he could not read English, and that he asked O. whether the deed were all right. He did not, however, ask to have the deed read to him. O. testified that he had told F. that the deed included the whole property, but it appeared that G. had called to O.'s attention that the deed covered a portion of the tract only. M. testified that she had never authorized O. to sell anything but the upper portion of the property above the road: *held*, there was not sufficient evidence to hold M. in an action of deceit at the suit of F. Id.

DEED. Wherever in a deed several words and phrases are followed by a general qualifying expression, which is as much applicable to the first as the last, the qualifying expression is not limited to the last, but applies to all the words. (C. P.) Meigs *v.* Milligan, 406.

When it is alleged that words were added to a deed for the conveyance of land after acknowledgment and delivery, the question is not of reformation, but of spoliation, and may be proved by either of the parties to the deed, and if so found as a fact, the deed may be taken as if the act had never been committed. Mix *v.* Royal Insurance Co., 558.

DELIVERY. Where personal property sold is not reasonably susceptible of actual delivery, a constructive delivery is sufficient, and it is not necessary that the vendee should do more than assume such control of it as will reasonably indicate the fact of the change of ownership Goddard, Hill & Co. *v.* Leopold Weil & Co., 98.

DEVISAVIT VEL NON. In appeals from the Register of Wills on the ground of want of testamentary capacity or undue influence, the inquiry is always to be directed to the mental condition of the testator at the time of the execution of the will, and to the circumstances then surrounding him or affecting his action. (O. C.) Lennig's Estate, 118.

Where an attack is made upon the whole of a will, which is alleged to have been procured through undue influence, separate issues of *devisavit vel non* as to each bequest will not be awarded. (O. C.) E win's Estate, 412.

DOWER. A widow's receipt for arrearages of her dower, specifying the years for which it is given, is a gift

DOWER—*Continued.*
to the tenant of the land upon which the dower is charged, and extinguishes her title to dower for the years specified, so that she will not be allowed to participate in the distribution of a fund arising from a sheriff's sale of said land. Fassett's Appeal, 272.

DURESS. To constitute duress by imprisonment, the latter must be unlawful, and it is unlawful even where a person is arrested under a legal warrant executed by a proper officer, if one of the objects of the arrest was to extort money or enforce the settlement of a civil claim. Fillman *v.* Ryon, 391.

The surrender of any property by the prisoner by reason of his arrest under such circumstances is void. Id.

EASEMENT. Where an easement is merged by reason of the title to both servient and dominant tenements vesting in the same owner, he may, in conveying the same, revive it as against the servient tenement. (C P.) Meigs *v.* Milligan, 406.

EJECTION FROM CAR. Measure of damages in case of. See MEASURE OF DAMAGES. Laird *v.* Pittsburgh Traction Co., 24.

EJECTMENT. Where the question at issue is as to the existence of a resulting trust, the judge sits as a chancellor and, if the evidence in his judgment be insufficient to sustain a verdict, it is his duty to take the case from the jury. Gilchrist *v.* Brown, 39.

In an ejectment by a mortgagor out of possession against a mortgagee in possession, if it be shown that the debt has been fully satisfied, before suit brought, the plaintiff will be entitled to an unconditional verdict and if it be not so shown he may obtain a verdict conditioned on the payment of the balance. Crouse *v.* Binkley, 312.

In an action of ejectment where the title of defendants has not been assailed for forty years, they are not called upon to defend their title until plaintiffs have made out a title in themselves that is good *prima facie*. Howell *v.* Mellon, 484.

ELECTION LAW. The title of the Act of June 10, 1893 expresses nothing which carries notice in any way of the intention to include the subject of the increase of municipal indebtedness and so much of that Act as relates to elections, other than those for public officers, is unconstitutional. Evans *v.* Township of Willistown, 385.

The Act of June 19, 1891, is defective for the same reason. Id.

The special election for the increase of the indebtedness of a township or other municipality is governed by the Act of June 9, 1891, P. L. 252, the clauses in the Acts of June 19, 1891, and June 10, 1893, inconsistent with said Act, being unconstitutional. Id.

See CONTESTED ELECTION. Commonwealth *v.* Ramsay, 142.

ELECTRIC MOTOR CARS. The right of an electric railway company to run its cars upon its tracks is equal to the right of the public to ride in a wagon on the street and the mere fact that a horse took fright at the sight of the car confers no right of action whatever, for injuries sustained by a person riding in a wagon to which the horse was attached. Yingst *v.* Lebanon & Annville Street Ry. Co., 320.

Electric cars may lawfully run upon the streets and may maintain a fair rate of speed. Id.

EMBEZZLEMENT. Looseness of method is not fraud and upon a failure of the Commonwealth to prove false misrepresentations by a consignee or factor the Court should direct a verdict of not guilty. Commonwealth *v.* Harris, 343.

EMINENT DOMAIN. A street passenger railway company does not possess the right of eminent domain. Pennsylvania R. R. Co. *v.* Montgomery County

Digitized by Google

EMINENT DOMAIN—*Continued.*
Passenger Ry. Co., 153; Township of Rahn *v.* The Tamaqua and Lansford Street Ry. Co., 165.

Land condemned for a country road has imposed upon it no other servitude than that of passage, the laying of tracks upon it is the imposition of a new servitude; it is otherwise in the case of land taken for city streets. Pennsylvania R. R. Co. *v.* Montgomery County Passenger Ry. Co., 153; Township of Rahn *v.* The Tamaqua and Lansford Street Ry. Co., 165.

Township authorities can permit an entry upon the public roads only so far as the public is concerned, but have no powers to bind private property or subject it to a servitude for the benefit of any person or corporation other than the township and the public it represents. The carriage of passengers through the township on their journey from one city or borough to another is in no sense a township purpose. Pennsylvania R. R. Co. *v.* Montgomery County Passenger Ry. Co., 153; Township of Rahn *v.* The Tamaqua and Lansford Street Ry. Co., 165.

Where land is taken in the exercise of the right of eminent domain, just compensation therefor is such a sum as shall equal the difference between the fair market value of the property entered before the entry and after it. If the entire lot be taken, its value at the time of taking determines the amount of the damages. If part only be taken, the jury should ascertain the value of what remains and the difference between this and the value of the whole before the entry was made fixes the measure of damages. Pennsylvania Schuylkill Valley R. R. Co. *v.* Spring City Gas Light Co., 413.

The jury must not be allowed in determining the value of the land taken to conjecture what use the owner might have made of it in the future had it not been taken. Such values are speculative and should not be considered by the jury. Id.

Unoccupied land of a gas light company having been taken and the company having averred that the land was part of its gas plant and claimed $25,000 damages on the ground that its plant had been impaired, evidence elicited on cross-examination from the treasurer of the company that the entire capital stock of the company was but $25,000 is relevant. Id.

A witness professing to be an expert as to the value and use of the appliances necessary to the production of gas is not a competent witness where a taking of land by right of eminent domain has not interfered with the machinery and structure of the gas works. Id.

See RAILROAD. Jones *v.* Erie & Wyoming Valley R. R. Co., 441.

ENTIRETIES. See TENANCY BY ENTIRETIES.

EQUITY. Where one has bought land and takes it expressly subject to two mortgages, he cannot, by making default in the payment of interest upon the earlier mortgage, bring about a sheriff's sale and buy in the land so as to hold it discharged from the lien of the second mortgage, and a bill by the second mortgagee, charging combination to bring about such a result and concealment of the fact that proceedings were pending upon the earlier mortgage and praying a declaration that the rights of the second mortgagee are unaffected by said sale, should not be dismissed upon a demurrer. Kennedy *v.* Borie, 73.

It is bribery in effect to secure the action of a public official by the promise of a reward to him as an individual and a court of equity will not recognize a contract so obtained. This rule applies in the case of a borough ordinance. Thomas *v.* The Inter-County Street Ry. Co., 176.

A landowner, desiring to build entirely on his own land, had his lines surveyed by the district surveyor and directed his builder to keep within the line in building

EQUITY—*Continued.*
the wall. After the building was up it was discovered that the wall proper was within the owner's line, but a portion of the foundation below the surface was extended one and three-eighths of an inch into the adjoining property: *held*, (1) the wall was not a party wall; (2) the owner of the adjoining property could treat this as a permanent trespass to be compensated for in damages or could compel the removal of the offending foundation by rebuilding from the defendant's side; (3) that in view of all circumstances the discretion of the court in allowing time for the removal of the wall and dividing the costs would not be disturbed. Pile *v.* Pedrick, 220.

Where a company undertakes to complete a road within a township, either without the consent of the local authorities or after a proper revocation of such consent, equity will enjoin it from proceeding with its construction. Township of Plymouth *v.* Chestnut Hill and Norristown Ry. Co., 317.

Where partners have, in writing, agreed on a valuation of the partnership property and that upon the death of one the other should have the option to purchase from the decedent's estate his interest at the sum agreed upon, that sum will be regarded as intended to have been mutually fixed, and the executors of the will of the deceased partner will be required to convey to the surviving partner the property, upon receiving the consideration for the same. Hormann's Appeal, 396.

Where a defendant commits trespass which consists in the negligent exercise of an undoubted right, the plaintiff has a remedy at law and hence cannot come into equity for an injunction. Caldwell *v.* East Broad Top R. R. & Coal Co., 405.

Where a passenger railway company, authorized to build a continuous road through several townships, provided the assent of the local authorities to the construction of the road be obtained, fails to obtain the assent of one, it may be restrained by injunction, from beginning the construction of its road, even in a township whose authorities have given consent; such an injunction is not "a practical repeal of the charter," it merely restrains the company from exercising its rights under the charter until it has complied with the condition precedent contained therein. Lehigh Coal & Navigation Co. *v.* Inter-County Street Ry. Co., 160.

See INJUNCTION.

Practice. Equity proceedings begun since the first Monday in March, 1894, which are not in accordance with the rules adopted by the Supreme Court on January 15, 1894, are irregular and void. Cassidy *v.* Knapp, 197.

A bill endorsed with a notice to appear in accordance with the old practice, and not in accordance with the new rules, cannot afford any foundation for proceedings. Id.

Where the answer is responsive to the bill, the burden is upon the plaintiff of overcoming it by more than his own oath. Bailie's Appeal, 130.

Where a bill alleges that the amount in controversy is over $2,000, a plea denying this must be supported by an answer giving discovery of all matters, material to the issue raised by the plea, concerning which the respondent has been specifically interrogated. (U. S. C. C.) Playford *v.* Lockard, 32.

An assertion that documents inquired for in a bill of discovery are reports made by agents or employees of a railroad company to their superior officers for the purpose of being submitted to counsel for use in the preparation of a defence to a pending action for damages, is a good answer, and the same objection to their production may be taken advantage of when set up in answer to interrogatories. Davenport Company *v.* Pennsylvania R. R. Co., 132.

A decree that the claims of creditors be established,

Digitized by Google

EQUITY—*Continued.*
according to the statements contained in their bill, is not a final order from which an appeal can be taken. Offerlee *v.* Reynolds Lumber Co., 540.

A direction in a decree that certain parties pay the costs may be regarded as final, but where a subsequent clause in the decree refers the whole matter of accounting and the conduct of further proceedings to a master, there is nothing from which an appeal can be taken. Id.

A decree declaring certain judgments void, and restraining distribution until the adjustment and satisfaction of certain claims, is not a final decree. Id.

An appeal from an interlocutory order of the Court in equity practice, is not a supersedeas, and when the jurisdiction of the court attaches the orders of the court are peremptory upon the party on whom they are made, and he must obey. And attachment for contempt will lie upon disobedience. The proper practice when a supersedeas is desired, is to apply to the Supreme Court for a special order. Haught *v.* Irwin, 128.

Pending disposition of an appeal from an interlocutory order, it is proper for the court, in cases in which a receiver has been appointed, to appoint a depository where all books and papers necessary for the receiver's compliance with the order of court may be held and access given thereto to both parties, subject to such restriction as the court may think best. Id.

ESTOPPEL. Where goods covered by a storage receipt, which is not a valid warehouse receipt as against other creditors, are hypothecated as collateral security for a loan, and subsequently pass from the custody of the owner to that of another of his creditors, on the latter's promise not to interfere with the owner's use of them to meet liabilities, they cannot be taken in execution by the second creditor on a judgment confessed to him, as he is estopped, as against the person to whom the goods were hypothecated, by his promise. Tradesmen's Bank *v.* Indiana Bicycle Co, 133.

Where an agent of an insurance company instructs or advises a holder of a policy as to what course of action to pursue, when selling the property on which the insurance exists, telling him to retain the policy and that he still has an insurable interest, the company is estopped from denying its liability in an action by the holder of the policy to recover its amount, although his course was not in conformity to the rules of the company or the custom in similar cases. Light *v.* Countrymen's Mutual Insurance Co., 454.

EVICTION. Where a defendant in an action for rent alleges that an injunction, issued to restrain him from interference with the work of a railroad company, prevents his possession and use of the demised premises, and that this amounts to an eviction, the case should be sent to a jury. Friend *v.* Oil Well Supply Co., 18.

EVIDENCE. A husband, whose wife has been sued as a co-partner of another, and who has suffered judgment by default, is a competent witness for the plaintiff on the trial between the plaintiff and the co-partner. Frack *v.* Gerber, 230.

A justice of the peace who has certified an acknowledgment of a deed, is not competent to prove that no such acknowledgment was made. New York & Ontario Land Co. *v.* Weidner, 461.

In an action by a wife to recover on a policy of insurance, taken out by her on property of which she was grantee in a deed in fee simple, she is competent to prove the introduction of the words "in trust for her husband" after the delivery of the deed, albeit her husband is dead at the time of the trial. Mix *v.* Royal Insurance Co., 558.

Under the Act of May 23, 1887, where, in a proceeding for divorce, the respondent has been personally served with a subpœna, the libellant may testify to the conduct

EVIDENCE—*Continued.*
of her husband which she has witnessed, or to his statements made to her touching the ground of complaint. Seitz *v.* Seitz, 553.

Whether a communication is to be regarded as confidential depends upon its character as well as the relation of the parties; if not made because of the relation of the parties, and in the confidence which that relation inspires, and which it is the policy of the law to hold inviolate, it is not privileged. Id.

Effect of pardon on competency of witness. See PARDON, WITNESS. Diehl *v.* Rodgers, 447.

Expert testimony is only admissible when the matters in which the expert is experienced are relevant to the issue. Penna. Schuylkill Valley R. R. Co. *v.* Spring City Gas Light Co., 413.

A witness professing to be an expert as to the value and use of the appliances necessary to the production of gas, is not a competent witness, in an action to recover where land has been taken by the exercise of the right of eminent domain where the taking has not interfered with the machinery and structure of gas works. Id.

In an action against a railroad company for a death arising from an accident, the train dispatcher of the defendant company was asked by the plaintiff whether some other method of running the trains than that used would not have been better railroading: *held*, it was proper to exclude the question, in the absence of proof that the witness was qualified to speak as an expert. Kennelty *v.* B. & O. R. R. Co. 50.

In an action under the Act of 1855, evidence of the factory inspector that he visited the fire escape of the defendant and found it sufficient is admissible, as is also the testimony of an expert that it was of the same kind as escapes in use in the large buildings in the same section of the city as the defendant's building and erected about the same time. Sewell *v.* Moore, 121.

The law favors marriage, which is a civil contract, and in civil cases at least, reputation and cohabitation are sufficient evidence of it. The admissions of the parties of their marriage are in the nature of direct proof of it. Strauss's Estate, 374.

In matters of general public interest as to which there is no inducement to collusion for a particular end, the declarations of deceased witnesses, made before the controversy arose, as to reputation in ancient things and ancient documentary evidence may be received. (C. P.) *In re* Old Eagle School Property, 348.

Under the Act of February 24, 1870, a certificate of a justice of the peace to an acknowledgment by a married woman to the conveyance of her interest in real estate is conclusive, except in cases of fraud or duress. Carr *v.* H. C. Frick Coke Co. 493.

A book account contained in the ledger of a decedent which does not purport to be a book of original entries and many of the items of which are not in chronological order, is not, when unsupported by other testimony, admissible as evidence of indebtedness in favor of the decedent. Huston's Estate, 205.

The Act of Assembly 12 May, 1891, P. L. 53, validating conveyances and other instruments, which have been defectively acknowledged, is a curative act, in line with the presumption of the common law, which dispenses with the production of the subscribing witnesses to a deed more than thirty years old, and in line, also, with prior Acts which have been held constitutional. Its object is not to reform defective acknowledgments but to make certain deeds admissible in evidence, notwithstanding such defects. New York and Ontario Land Co. *v.* Weidner, 461.

If an alteration in a written instrument be material and in the interest of the party producing the writing it gives

Digitized by Google

EVIDENCE—*Continued.*
rise to a suspicion which it is incumbent upon him to remove. Lilly *v.* Person, 382.

A deed conveying a title in fee simple may be shown to have been in fact a mortgage or method of securing a debt. Crouse *v.* Binkley, 312.

Where a lease requires work to be prosecuted with "due diligence" until "abandonment," parol evidence of the understanding of the parties with reference to due diligence and abandonment is admissible, as it does not modify the written contract but tends to define the words and show the sense in which the parties used them. Bartley *v.* Philips, 19.

An absolute assignment of a policy of life insurance by a daughter to her mother may be shown by parol to have been intended to create a trust in the mother to collect and manage the insurance money and apply the income to the support and care of the daughter. Estate of Ellen J. Harker, 207.

Where there is a contract to convey three houses and a failure to convey two thereof, while there may be no fraud in the representations attending the making of the contract the attempt to enforce a part thereof is such fraud as will admit parol evidence to qualify a separate written contract for one property and show the real nature of the contract. Martin *v.* Fridenberg, 464.

A mistake or inconsistency, apparent on the face of a deed, may be explained and corrected by parol. Carr *v.* H. C. Frick Coke Co. 493.

Certain buildings, including a smoke-house, were insured with their "contents." A fire occurred, in which the smoke-house was not burned but its contents which had been removed to a storage room in one of the other buildings were wholly consumed. In an action upon the insurance policy, it appeared that when application for insurance was made the president of the insurance company was upon the ground and saw the buildings. He was told that the smoke-house would hold very little goods at one time and that as fast as the goods were smoked they would be transferred to the other buildings. The president said that the smoked goods would be properly insured as contents of the smoke-house and these words were inserted in the application and policy with that understanding. The plaintiff having claimed that he should recover for the full amount of the insurance upon the contents of the smoke-house in the above sense, the jury gave a verdict in his favor; *held*, that the submission of the above evidence to the jury was not a reformation of the policy but only a finding by the jury of the meaning of the word contents in the policy. Graybill *v.* Penn Township Mutual Fire Insurance Co., 554.

When it is alleged that words were added to a deed for the conveyance of land after acknowledgment and delivery, the question is not of reformation but of spoliation and may be proved by either of the parties to the deed and if so found as a fact, the deed may be taken as if the act had never been committed. Mix *v.* Royal Insurance Co., 558.

Notwithstanding a policy of insurance contains a stipulation that nothing less than a written agreement endorsed on the policy shall suffice to establish a waiver, a waiver may be shown by parol testimony of acts *in pais* of the agent of the company. Id.

Parol evidence as explanatory of written contract. See CONTRACT. Martinez *v.* Earnshaw, 498.

A statement as to the ownership of goods, made in the absence of the seller thereof and of which he had no knowledge, cannot affect him, but where the statement is made by a witness for the seller, who, as plaintiff, is seeking to recover their price, and the said statement gives a different account of the ownership from that which the witness has testified to upon the trial, it is admissible in

EVIDENCE—*Continued.*
evidence to affect the credibility of the witness. Frack *v.* Gerber, 230.

Where an attempt is made to set aside a sheriff's deed on the ground of an alleged written agreement between the sheriff's vendee and the debtor, which has been subsequently lost, the plaintiff cannot simply give his opinion as to the legal effect of such agreement, unless he can recollect all its contents and the exact terms upon which a reconveyance was to be made. Burr *v.* Kase, 284.

Plaintiff's testimony alone, when contradicted by defendant, is not sufficient to prove the existence of such an agreement. Id.

In an action for malicious prosecution, it is competent for the plaintiff to prove his acquittal and the proper means to do this is by the record of the court of trial. Grohmann *v.* Kirschman, 389.

In an action to recover for a malicious prosecution, it is error to admit testimony as to the remarks of the judge in directing an acquittal of the plaintiff in the Court of Quarter Sessions. Id.

Evidence relevant in prosecution for incest. See INCEST. Commonwealth *v.* Bell, 146.

If the evidence of a parol partition of land depend upon the declarations of the parties to third persons in the course of conversations, these declarations must be specific and definite as to the contract and its terms. Howell *v.* Mellon, 484.

In an action to recover for leather furnished and to be forwarded by plaintiff in response to a written order the defendant may show that the leather was purchased for the purpose of making harness, that this was known to the plaintiff and that only thoroughly tanned leather could be used for the purpose named. Groetzinger *v.* Kann, 9.

Where there is evidence that an electric bell, one of the signals at a railroad crossing, was out of order and that before the accident it rang so lightly that it was difficult to hear it, it may be shown that the defendant repaired it a day or two after the accident. Link *v.* P. & R. R. R. Co., 21.

In an action under the Act of 1885 to recover for injuries, where defendant has failed to maintain a sufficient fire escape, a certificate given under the Act of 1883 for a fire escape since a fire, approving an escape, precisely identical with the one erected prior to the fire, is not admissible in evidence. Sewell *v.* Moore, 121.

The mere fact that a person was present at an audit when the question of his indebtedness to a decedent's estate was discussed, heard that the books showed a large balance due from him to decedent and made no objection is not sufficient to warrant a finding that he was indebted to the estate, when the matter before the auditor was solely in relation to an attempted surcharge of the administrators. Huston's Estate, 205.

No number of insufficient acknowledgments of an indebtedness will constitute a sufficient one. Simrell *v.* Miller, 519.

It is error to combine the testimony of witnesses to bring any of them up to the required standard of acknowledgment of indebtedness. Id.

Unoccupied land of a gas light company having been taken and the company having averred that the land was part of its gas plant and claimed $25,000 damages on the ground that its plant had been impaired, evidence, elicited on cross-examination from the treasurer of the company, that the entire capital stock of the company was but $25,000 is relevant. Pennsylvania Schuylkill Valley R. R. Co. *v.* Spring City Gas Light Co., 413.

Where the record of a deed purporting to be the deed of A. and B., his wife, for land owned by B., fails to show B.'s signature to same and a suit in ejectment is brought

Digitized by Google

EVIDENCE—*Continued.*
for the land by B.'s only son after the death of A. and B., it is competent for the defendant, after proof of loss of the original deed, to show, as evidence that the deed was actually executed by B. (1) An original article of agreement to sell, according to the terms of the deed which was signed by A. and B., although not acknowledged; (2) the obligations in writing which the purchaser gave for same which were in accordance with the terms in the deed and which were in the name of A. and B. and two of which had been duly assigned in writing by A. and B.; (3) the record of the paper which purported to be the deed of A. and B. to which was attached a certificate of a justice of the peace of the due acknowledgment of the deed by the wife. Carr *v.* H. C. Frick Coke Co., 493.

An offer of testimony may be explained but it cannot be enlarged by a statement of its purposes. Mentel *v.* Hippely, 135.

The order of introducing testimony is in the discretion of the judge; therefore, the testimony of a witness which would have been evidence in chief and material as part of the Commonwealth's case but which is also a contradiction of testimony given by the defendant on the stand may properly be admitted after the close of defendant's testimony. Commonwealth *v.* Weber, 193.

It is not error that evidence admissible in chief and cumulative was received in rebuttal. Commonwealth *v.* Bell, 146.

EXAMINERS. An examiner is a mere agent to take depositions for the parties, he has no right to withhold his reports for the purpose of compelling the payment of his fee. (O. C.) McCarthy's Estate, 315.

Rule V., sec. 10, of the Orphans' Court only applies where his duties have not been completed; he can not require security for costs after the completion of his duties. Id.

EXCLUSIVE PRIVILEGE. See CHARTER, South Side Water Company, 55.

EXECUTION. The title of a defendant, even for purpose of insurance, is not divested by a levy upon execution, but continues until the delivery of the deed to the sheriff's vendee. Collins *v.* The London Assurance Corporation, 26.

An execution upon a general judgment is not equivalent to a foreclosure of a mortgage upon the same premises. Id.

Exemption of corporate property therefrom. See CORPORATION. Reynolds *v.* Reynolds Lumber Co., 537.

EXECUTORS. A generous compensation will be allowed to executors and other trustees, whenever, through their skill, personal service and unusual endeavors, a large and unexpected profit is earned for the estate, and this is so even when the executor or trustee has an undivided interest in the estate, for his management has inured to the benefit of the other parties interested. (O. C.) Brolasky's Estate, 263.

An executor has no estate in his testator's lands by virtue of his office as executor; and if rents, accruing after the testator's death, come into his hands, he cannot apply them to the payment of debts or legacies. Watt's Estate No. 2, 372.

Under an order of the Orphans' Court, or by authority given to him by the will, an executor may sell real estate for the payment of debts and legacies and the proceeds then become assets in his hands for that purpose; but, until the sale is actually effected, the title to the real estate descends to the heir under the law or by gift to the legatee and until a sale the heir or legatee is entitled to the rentals. Id.

Compensation of. See COMMISSIONS.

EXEMPTION. The property necessary for the operation of a company, whose purpose is one in which the public is directly interested, cannot be sold, unless with its franchises and then only by virtue of the special writ provided by the Act of April 7, 1870, but this exemption does not extend to property not reasonably essential to the exercise of its franchises. Reynolds *v.* Reynolds Lumber Co., 537.

The Act of April 7, 1870, applies only to corporations in which the public has a direct interest. The property of a purely private corporation may be sold without regard to the effect or its operations. Id.

From Taxation. See TAXATION. Pennsylvania Hospital *v.* Delaware County, 547. Philadelphia *v.* Keystone Battery A., 482.

FEE BILL. Where a statute, establishing a fee bill, contains no penalty for the exaction of fees illegal under it, the penal provision of a former statute on the same subject may not be resorted to. Irons *v.* Allen, 507.

FEES—COUNTY OFFICERS. Under the Act of March 10, 1810, the State was entitled to one-half the aggregate fees of county officers in excess of $1,500, without any deduction for clerk hire and expenses. This was amended by the Act of April 5, 1842, allowing such officers to deduct such expenses, and providing that one-half the remainder should go to the State. These Acts were subsequently repealed, except as to six certain counties, including Philadelphia county. The Act of March 31, 1876, was then passed, "to carry into effect Sec. 5, Art. XIV., of the Constitution, relative to the salaries of county officers, and the payment of fees received by them into the State or county treasury in counties containing over 150,000 inhabitants." This Act provided salaries for such county officers, declared that all fees should belong to the county, and made it the duty of such officers to collect all fees to and for the use of their respective counties, "except such taxes and fees as are levied for the State, which shall be paid to and for the use of the State:" *held*, (1), that the Act of March 31, 1876, was a substitute for the Act of March 10, 1810, and that all fees received by such officers are to be paid to the county; (2), that words, "except such taxes and fees as are levied for the State, which shall be paid to and for the use of the State," do not qualify the previous declaration that all fees received by the officer, *qua* county officer, should belong to the county; these words refer to certain fees and taxes levied directly for the State, *e. g.* collateral inheritance tax, State tax on writs, wills, commissions and license fees; (3), this act is not invalid because of any alleged inequality in exempting the larger counties from paying a share of fees to the Commonwealth; (4), the construction put upon the Act of March 31, 1876, for a period of twenty years, both by the county and State officers, will be presumed to be the true one. Commonwealth *v.* Mann, 297.

The Act of March 10, 1810, was repealed by the special Act of April 6, 1871, and its supplement of March 6, 1872, so far as relates to the right of the Commonwealth to one-half of the office fees of officers of Allegheny county. Commonwealth *v.* County of Allegheny, 303.

FELLOW SERVANT. In an action in trespass for damages for injuries received while working under the direction of a foreman appointed by the authority of the defendant, if the facts which would constitute the foreman a vice principal are contradicted, the case must be passed upon by the jury, and must be presented to them, free from assumption of proof of the relations being established. Evilhock *v.* Philadelphia, Harrisburg & Pittsburgh R. R. Co., 568.

See MASTER AND SERVANT.

Digitized by Google

FERRYMAN. A ferryman must provide his boat with all proper and suitable guards and barriers for the security of property carried by him, although ordinary care is required of the traveler. Sturgis *v.* Kountz, 78.

FIRE DEPARTMENT. Liability of city for negligence. See MUNICIPALITY. Kies *v.* City of Erie, 426.

FIRE ESCAPE. An owner of a building who attaches thereto a fire escape of the design prescribed by the Act of June 3, 1885, P. L. 68, is absolutely exempted from the penalty of the Act, but he may erect an escape of a different kind at his own risk that it shall prove "permanent, safe and external," and that it shall be subject to the inspection and approval of the proper officials. Sewell *v.* Moore, 121.

The effect of the absence of a certificate of approval of a fire escape, is to put on the owner of the building the burden of proof that he has erected an escape according to the design of the Act, or has made a permanent, safe and external escape which is substantially equivalent. Id.

A certificate given under the Act of June 1, 1883, for a fire escape since a fire, approving an escape precisely identical with one erected prior to the fire, is not admissible in evidence; it does not reach the rank of the best evidence. Id.

The Act relating to fire escapes authorizes a recovery against the owner only where the absence of a proper escape has been the proximate cause of the injury suffered by the plaintiff; where owing to the act of a tenant in locking the door to the fire escape, a person cannot reach it, and in consequence endeavors to escape by the window and is hurt, the question of the sufficiency of the fire escape does not arise. Id.

In an action under the Act of 1885, evidence of the factory inspector that he visited the fire escape of the defendant and found it sufficient, is admissible, as is also the testimony of an expert that it was of the same kind as escapes in use in the large buildings in the same section of the city as the defendant's building and erected about the same time. Id.

FIREWORKS. The City of Philadelphia is not restrained from making a contract for an exhibition of fireworks by the Act of August 6, 1721. Heidenwag *v.* Philadelphia, 281.

FOOT FRONT RULE. See MUNICIPAL IMPROVEMENTS. Witman *v.* City of Reading, 528.

FORGERY. Any alteration of negotiable paper, which increases the liability of the maker without his knowledge, is a forgery. If the alteration be apparent on the face of the note, it is notice to an endorsee, and the latter is not an innocent holder for value. Gettysburg National Bank *v.* Chisolm, 472.

FOREIGN ATTACHMENT. Answers of a garnishee are not to be construed with the same strictness as an affidavit of defence, and judgment will not be entered on the answers, unless they, by fair interpretation, admit an indebedtness due to the defendant for some specific amount, or at least for a sum sufficient to cover the plaintiff's demand. Conshohocken Tube Co. *v.* Equipment Co., 256.

It is not incumbent on garnishees, who are stockholders merely, and who allege that the fund in their hands is claimed by some other than the defendant, to show that the claimant has a good title to the money, but if they set up such a claim, judgment on answers should be refused, and the case sent to a jury to determine the facts with reference to the adverse claim. Id.

Land in the possession of A. as guardian of X. was attached by C. in foreign attachment proceedings as the property of Y. Pending the attachment A. sold the property, under an agreement with the purchaser and C. that the purchase money should be deposited with B. to hold

FOREIGN ATTACHMENT—*Continued.*

until C. should recover judgment and establish that the property was subject to the attachment and, if C. failed to establish this, then B. was to pay the money back to A. In a suit by A. against B. to recover this fund: *held*, (1), A. could not recover until the attachment proceedings terminated; the mere fact that C. allowed thirteen years to elapse without further proceedings in the attachment gave A. no right to sue: (2), ordinarily A. would have no right to intermeddle with the attachment proceedings, but by the agreement C. recognized A.'s interest in the land, and A. was authorized to intervene. The proper course for A. to pursue was to bring a bill in equity, or take a rule to intervene in the attachment proceedings and compel C. to go on or be non-suited. Fidelity Insurance Co. *v.* Commonwealth Title Insurance Co., 387.

FOREIGN EXECUTOR. The Orphans' Court is powerless to compel contribution by a legatee who has been overpaid, either under the decree of a foreign court or voluntarily by a foreign executor. Wheeler's Estate, 296.

FORFEITURE. Where a building agreement contains a provision for a *per diem* forfeit for failure to comply with the terms expressed in the agreement, and the terms of the agreement are varied, even by mutual concession and under the provisions of the agreement itself, it is a question of fact whether or not, under the circumstances, a completion of the work, within the time specified, was possible, and if it be found not to have been possible the forfeit will not be enforced. Lilly *v.* Person, 382.

FRAUD. If there has neither been delivery nor the assumption of control, it may be the duty of the court to pronounce a sale void for legal fraud; but when the vendee has assumed control the question whether the sale is *bona fide* is usually one of fact, and it is for the jury to find whether the vendee has done all that could reasonably be expected in such a case. Goddard, Hill & Co. *v.* Leopold Weil & Co., 98.

While gross inadequacy of price, standing alone as the only fact established, may not justify an inference of fraud, yet, when connected with other facts it must be considered with them, and the question must be submitted to the jury. Id.

An explicit misstatement of a fact, conducing and intended to influence the action of a vendor, the falsehood of which he could not reasonably detect, *e. g.* that a rival party had offered the purchaser the same goods at the specified price, is fraud and will justify the rescission of the contract. Smith, Kline, French & Co. *v.* Smith, 124.

The fraud which will convert a purchaser at a sheriff's sale into a trustee *ex maleficio* for the debtor must have occurred at the time of the sale. Burr *v.* Kase, 284.

Where an alleged false representation as to its credit is made by a firm to a mercantile agency and, subsequently, a new firm is formed containing one of the partners of the old firm and a new man, which new firm retains the name of the old one, one who sells goods to the new firm cannot rescind the sale, on the ground of the false statement as to the old firm's credit, especially when the false statement has not been learned by him until after making the sale. Manhattan Brass Co. *v.* Reger, 342.

Where a policy of insurance is obtained upon a stock of goods of a married woman, the policy being applied for without stating either her sex or her Christian name or coverture, but speaking of her as "R. F.," her agent representing that "Mr. F." is a successful business man, and the insurance company believe, that it is insuring the property of a man of business, there is such fraud as will entitle the company, when it has not discovered the fraud until after a loss by fire, to disaffirm the contract

Digitized by Google

FRAUD—*Continued.*
even after such loss. Freedman *v.* Fire Association, 353.

Where there is a contract to convey three houses and a failure to convey two thereof, while there may be no fraud in the representations attending the making of the contract, the attempt to enforce a part thereof is such fraud as will admit parol evidence to qualify a separate written contract for one property and show the real nature of the contract. Martin *v.* Fridenberg, 464.

GAMBLING CONTRACT. Purchases and sales of stock are not necessarily gambling transactions, though made partly or wholly on credit. Hopkins, Receiver, *v.* O'Kane, 475.

GIFT. To sustain a gift of realty from husband to wife it must be shown that the husband was solvent at the time the gift was made. Commonwealth Title Ins. & Trust Co. *v.* Brown, 190.

See DOWER. Fassett's Appeal, 272.

GRAND JURY. Before indictment found, the defendant was brought handcuffed into the court room in the presence of the grand jury: *held*, not to warrant the inference that the grand jury was prejudiced against him in finding the bill of indictment. Commonwealth *v.* Weber, 193.

GUARANTEE. Use of word "guarantee" in a sense not implying a technical guarantee. See CONTRACT. Martinez *v.* Earnshaw, 498.

GUARDIAN AND WARD. The guardian of a minor who has paid, out of the principal of the estate, various sums to the minor which she gave her mother for household expenses, will be surcharged for the amounts so paid. (O. C.) Springer's Estate, 335.

HANDCUFFS. Before indictment found, the defendant was brought handcuffed into the court room in the presence of the grand jury: *held*, not to warrant the inference that the grand jury were prejudiced against him in finding the bill of indictment. Commonwealth *v.* Weber, 193.

HEIRS. A testamentary gift to a person will lapse if the legatee die in the testator's lifetime, even though the gift be expressed to be to him and his heirs, but it may be so worded or the context may be such as to show that the word heirs was meant to describe not the estate, but the takers. (O. C) Worsley's Estate, 247.

Where the subject of a gift is personal estate, under a limitation to heirs, taking substitutionally or, by way of succession, after a prior gift to an ancestor and the word "heirs" is used, not to denote succession or substitution, but to describe a legatee and there is nothing in the will or surrounding circumstances to indicate a contrary intent, "heirs" is understood as meaning those to whom such property passes under the statute of distribution, not including a widow or husband of the first taker. (O. C.) Keys's Estate, 459.

HIGHWAY. One who, has by contract with a township under authority of the Act of June 12, 1893, undertaken the making and repair of all the public roads within the limits of the township, has the right to object to the introduction or maintenance of any obstruction to the public travel thereon, which may increase the burden of repair and add to the difficulty of suitable supervision. Lehigh Coal and Navigation Co. *v.* Inter-County Street Ry. Co., 160.

An abutting owner has such an interest in the highway that he may maintain a bill for an injunction against its obstruction by a mere wrongdoer. Thomas *v.* Inter-County Street Ry. Co., 176.

The presumption that a railroad company takes, when it enters by virtue of the right of eminent domain, the full breadth of 60 feet for its line of way is applicable, only,

HIGHWAY—*Continued.*
where the entry is adverse and upon property subject to seizure or appropriation under general laws. It does not apply to an entry upon a highway or public street. Its right in such case depends upon the charter or the terms of a municipal grant and, unless the grant confer the right to occupy the street for the breadth of 60 feet, the company acquires no more than a right of passage of a reasonable width. Jones *v.* Erie & Wyoming Valley R. R. Co., 441.

The construction of a road by a company and an actual occupation of a street therefor shows what is reasonably necessary for the purpose of the passage, is a definition by the company of its needs and a construction by it of the municipal grant. Id.

HOUSEBREAKING. In the offence of housebreaking under the Act of April 22, 1863, section 2, it is the intent with which the entry is made which is controlling and not the manner or hour of making it. Commonwealth *v.* Carson, 115.

HUSBAND AND WIFE. A conveyance of real estate by a husband to a wife can be sustained only as a gift or as a conveyance founded upon a valid consideration. If it be sought to sustain it as a gift, the wife must show that her husband was solvent at the time the gift was made and if as a purchase, that she gave a valid consideration therefor. Commonwealth Title Ins., Trust Co. *v.* Brown, 190.

B., a builder, borrowed from a trust company for the purpose of his business, a large sum of money for which he gave his bond and mortgage. Subsequently he conveyed all his property, except one tract, to one W. to secure the loan made by the company, it being agreed that the trust company should market the property and, after paying the debts of B., should repay to B. any balance that might remain. B. afterwards conveyed the tract thus excepted, through a third person, to his wife, M., who sold the same and deposited the money in bank. B.'s debt to the trust company not being paid, the company entered judgment on the bond and attached the money in the hands of the bank. Defence was made that the money attached belonged to M. and not to B., and that M. had joined with her husband in executing the deed to W. in consideration of this conveyance to her. It appeared that the property conveyed to W. by B. was very little, if anything, in value above the encumbrances thereon, and, at the time of the trial, the indebtedness of B. to the company had not been paid: *held*, that there was no evidence of a gift by B. to M. and especially of such a gift as could be sustained against B.'s creditors; (2) that the consideration set up was no more than her inchoate right of dower in encumbered real estate conveyed to her husband's creditors to secure his debts; (3) that such a bare possibility, which could be swept away by a sale under the then existing mortgages and other liens, was not a valid consideration as against creditors. Id.

Words which in a conveyance to unmarried persons would create a joint tenancy or a tenancy in common, create where the grantees are husband and wife, and they are so named in the conveyance, a tenancy by entireties. Young *v.* Fox, 201.

Where a deed would create neither a tenancy in common nor a joint tenancy in unmarried persons it will not create a tenancy by entireties though the grantees may be described as husband and wife. Id.

There is no presumption arising from a wife's possession of money that she stole it from her husband, and, if he allege that she took it from him without his consent or knowledge, he must support his assertion by evidence. Saake *v.* Dorner, 204.

A married woman, being the owner of money or other

Digitized by Google

HUSBAND AND WIFE—*Continued.*
property, has an undoubted right, under the Act of June 3, 1887, to dispose of it by way of trust or otherwise. Id.

A husband, whose wife has been sued as a co-partner of another and who has suffered judgment by default, is a competent witness for the plaintiff on the trial between the plaintiff and the co-partner. Frack *v.* Gerber, 230.

The earning capacity of a husband is not property of the wife and she cannot maintain, during his life, an action for its impairment by the deed or neglect of another. Bradford *v.* Boley, 238.

The liability of a husband for the funeral expenses of his wife and for medical services in her lifetime is not discharged, as against the creditor, by a provision in her will directing payment out of her estate; but such a provision gives the husband the right to call upon her executor for exoneration, as between himself and mere legatees, after all claims for which he is responsible have been fully satisfied. Wheeler's Estate, 296.

Where a husband has deserted his wife and family and has ceased to contribute to their support, the wife may maintain an action, under the Act of April 15, 1851, P. L. 674, to recover damages for the death of a minor child of said husband and herself, without joining the husband as a party to the action. Kerr *v.* Pennsylvania Railroad Company, 325.

Under the Act of May 23, 1887, where, in a proceeding for divorce, the respondent has been personally served with the subpœna, the libellant may testify to the conduct of her husband, which she has witnessed, or to his statements made to her touching the ground of complaint. Seitz *v.* Seitz, 553.

Whether a communication is to be regarded as confidential depends upon its character, as well as upon the relations of the parties, if not made because of the relation of the parties and in the confidence which that relation inspires and which it is the policy of the law to hold inviolate it is not privileged. Id.

In an action by a wife to recover on a policy of insurance, taken out by her on property of which she was grantee in a deed in fee simple, she is competent to prove the introduction of the words "in trust for her husband" after the delivery of the deed albeit her husband have died prior to the trial. Mix *v.* Royal Insurance Co., 558.

See MARRIED WOMAN.

INCEST. In a prosecution for incestuous fornication, evidence of prior illicit relations between the parties is admissible, although it discloses other similar indictable offences, which were barred by the statute of limitations. Commonwealth *v.* Bell, 146.

Evidence that prosecutrix was forbidden to go to church and school, coupled with evidence tending to show that this was in furtherance of defendant's unlawful purpose is relevant in such action. Id.

INDEPENDENT CONTRACTOR. See MUNICIPALITY. Heidenwag *v.* Philadelphia, 281.

INJUNCTION. Where, in a suit between two rival claimants of the right to occupy a road for railway purposes, an injunction has been granted, such injunction will not be dissolved when it appears that the defendant had no right to occupy the road, although it also appear that the plaintiff had no greater right than the defendant. The Tamaqua and Lansford St. Ry. Co. *v.* Inter-County St. Ry. Co., 166.

The Act of May 14, 1889, P. L. 211, establishes a new and complete system for the organization and government of street railway companies in the State and is the only general law in force on the subject. County of

INJUNCTION—*Continued.*
Berks *v.* Reading City Pass. Ry. Co. & Reading Traction Co., 173.

The Act of May 14, 1889, section 20, enables all street railway companies, whether organized under invalid acts or organized under valid special acts, to bring themselves within the Act of 1889 and become entitled to the franchises conferred by said act. Id.

If a street railway company seek the use of a county bridge for its purpose, it is the duty of the commissioners to refuse permission for such use, if it will jeopardize the travelling public using it in the ordinary manner, but if it can be made safe for use, both by public and the railway, it is the duty of the commissioners to consider what is necessary for that purpose and in what way it can best be accomplished. Id.

See EQUITY. Lehigh Coal & Nav. Co. *v.* Inter-County Street Ry. Co., 160.

INNOCENT HOLDER. See NEGOTIABLE PAPER. Gettysburg National Bank *v.* Chisolm, 472.

INSURANCE. Notwithstanding a policy of insurance contain a stipulation that nothing less than a written agreement endorsed on the policy shall suffice to establish a waiver by the insurer, a waiver may be shown by parol testimony of acts *in pais* of the agent of the company. Mix *v.* Royal Insurance Co., 558.

Insurance, Fire. Where property is insured by a policy against fire, which contains a proviso that if the interest of the insured in the property be divested by judicial process her interest in the policy shall determine; the interest in the property is not for the purposes of the policy divested by the levy of the property upon a writ of execution against the insured, but continues until the insured property is sold at sheriff's sale and title is made to the sheriff's vendee by delivery of the deed and, up to the time of the delivery, the policy remains in force. Collins *v.* The London Assurance Corporation, 26.

When a policy of insurance declares that it shall be avoided if foreclosure proceedings be commenced against the insured property by virtue of any mortgage or trust deed, a proceeding upon a general judgment to levy and sell the said property is not equivalent, for the purposes of the policy, to a foreclosure. Id.

Where a policy of insurance is obtained upon a stock of goods of a married woman, the policy being applied for without stating either her sex or her Christian name or coverture, but speaking of her as "R. F.", her agent representing that "Mr. F." is a successful business man, and the insurance company believes that it is insuring the property of a man of business, there is such fraud as will entitle the company, when it has not discovered the fraud until after a loss by fire, to disaffirm the contract even after such loss. Freedman *v.* Fire Association, 353.

Where a company has been led to believe that the property which it has insured is that of a man, whereas in fact it is that of his wife and, after a loss, the husband so deals with the agents of the company as to lead them to believe that he is the insured person, the mere facts that, pending negotiations, the wife makes out proofs of loss which reveal her sex and sends them to the central office and, as a result, receives a reply addressed "Madam," calling her attention to defect in the proof, but not admitting liability, do not show a waiver by the insurer of the right to insist on the fraud of the plaintiff in obtaining the policy, as a defence in an action upon it. Id.

The mere holding of a judgment by the vendor against the vendee to secure part of the purchase money of a property will not confer an insurable interest. Light *v.* Countrymen's Mutual Insurance Co., 454.

Where an agent of an insurance company instructs or advises a holder of a policy as to what course of action to pursue, when selling the property on which the insurance

Digitized by Google

INSURANCE—*Continued.*
exists, advising him to retain the policy and that he still has an insurable interest, the company is estopped from denying its liability in an action by the holder of the policy to recover its amount, although his course was not in conformity to the rules of the company or the custom in similar cases. Id.

In an action by a wife to recover on a policy of insurance, taken out by her on property of which she was grantee in a deed in fee simple, she is competent to prove the introduction of the words "in trust for her husband" after the delivery of the deed, albeit her husband have died prior to the trial. Mix *v.* Royal Insurance Co., 558.

Where a policy of fire insurance requires that the insured shall make a complete inventory of personal property damaged, "stating the quantity and cost of each article and the amount claimed thereon," there is a substantial compliance if he furnish an inventory of the entire stock of goods, although some items may be of a collective character. The object of the stipulation is to secure a full statement of the loss claimed and that the company may have the opportunity to test its correctness and it is not to be construed most strictly against the insured. Boyle *v.* Hamburg-Bremen Fire Insurance Co., 476.

When the policy provides that when an agreement between the insured and the company, on the question of loss, cannot be reached, an appraiser shall be chosen by each, who shall elect an umpire, it must be shown, before either party can insist on selecting the appraisers, that an actual effort has been made to agree as to the amount of loss. Id.

The word "contents" in a contract of insurance is not a certain and definite description of any particular class of goods. Its meaning must be ascertained by considering the contract, the nature and methods of the business for which the building whose "contents" are to be insured is to be used and the understanding and intentions of the parties, as expressed at the time of the contract of insurance. Graybill *v.* Penn Township Mutual Fire Insurance Association, 554.

Certain buildings, including a smokehouse, were insured with their contents. A fire occurred, in which the smokehouse was not burned, but its contents, which had been removed to a storage room in one of the other buildings, were wholly consumed. In an action upon the insurance policy, it appeared that when application for insurance was made the president of the insurance company was upon the ground and saw the buildings. He was told that the smokehouse would hold very few goods at one time and that as fast as the goods were smoked they would be transferred to the other buildings. The president said that the smoked goods would be properly insured as contents of the smokehouse and these words were inserted in the application and policy with that understanding. The plaintiff having claimed that he should recover for the full amount of the insurance upon the contents of the smokehouse in the above cause, the jury gave a verdict in his favor: *held*, that the submission of the above evidence to the jury was not a reformation of the policy, but only a finding by the jury of the meaning of the word "contents" in the policy. Id.

Insurance, Life. Where a life insurance policy contains a clause stipulating that unless action be commenced within six months next after the decease of the insured it shall be considered as conclusive evidence against the validity of the claim and also a condition that "if the insured shall die three or more years after the date thereof and after all due premiums shall have been received by the company the policy shall be incontestable," it is error to charge that the latter clause invalidates the former. The latter clause prevents the company from

INSURANCE—*Continued.*
contesting the policy, but the right of the company to contest its liability on the ground of delay in commencing the action is not affected. Brady *v.* The Prudential Insurance Co., 401.

The condition of the health of an insured when the policy was issued is essentially and entirely a question of fact to be decided upon the evidence and involving the credibility of witnesses and it would be manifest error to refuse to submit that question to the jury. Dietz *v.* Metropolitan Life Insurance Co., 403.

INTERPRETATION OF STATUTES. A statute which embraces all the essential provisions of an antecedent one on the same subject and formulates a new system will be construed to be a substitute for the old one, although there be no expressed intention to that effect. Commonwealth *v.* Mann, 297.

An earlier statute is repealed by a later one which acts as a substitute and which, if enforced according to its terms, leaves nothing for the old Act to operate upon. Commonwealth *v.* County of Allegheny, 303.

Statutes which bestow repugnant rights are irreconcilable and the later one must prevail, but different and distinct remedies may co-exist. Schroeder *v.* City of Lancaster, 572.

The Acts of May 21, 1836, and May 25, 1887, differ merely in matters of procedure, the latter is cumulative, giving additional powers, to be exercised in a different way than those given by the former Act. Id.

INTESTATES' ESTATES. The Legislature having declared who shall succeed to the estates of deceased intestates, to deprive a son of this inheritable right, because it is his own wrongful act that has terminated his father's life, is an imposition of punishment for the son's wrongful act, beyond the legislative enactment and outside of the power of the court. Carpenter's Estate, 516.

Cases in which instruments between private persons are set aside on the ground of fraud or wrong-doing are in no sense analogous to a case in which the law itself casts the descent. Unless the law contain some qualification which changes its application or provides some disqualification by way of penalty, no limitation can be put upon it. Id.

INTIMIDATION. The consent given by a supervisor that a road may be occupied by a street passenger railway company, if obtained by intimidation or bribery, is not an official act and is not binding upon the township. Township of Rahn *v.* Tamaqua and Lansford St. Ry.Co., 166.

INVESTIGATION BY COUNCILS. When, in the course of an investigation conducted by a committee of councils by virtue of the Acts of May 17, 1883, P. L. 33, and June 1, 1885, P. L. 53, a witness refuses to answer a question and the matter is certified to the Court of Common Pleas which, without allowing the witness a sufficient time in which to reply to a rule taken upon him to show cause why he should not answer the questions propounded to him by the committee, makes an order that he answer, the Supreme Court will reverse the action of the Common Pleas without regard to the merits of the controversy. Petition of Clerks of Councils, 89.

JUDGE. While the findings of fact by a judge, on an appeal from a summary conviction, have not the conclusive effect of a verdict of a jury they are entitled to great weight and will not be disturbed unless plain error be shown. Commonwealth *v.* Harmel, 1; Commonwealth *v.* Coon, 5.

JUDGMENT. Rights of partnership creditors, as against separate creditors, are not affected or enlarged by the fact that a firm debt is reduced to judgment. (O. C.) Stauffer's Estate, 150.

Digitized by Google

JURY. Eleven jurors having been selected, a twelfth was chosen from those who had been previously stood aside, a jury from the same panel being at that time engaged in the trial of another case and therefore not called. The prisoner's right of peremptory challenge not having been exhausted: *held*, such action was within the discretion of the Court. Commonwealth *v.* Weber, 193.

JURISDICTION. Only, when the liability of the defendant to respond to the plaintiff is established and the indebtedness of garnishees to defendant is determined, can the question be considered whether the judgment rendered by a State Court will protect garnishees, who are receivers appointed by a Federal Court, in the payment of the money in their hands or whether leave to pay should, first, be obtained from the Federal Court having control of their accounts; the mere fact that garnishees are such receivers will not prevent a judgment against them for the amount admitted, although they have been summoned as garnishees, without the leave of the Federal Court having been first obtained. Conshohocken Tube Co. *v.* Iron Car Equipment Co., 254.

JUSTIFICATION. Effect of plea of in libel case. See LIBEL. (C. P.) Smith *v.* Times Company, 561.

LACHES. Where a mortgage was assigned to a husband and wife as grantees each of a moiety in severalty, and where, upon the death of the husband, the wife, who was the executrix of her husband, treated this mortgage as though it had been her own by right of survivorship, a grandson of the husband who has for eight years (being all that time of full age) acquiesced in this settlement of his grandfather's estate, is guilty of laches and estopped from demanding at the death of the executrix that her executor should file an account showing the disposition of the moiety of the mortgage which belonged to her husband's estate. Young *v.* Fox, 201.

Where the plaintiff has allowed twelve years to pass before taking action and the evidence shows that the conditions, upon which he alleges the property was to be reconveyed, were fulfilled one year after the deed, and that the title has been in the hands of a third person for five years, and the latter has expended money upon the same, the plaintiff is guilty of such gross laches as is fatal to his claim to have a reconveyance of the property. Burr *v.* Kase, 284.

LANDLORD AND TENANT. Where a lease for a term contains a clause to the effect "if the lessee shall hold over after the expiration of the term hereby granted with the consent of the lessors, it shall be deemed and taken to be a renewal of this lease, and all terms, conditions, covenants and provisos herein contained, for the term of another year, and so on, if the possession is still continued with like consent after the expiration of this additional year from year to year, unless either party shall give three months previous notice to the other of an intention to determine the tenancy at the end of any year," the obligation to give notice before leaving does not arise, until after the expiration of the additional year. Ashhurst *v.* Eastern Pennsylvania Phonograph Company, 60.

A lessor cannot distrain for rent goods of a deceased lessee, which have been removed from the demised premises, notwithstanding the lease contain an agreement that the goods on the premises shall be liable to distress for thirty days after their removal therefrom; such agreement applies only during the lifetime of the tenant. Gandy *v.* Dickson, 95.

An agreement in a lease, that the rights and liabilities of the parties shall extend to their heirs and personal representatives, cannot interfere with the administration

LANDLORD AND TENANT—*Continued.*

of an estate, or by permitting a distraint of the decedent's goods enable the landlord to obtain a preference, other than that given by the Act of February 24, 1834, P. L. 77. Id.

Interpretation of lease. See OIL LEASE, Balfour *v.* Russell, 225.

In the absence of a provision in a lease that the lessor shall repair, it is no defence to an action for rent that the demised premises were not in a tenantable condition. Reeves *v.* McComeskey, 394.

Where a lessee claims to be released from liability to pay rent by reason of a surrender of the demised premises during the term, he must prove clearly an acceptance by the lessor. Id.

A lessee, having given the requisite notice under the terms of his lease of his intention to surrender possession at the end of the current term, cannot escape liability for the rent of another term, if he remain in possession after the beginning of a new term. Graham *v.* Dempsey, 533.

LAPSE. A testamentary gift to a person will lapse, if the legatee die in the testator's lifetime, even though the gift be expressed to be to him and his heirs, but it may be so worded, or the context may be such, as to show that the word "heirs" was meant to describe not the estate but the takers. (O. C.) Worsley's Estate, 247.

In the absence of words of substitution or of statutory provisions, the death of a legatee, in the lifetime of the testator, occasions a lapse of the legacy, which will go to the residuary legatee or to the next of kin, unless the legatee be one of a class taking as tenants in common, in which case the survivors of the class will take the entire fund. (O. C.) Coffin's Estate, 71.

LEASE. The existence of a lease does not give notice that the lease contains an agreement giving the tenant an option to purchase. Wertheimer *v.* Thomas, 309.

See LANDLORD AND TENANT. Gandy *v.* Dickson, 95.

LEGACIES. After legacies become due and payable they are matured obligations against the estate and bear interest as any other liquidated demands would do, at the rate fixed by law. Watt's Estate, No. 1, 369.

LEGATEE. The Orphans' Court is powerless to compel contribution by a legatee, who has been overpaid either under the decree of a foreign Court or voluntarily by a foreign executor. Wheeler's Estate, 296.

LIBEL. Everything which a defendant in a libel suit does which tends to injure the plaintiff may be considered by the jury as evidence of malice. (C. P.) Smith *v.* Times Co., 561.

A failure to establish a plea of justification enhances the damages, because the plea is a reiteration of the libel. Id.

LIEN. P. devised land to A. E. and J. "to be divided into shares thus: A. $1,200, E. $800, and J. $1,000, to hold to themselves, their heirs and assigns forever, provided that my daughter A. will, at her option, within five years of my death, purchase the shares of E. and J. at a price not exceeding the amount bequeathed to each. At the time of P.'s death, October 19, 1892, there was a judgment against E., on which execution issued on November 1, 1892, which was levied on E.'s share of the land. On October 31, A. had elected to take E.'s share and had paid him $800, but did not then receive a deed: *held*, (1), A. took the title directly under the will and not through or by a purchase from E. (2), Even if the transaction were a purchase, E.'s title was, on October 31, 1892, divested by the completion of the sale, before the

Digitized by Google

LIEN—*Continued.*
acquirement of any lien upon the land by the judgment creditor. Bayer *v.* Walsh, 57.

A travelling salesman, employed by a wholesale dry goods house and paid by commissions on sales, is not a "clerk" under the terms of the Act of May 12, 1891, P. L. 54, and, therefore, his commissions or compensation do not entitle him to a lien upon the property of the firm by which he is employed. Mulholland *v.* Wood, Brown & Co., 140.

The fact that a lien creditor will be deprived of his right to use his lien as money in bidding at a sale by an order of sale of the interest of a debtor, under the Act of February 17, 1876, P. L. 4, does not deprive the Court of the right to make such order. Assigned Estate of Edward S. Handy, 265.

Priority of lien of writ of attachment. See ATTACHMENT. Underhill *v.* McManus, 552.

LIMITATION OF ACTIONS. The Act of April 22, 1856, section 6, providing that no action shall be maintained to enforce any implied or resulting trust as to realty, but within five years after such trust accrues, applies as well to resulting trusts which arise *ex maleficio* as to those which are founded upon the payment of purchase money. Barry *v.* Hill, 92.

A claim made against N. matured October 1, 1883. N. died in 1893. During the interim there was no demand for payment by the claimant and no acknowledgment by the decedent or payment upon the claim. Proof was offered to show loose declarations of decedent to members of claimant's family tending to acknowledge the debt: *held*, the claim was barred by the statute of limitations. (O. C.) Naglee's Estate, 104.

A promise to pay, or an acknowledgment consistent with and equivalent to such promise, must be made to the creditor or his known agent; and such acknowledgment must be clear and definite, and the sum or the amount due must be specified or a reference made to something by which such amount can be definitely ascertained. Id.

Mere ignorance of the commission of a trespass will not stop the running of the statute of limitations, where the means of information are within the reach of the complaining party. Scranton Gas & Water Co. *v.* Lackawanna Iron & Coal Co., 185.

A water company which had the right of free access to the defendant's works and the right of put in meters to cover the amount of water taken by defendant, brought an action for the improper taking of pure water for a period of over ten years: *held*, the statute of limitations would apply, and there could be no recovery for water taken more than six years before the bringing of the action. Id.

Where a life insurance policy contains a clause stipulating that unless action be commenced within six months next after the decease of the insured, it shall be considered as conclusive evidence against the validity of the claim, and also a condition that "if the insured shall die three or more years after the date thereof, and after all due premiums shall have been received by the company the policy shall be incontestable," it is error to charge that the latter invalidates the former. The latter clause prevents the company from contesting the policy, but the right of the company to contest its liability on the ground of delay in commencing the action is not affected. Brady *v.* The Prudential Insurance Co., 401.

LIQUOR LAWS. The damages recoverable by virtue of the Act of May 8, 1854, P. L. 663, from one who sells liquor to a person of known habits of intoxication are those only of which the act of selling or furnishing liquor is the proximate cause. Bradford *v.* Boley, 238.

LIQUOR LAWS—*Continued.*
A wife whose husband, a man of known habits of intoxication, has been furnished with liquor and, while under the influence thereof, commits a crime, for which he is sentenced to prison, cannot recover, from the liquor seller, damages based on the loss to her through her husband's inability to work for his family during his imprisonment. Id.

The Act of May 13, 1887, is an act to restrain and regulate the sale of intoxicating liquors, and its provisions are not applicable to the table or the personal habits of citizens within the precincts of their own home. Commonwealth *v.* Heckler, 363.

The discretion given to the Court of Quarter Sessions, by the Act of June 9, 1891, P. L. 257, is a judicial discretion, and when so exercised will not be reviewed. Gemas's License, 367.

Applicants for license are entitled to a judicial hearing. Id.

The fifth requirement set out in section 4 of the License Act that the place to be licensed is necessary for the accommodation of the public does not apply to distillers, the proviso expressly exempting them and brewers. Id.

The balance, under the Act of 1891, providing for the payment of liquor licenses, is not county money in any sense, and the county commissioners have no control over it. They cannot modify or abrogate in any degree the duties of the county treasurer, as the statutory receiver of the license money, nor is their order or warrant an indispensable voucher for him. He may, upon settlement of his accounts with the county auditors, make proof in any competent way of the payment of the money he holds for others as by the receipts, properly executed, of those entitled to receive it. Commonwealth *v.* Martin, 479.

The county has no interest in any part of the license money, except that part which the statute directs shall be for its use. Id.

LOAN. Where a testator has made a loan to his son and has directed the interest to be deducted from the son's income under the will, during the widow's lifetime, and the principal from the son's share at the death of the widow and has blended his entire estate, until partition be made by trustees, and has bequeathed to the son a share of the blended estate, the loan becomes a charge on the whole share of the son, including the real estate. Assigned Estate of Edward S. Handy, 265.

See ADVANCEMENT. Assigned Estate of Edward S. Handy, 265.

MALICIOUS PROSECUTION. An action for malicious prosecution may be begun after a hearing and discharge by a committing magistrate. Mentel *v.* Hippely, 135.

In an action for malicious prosecution, an offer to show that the magistrate issued the warrant after a statement of the occurrences upon which a charge of larceny was based does not raise the question whether the prosecution was instituted by the advice of the magistrate, given and acted upon after full disclosure of all the facts, nor can such offer be helped by a statement of what was intended to be shown by such offer. Id.

In the trial of an action for malicious prosecution or false arrest, a verdict of guilty is strong *prima facie* evidence of probable cause, but it may be rebutted by proof that it was obtained by corrupt or undue means. The effect to be given to a verdict of acquittal depends upon the circumstances under which it was rendered. Grohmann *v.* Kirschman, 389.

MARGIN. See STOCK TRANSACTIONS. Hopkins *v.* O'Kane, 475.

Digitized by Google

MARRIED WOMAN. While the Act of June 3, 1893, declares that a married woman may bind herself by certain contracts, it expressly continues her disability to become an accommodation endorser, guarantor or surety for another and a note made by her as security for the debt of her husband is simply a device to evade an express statutory enactment and to create by form a liability where by law none in fact exists. Patrick *v.* Smith, 10.

Where a married woman gives to her father a bond for money loaned, at his death it becomes part of his estate in her possession. She cannot render it valueless by disaffirming it and repudiating her contract, when by so doing she would defeat the purpose of the will to give her only an equal share with the other children who are beneficiaries. Willock's Estate, 13.

The married person's property Act is for the purpose of preventing perpetration of fraud upon one under coverture, but not of enabling a married woman to defraud others with impunity. Id.

The law favors marriage, which is a civil contract, and in civil cases, at least, reputation and cohabitation are sufficient evidence of it. The admissions of the parties of their marriage are in the nature of direct proof of it. Strauss's Estate, 374.

A married woman having an estate in fee, subject to a separate use trust, cannot devise it by will unless authorized by the instrument creating the trust. Steinmetz's Estate, Cobb's Appeal, 378.

The Acts of April 11, 1848, P. L. 536, and June 3, 1887, P. L. 332, apply to the common law rights of a married woman, not to trusts in equity for separate use. Id

Under the Act of February 24, 1870, a certificate of a justice of the peace to an acknowledgment by a married woman to the conveyance of her interest in real estate is conclusive, except in cases of fraud or duress. Carr *v.* H. C. Frick Coke Co., 493.

See HUSBAND AND WIFE.

MASTER AND SERVANT. A tinsmith employed by a railroad company was engaged in making repairs on the roof of a passenger car which was standing on a side track. He was told the car would remain there until noon, but when he had been on the roof but a short time, the car was drawn rapidly forward and he was struck by a wire, stretched across the track a few feet above the roof of the car: *held*, there was nothing to call for unusual vigilance on plaintiff's part and the question of negligence of the defendant was properly left to the jury. Stoltenburg *v.* Pittsburgh & Lake Erie R. R. Co., 87.

Where it is clearly shown, by the testimony produced by the plaintiff, that the accident upon which action is brought was caused solely by a reckless disregard of clearly-defined and well-understood duties by co-employees of the person killed, there is no question for the jury. Kennelty *v.* B. & O. R. R. Co., 50.

In an action in trespass for damages for injuries received while working under the direction of a foreman, appointed by the authority of the defendant, if the facts which would constitute the foreman a vice principal are contradicted, the case must be passed upon by the jury and must be presented to them, free from assumption of proof of the relation being established. Evilhock *v.* Philadelphia, Harrisburg and Pittsburgh R. R. Co., 568.

See FELLOW SERVANTS.

MEASURE OF DAMAGES. In an action to recover for ejection from a street car, it is not error to refuse to charge that the plaintiff is only entitled to recover for the trouble and inconvenience caused him by the delay in being put off the car at the point of ejectment and the additional expense necessary to complete

MEASURE OF DAMAGES—*Continued.*

his journey. To sanction such measure of damages would tend to encourage rather than prevent the commission of indignities to which no well-behaved passenger in a public conveyance should be subjected. Laird *v.* Pittsburgh Traction Co., 24.

The measure of damages in case of negligence on the part of a common carrier of goods which have been lost is the market value of the goods at the point of destination at the time when under ordinary circumstances they should arrive. Ruppel *v.* Allegheny Valley Ry. Co., 210.

In an action to recover damages for change of grade of a street, the jury cannot consider the matter of the opening of future streets through the plaintiff's property, so far as concerns damage that may be occasioned by such future change. J. G. Brill Co. *v.* Philadelphia, 217.

Where, in a contract providing for the delivery of ore upon vessels to be furnished by vendee, a breach occurs, owing to the vendee's failure to furnish vessels, the measure of damages is the difference between the contract price and the market price at the place of delivery, when the vendor discovered definitely that the vendee would not receive the ore. Martinez *v.* Earnshaw, 498.

The measure of damages recoverable by a tenant who has been compelled to take down the front of his building, on account of the widening of a street, is the actual money loss caused by the necessary work in taking down with care the said front, including the actual injury arising from dirt and grime. Shaw *v.* Philadelphia, 510.

It is not error to charge a jury that the amount claimed as damages by the plaintiff is the utmost limit to which the jury may go in their verdict. (C. P.) Smith *v.* Times Co., 561.

MECHANIC'S LIEN. A pavement cannot be regarded as laid in the "erection and construction of" a building itself, and, therefore, work done and material furnished for the paving are not the subjects of a mechanic's lien. Clymer Paving Co. *v.* Donegan, 261.

A mechanic's lien is entirely a creature of statute and unless it can be shown to be within the act it does not exist. Id.

MERGER. Where an easement is merged by reason of the title to both servient and dominant tenants vesting in the same owner, he may, in conveying the same, revive it as against the servient tenement. (C. P.) Meigs *v.* Milligan, 406.

MORTGAGE. The consent of a mortgagee to a sale of the timber on the mortgaged land and the receipt by him of the proceeds of such sale operate as a release of the timber from the lien of the mortgage. Fredonia National Bank *v.* Borden, 16; Perrin *v.* Waterhouse, 17.

Where one has bought land and takes it expressly subject to two mortgages, he cannot, by making default in the payment of interest upon the earlier mortgage, bring about a sheriff's sale and buy the land, so as to hold it discharged from the lien of the second mortgage, and a bill by the second mortgagee, charging combination to bring about such a result and concealment of the fact that proceedings were pending upon the earlier mortgage and praying a declaration that the rights of the second mortgagee are unaffected by said sale, should not be dismissed upon a demurrer. Kennedy *v.* Borie, 73.

A mortgage of real estate in two or more counties may be foreclosed in either county, under the Act of March 23, 1877, and it is not necessary that the real estate should be adjoining tracts divided by the county line. Prospect Building and Loan Asso. *v.* Russell, 260.

In a sci. fa. upon a purchase money mortgage, testimony that, in purchasing the mortgaged premises, the defendants, relied on representations, made by the plaintiff's

Digitized by Google

MORTGAGE—*Continued.*
agent, through whom the sale was negotiated, to the effect that the house was built on solid and not on made ground, was a well-built house, etc., that it soon became apparent that the house was erected on filled in or made ground, which gradually settled to such an extent as to cause the sinking, cracking and bulging out of the front wall and other resultant damages and that an expenditure of seven or eight hundred dollars would be required to repair the damages, thus occasioned, and put the building in proper condition, should be submitted to the jury with proper instructions as to the law applicable to such facts as the defendant's testimony tended to prove and it is error, when such testimony has been offered, to direct a verdict for plaintiff for the full amount of the mortgage. McNeile *v.* Cridland, 274.

In order to convert into a mortgage a deed, absolute upon its face, executed prior to the Act of June 8, 1881, P. L. 84, or where the defeasance, though in writing, is not recorded, or to create a parol secret trust as against such deed, the evidence must be clear, precise and indubitable. Burr *v.* Kase, 284.

In an ejectment by a mortgagor out of possession against a mortgagee in possession, if it be shown that the debt has been fully satisfied before suit brought, the plaintiff will be entitled to an unconditional verdict and, if it be not so shown, he may obtain a verdict conditioned on the payment of the balance. Crouse *v.* Binkley, 312.

A deed conveying a title in fee simple may be shown to have been only in fact a mortgage or method of securing a debt. Id.

See CORPORATION MORTGAGE. (U. S. C. C.) Pennsylvania Co. *v.* Phila. & Read. R. R. Co., 534.

MOTHER AND DAUGHTER. Nature of trust arising from relation. See Trust Estate of Ellen J. Harker, 207.

MUNICIPAL CLAIM. The requirement of the Act of March 23, 1866, that notice be served upon a property owner before issuing a sci. fa. on a claim against his property is not mandatory in the sense that it cannot be waived by the party for whose benefit it was enacted, *i. e.*, the land owner. City *v.* Schofield, 108.

An owner, who, having knowledge of a claim announces his intention to contest it and enters into an agreement with the city solicitor for an amicable sci. fa. upon it, cannot, after judgment against him, be heard to allege, as ground for setting aside or opening the judgment, that the city failed to give the statutory notice before issuing the sci. fa.; nor does the opening of the judgment enable him successfully to interpose such a defence. Id.

An owner who with knowledge of a claim against his property enters into an agreement with the city solicitor for an amicable sci. fa. upon it, thereby, in the absence of fraud or duress, waives the notice prescribed to be given to property owners by the Act of March 23, 1866. Id.

The right of lien for curbing and grading is the right of the municipality and cannot, even with its consent, be exercised, except where the work is done by its direction and for it. City of Chester *v.* Eyre, 216.

An affidavit of defence to a sci. fa. sur municipal claim denying that the city authorized the work, for which the lien is filed, to be done is sufficient. Id.

A municipal claim for the filling of a well may sustain the filing of a lien for the abating of a nuisance. (C. P.) City of Philadelphia *v.* Goudey, 246.

Municipal claims for paving, etc., are *in rem* and there is no authority for dividing up the assessment and filing a lien against the right and title of one joint owner. City of Reading *v.* O'Reilly, 489.

MUNICIPAL IMPROVEMENTS. The Act of May 16, 1891, providing, *inter alia*, for the construction of sewers and assessment for the cost and expense of

MUNICIPAL IMPROVEMENTS—*Continued.*
same, gives no authority to the viewers to assess any but property on the line of the improvement nor could it constitutionally have done so. *Re* Sewer on Park Avenue, 525.

The foundation of the foot front rule of assessment for street improvements is not in uniformity of value, but in uniformity of benefit; the latter is not always and, perhaps, not even generally dependent on the former or in any fixed ratio to it; therefore, the difference in value of property on the line of an improvement will not prevent the assessment of a claim upon it by the front foot rule. Witman *v.* City of Reading, 528.

While the measure of the assessment is the amount of the benefit, yet it is limited to the cost of the improvement. Id.

See TAXATION. *Re* Park Avenue, 525.

MUNICIPALITY. Township authorities can permit an entry upon the public roads, only so far as the public is concerned, but have no power to bind private property or subject it to a servitude for the benefit of any person or corporation, other than the township and the public it represents. The carriage of passengers through the township on their journey from one city or borough to another is in no sense a township purpose. Pennsylvania R. R. Co. *v.* Montgomery County Passenger Ry. Co, 153; Township of Rahn *v.* The Tamaqua and Lansford Street Ry. Co, 165.

The right of lien for curbing and grading is the right of the municipality and cannot, even with its consent, be exercised, except where the work is done by its direction and for it. City of Chester *v.* Eyre, 216.

A city is not bound to define its future policy as to opening streets. It is liable for land taken and the injury caused by opening streets, but not for what it intends to do or what a landowner conjectures may be its future action. J. G. Brill Co. *v.* Philadelphia, 217.

The councils of a municipality have power to validate and ratify an act, assumed to be done on its behalf, although such act was not done in accordance with any ordinance or resolution passed before the act was performed. *In re* Shiloh Street, 219.

A municipality has a right to recognize a moral obligation as a good consideration for the payment of public money. Bailey *v.* Philadelphia, 236.

A municipality which employs an independent contractor to do a piece of work, which is not unlawful in itself, is not responsible for injury occurring through the negligent performance of said work. Heidenwag *v.* Philadelphia, 281.

A municipality may lawfully make a contract for the preparation and setting off of fireworks within its limits. Id.

Where a person walking upon the street of a city is injured by the sudden opening of the doors of a building used by the fire department, he is entitled to recover damages from the city, if the necessary and natural and probable operation of the doors be dangerous, although accompanied by the use of ordinary care. Kies *v.* City of Erie, 426.

If the accident could have been provided against by the use of reasonable care on the part of the fireman opening the door the city is not answerable. Id.

It is only the first or original pavement, whatever it be composed of, converting a common road into a street, for which the municipality can charge the abutting property-owner. Philadelphia *v.* Eddleman, 438.

As the municipality has the exclusive right to determine when and with what material the conversion of a road to a street shall take place, it is essential to a first paving, such as shall exonerate the abutting owner from

Digitized by Google

MUNICIPALITY—*Continued.*
further charge for improvement, that it shall be laid or adopted by the municipal authority. Id.

Notice to, of unsecured condition of contrivances in public grounds. See NOTICE. Glase *v.* City of Philadelphia. 453.

MURDER. The penalty for murder in the first degree is hanging and there is no penalty of corruption of blood or forfeiture of estate for the crime of murder. Carpenter's Estate, 516.

The murder by a son of his father will not destroy the son's right of inheritance in his father's estate. Id.

NATIONAL BANKS. The Tax Act of 1891 is not in conflict with the condition of U. S. R. S., section 5219, allowing a State to tax stock of national banks, *i. e.*, that the taxation thereof shall not be at a greater rate than that assessed upon other moneyed capital in the hands of individual citizens of such State. Commonwealth *v.* Merchants & Manufacturers National Bank, 291.

Membership of a clearing-house association and the issue of clearing house certificates do not violate any of the statutes of the United States referring to national banks. Philler *v.* Patterson, 416.

NEGLIGENCE. Where a rule of court pro vides that "such items of claim and material averments of fact as are not specifically traversed and denied by the answer shall be taken as admitted," an undenied allegation of negligence is not to be "taken as admitted," if the relations of defendant to plaintiff do not legally support the duty alleged to have been neglected. Farmers and Mechanics Bank *v.* Third National Bank, 47.

Where it is clearly shown, by the testimony produced by the plaintiff, that the accident upon which action is brought was caused solely by a reckless disregard of clearly-defined and well-understood duties by co-employees of the person killed, there is no question for the jury. Kennelty *v.* B. & O. R. R. Co., 50.

An express train of a certain railroad came within one hundred miles of its terminus P., two hours and eleven minutes late. There the engineer received a telegraph order to run to P., two hours late. By the rules of the road this meant that a track clear of all freight trains would be kept for it, but that the engineer must run with reference to the schedule time of all passenger trains. At the time an accommodation was running on its schedule time to P., and, to obey the telegraphic order, the express train would have to pass it, or to run behind it in accordance with the general rule to which such orders were subject. The express train overtook and ran into the accommodation train, killing K., the brakeman and assistant baggage master on thrt train: *held*, the accident was caused by the gross negligence of the engineer in running his train, in violation of the rules of the road, and there could be no recovery against the company for K.'s death. Id.

When the evidence of the plaintiff is clearly sufficient to show negligence on the part of the defendant, the fact that it is directly contradicted in every essential particular by the witnesses of the defendant does not authorize a peremptory instruction to find for defendant. Link *v.* Phila. & Read. R. R. Co., 21.

L. approached, along a public highway, a railroad crossing where there were five tracks, on two of which trains were standing with their engines blowing off steam and one train in such a position as to interfere with the view of the tracks. L. was struck as he reached the fourth track by a rapidly-moving train and killed. It appeared that in the vicinity of the crossing, he stopped, looked and listened and that any sounds he might have heard were deadened by the noise made by the standing engines: *held*, there was nothing to warrant a declaration as a matter of law that the deceased was guilty of contributory negligence; (2), that the question whether L. stopped at the best point to look for the approach of a train was for the jury. Id.

Under the above state of facts, it would not be error to refuse to charge that if the engineer of the train which injured L. blew his whistle at the proper place and such whistle could be heard at the crossing, there could be no recovery, as such point ignored the condition of the crossing at the time of the accident. Id.

Where there is evidence that an electric bell, one of the signals at a railroad crossing, was out of order and that, before the accident, it rang so lightly that it was difficult to hear it, it may be shown that the defendant repaired it a day or two after the accident. Id.

Plaintiff took passage with his horse and wagon upon a ferry-boat; a tug passing sounded its whistle which frightened the horses on the boat and plaintiff's horse backed against the entrance rail of the boat, which, being in a defective condition, broke and let the plaintiff's horse and wagon fall into the river: *held*, that, as the whistling was not out of the ordinary course of things and as it was not out of the ordinary and usual habit of horses to take fright at such sounds, the ferryman was required to have foreseen, and provided against, the consequences of such fright on the part of the horses carried by him, and that the breaking of the rail, by the pushing of a frightened horse against it, was the natural and probable consequence of the use of a defective bar and that such use constituted negligence, which was the proximate cause of the plaintiff's injuries. Sturgis *v.* Kountz, 78.

Where a person is, through the act and invitation of a carrier, in a place of danger from which he cannot extricate himself, without risk of greater danger, and is thus injured through the act of the carrier's agent, he cannot be held guilty of contributory negligence. Dennis *v.* Pittsburgh & Castle Shannon R. R. Co., 81.

Where the testimony is that a conductor of a railway car announced "there is room inside here; this train is going out right away"; that, led by such announcement, plaintiff got upon the platform of the car and found it so crowded that he could not get inside and, in the meantime, others had crowded behind him, so that he could not get off; that some one, having got upon the car and finding it a wrong one, was commanded by the conductor to get off; that the conductor began pushing the passengers to make way for this person, whereby the plaintiff was pushed backward through an opening in the platform railing; there is sufficient evidence to sustain a verdict against the railway company; if the above statement of facts is contradicted, the case is for the jury. Id.

The question of the rate of speed at which a car may be going at the time of an accident is one of fact and, solely, for the jury, if this speed be found to be too great, considering the conditions of the case, the company is negligent. Thatcher *v.* Central Traction Co., 84.

Where there is conflicting testimony bearing on the question of defendant's negligence and the alleged contributory negligence of the deceased, the case cannot be withdrawn from the jury, without manifest usurpation of authority and invasion of the province of the jury. Iaquinta *v.* Citizens Traction Co., 86.

A tinsmith employed by a railroad company was engaged in making repairs on the roof of a passenger car which was standing on a side track. He was told that the car would remain there until noon, but, when he had been on the roof but a short time, the car was drawn rapidly forward and he was struck by a wire stretched across the track a few feet above the roof of the car:

Digitized by Google

NEGLIGENCE—*Continued.*
held, there was nothing to call for unusual vigilance on plaintiff's part and the question of the negligence of the defendant was properly left to the jury. Stoltenburg *v.* Pittsburgh & Lake Erie R. R. Co., 87.

In an action for damages caused by a runaway horse, the case went to the jury upon the question whether the flight of the horse was chargeable to the negligence of the driver. It was not error in such case to tell the jury that, if they found the driver's negligence was the cause of the escape of the horse, the disposition of the horse was immaterial. Wissler *v.* Walsh, 114.

In an action of trespass against a street railway company, which is bound to keep the cartway "in good repair," it is the province of the jury to find whether, had proper care been exercised by the company in keeping their tracks in good condition, the plaintiff would have suffered injuries or not. Gilton *v.* Hestonville Pass. Ry. Co., 143.

The measure of damages in case of negligence on the part of a common carrier who has failed to deliver goods in due time is the market value of the goods at the point of destination at the time when under ordinary circumstances they should arrive. Ruppel *v.* Allegheny Valley Ry. Co., 210.

A municipality which employs an independent contractor to do a piece of work, which is not unlawful in itself, is not responsible for injury occurring through the negligent performance of said work. Heidenwag *v.* Philadelphia, 281.

The erection of a scaffolding, necessary for the purpose of supporting set pieces or fireworks, is within the contemplation of a contract for the display of fireworks, specifying such set pieces, and for the erection and care of such scaffolding the independent contractor for the display of the fireworks is responsible and not a municipal ity which has engaged him to make such display. Id.

An allegation of negligence in respect of speed cannot be sustained without testimony showing a standard and further testimony showing the violation of the standard. Yingst *v.* Lebanon & Annville Street Ry. Co., 320.

In an action for injuries, caused by a horse having been frightened by an electric car, it appeared that as the car approached the horse became frightened and turned round and the wagon was upset. The only direct evidence on the part of the plaintiff as to the speed of the car, which plaintiff alleged was the cause of the accident, was her own testimony which was to the effect that the car was going fast, but she could not say how fast. On the other hand two of her witnesses gave testimony which showed that the car was not going faster than a man could walk, and that the horse did not become frightened until the car was within 30 feet of it: *held*, there was no evidence of negligence which could be submitted to the jury. Id.

Where the evidence shows that the deceased, to recover for whose death the action is brought, was killed by the defendant's train at a grade crossing and that, in approaching this crossing, at a point about 40 feet from the track an approaching train could be seen for 800 or 1000 feet and, as this distance diminished in approaching the track, the view of the railroad was rapidly extended, until, at the crossing and before getting to it, a train could be seen for more than one-third of a mile, a non-suit should be entered, notwithstanding evidence that the deceased stopped, looked and listened 40 feet from the railroad. Gangawer *v.* P. & R. R. Co., 356.

The measure of the duty of a railroad company toward a person who is on the platform of a station and who is either a passenger or is about to become one, having purchased a ticket, is that the company must take all the care for his safety that foresight can suggest. (C. P.) Wood *v.* Pennsylvania R. R. Co., 410.

The responsibility for negligence does not extend to all the consequences that may by possibility result from that negligence, but to those consequences only that, under the circumstances, might and ought to have been foreseen. Id.

Where a person, walking upon the street of a city is injured by the sudden opening of the doors of a building, used by the fire department, he is entitled to recover damages from the city, if the necessary and natural and probable operation of the doors be dangerous, although accompanied by the use of ordinary care. Kies *v.* City of Erie, 426.

If the accident could have been provided against by the use of reasonable care on the part of the fireman, when opening the door, the city is not answerable. Id.

Plaintiff was injured by falling astride the cover of a manhole of defendant, which revolved to a vertical position. The testimony showed that the accident occurred in a public park, that the manhole was close to a column and that plaintiff was excited and running to get around the column: *held*, that whether he exercised due care under the circumstances was a question for the jury. Glase *v.* City of Philadelphia, 453.

Where any one goes upon a railroad track unnecessarily, and thus voluntarily assumes a position of peril, he is guilty of contributory negligence and, if he be injured by a car running upon the track, he cannot recover damages. Dell *v.* Phillips Glass Co., 467.

D., employed as a mail carrier by a railroad company to carry mail bags to and from the station on the arrival and departure of trains, came to the station one night after dark and some ten minutes before a train was due. While waiting for the train, he stood between the rails of a siding and was struck and killed by a box car which broke loose from its brakes some distance off and coming down grade broke through the switch and followed the siding to where D. was standing: *held*, that D. was guilty of contributory negligence. Id.

STERRETT, C. J., dissented on the ground that the question of negligence was for the jury.

In an action in trespass for damages for injuries received while working under the direction of a foreman, appointed by the authority of the defendant, if the facts which would constitute the foreman a vice principal are contradicted, the case must be passed upon by the jury and must be presented to them free from assumption of proof of the relations being established. Evilhock *v.* Philadelphia, Harrisburg & Pittsburgh R. R. Co., 568.

NEGOTIABLE PAPER. One who takes negotiable paper, on the face of which is an apparent alteration, is not an innocent holder for value. Gettysburg National Bank *v.* Chisolm, 472.

Any alteration of negotiable paper, increasing the liability of the maker without his knowledge, is a forgery and, if apparent on the face, is notice to an endorsee. Id.

Where an interlineation of the words "with interest at six per cent." is made after the signature of a note by the maker, and without his knowledge, one who takes such note cannot claim to recover as an innocent holder nor can he disregard the interlineation and recover the face value, without the interest. Id.

NON-SUIT. When an issue of fact is raised, although the testimony is not presented in a clear and orderly manner and is far from being clear and convincing, it is a matter for the jury and a non-suit should not be entered. Fitzwater *v.* Kirk, 113.

NOTICE. See LANDLORD AND TENANT. Ash-

Digitized by Google

NOTICE—*Continued.*
hurst *v.* Eastern Pennsylvania Phonograph Company, 60.

The general rule is that notice of a lease will affect the purchaser of real estate with notice of the covenants contained in it. An agreement, however, giving the tenant an option to purchase, although incorporated in a lease, is not a part of it, but is a distinct agreement having no necessary connection with the lease, is unusual and not to be expected. Wertheimer *v.* Thomas, 309.

Where plaintiff is injured by falling upon the cover of a manhole of defendant, which revolved in a vertical position, being unsecured, the question whether the defendant, a municipality, had actual or constructive notice of the unsecured condition of the manhole is a question for the jury. Glase *v.* City of Philadelphia, 453.

Any alteration of negotiable paper, increasing the liability of the maker without his knowledge, is a forgery and, if apparent on the face, is notice to an endorsee. Gettysburg National Bank *v.* Chisolm, 472.

A lessee, having given the requisite notice under the terms of his lease of his intention to surrender possession at the end of the current term, cannot escape liability for the rent of another term if he remain in possession after the beginning of a new term. Graham *v.* Dempsey, 533.

NUISANCE. A city may authorize a scaffolding to be erected on its highway or bridge for the purpose of the exhibition of fireworks and such scaffolding is not a nuisance *per se*. Heidenwag *v.* Philadelphia, 281.

OFFER. An offer of sale of land at a certain price without more is in the present, only, and may be withdrawn at the next moment unless accepted. There is given by the offer no time for consideration, which the jury may find reasonable or otherwise, unless by the agreement or concession of the party making the offer. Vincent *v.* Woodland Oil Company, 52.

OIL LEASE. Abandonment of oil lease. See ABANDONMENT. Bartley *v.* Phillips, 19.

A forfeiture clause in an oil or mining lease is for the benefit of the lessor, and no act of the lessee can produce a forfeiture without the concurrence of the lessor. Bartley *v.* Phillips, 19.

B. leased certain land, amounting to seventy acres, to S., for the purpose of exploring for and obtaining oil or gas, at a rental of three dollars per acre per annum, and one-eighth of the oil and gas produced, with the usual transportation for the same. The lease was for three years, or while oil or gas was produced from the demised premises in paying quantities. The continuance of the lease beyond three years was contingent upon the production of oil or gas in such quantities within that time, and it contained the following reservation: "Reserving therefrom four acres around the buildings upon which no wells are to be drilled without the written consent of both parties, the boundaries of which are to be designated and fixed" by B. S. drilled two wells. One was not worth opening, and he abandoned it. The other, which produced oil in paying quantities, was drilled within the reservation with the written consent of B. and S. The tenant, S., then assigned his interest in the lease to R. and F., who drilled two other wells, one of which was useless, but the other produced oil and gas in paying quantities. At the end of the three years R. and F. tendered the rent, which was payable in advance, but D. refused to receive it, and brought ejectment to recover the land, claiming that the paying well drilled by R. and F. had been drilled within the reservation without his consent and that by its terms the lease expired at the end of three years, no paying well having been drilled under the lease within that time. It was in evi-

OIL LEASE—*Continued.*
dence that B. had always received rental upon the full seventy acres, and had never notified R. and F. that the well was within any reservation, and had always accepted his eighth share of the oil produced by it; *held* (1), that the reservation was merely a stipulation that wells should not be dug within certain boundaries designated by the lessor without his consent; (2), that when such consent was given, and resulted in the establishment of a paying well, the effect was the same as if it had been constructed outside the boundaries; (3), that this construction was in accordance with the understanding of the parties, as shown by their conduct in the payment and acceptance of the rent. Balfour *v.* Russell, 225.

ORDINANCE. An ordinance authorizing the use of a street will be regarded as a contract, and, if obtained by bribery, will not be recognized by a court of equity. Thomas *v.* The Inter-County Street Ry. Co. 176.

An ordinance passed at one regular meeting should be promptly placed in the hands of the burgess, who will then have until the next regular meeting for examination and decision. McMichael *v.* The Inter-County Street Ry. Co., 179.

A burgess, who claims that an act which is justified under color of an ordinance is illegal because the ordinance had been returned by him with his veto, is a proper party to a bill to restrain the commission of the act. Id.

The Act of May 1, 1876, in reference to cities not of the first class, enacting that an ordinance for paving shall not be valid unless a plan be made and attached to the ordinance before its passage, means that the plan, estimates, etc., shall be made in view of the ordinance. City of Reading *v.* O'Reilly, 489.

The prerequisites to the passage of an ordinance must be had with direct reference to and in the very course of the legislation itself; otherwise the main object of the statute is not accomplished. Id.

ORPHANS' COURT. The Orphans' Court has no jurisdiction to make a decree, ordering a conveyance by an executor or trustee, under a power conferred by will, unless the aid of the court is required to supply some omission in the terms of the instrument creating the power. Schwartz's Estate, 337.

PAPER BOOK. A paper book which, in lieu of the history of the case contains, under that title, an averment of facts without proof and an argument, is defective and liable to be quashed on motion. Young *v.* Patterson, 100.

PARDON. A pardon, as a rule, does away with the future consequences of the criminal act as completely as if it had never been committed. Diehl *v.* Rodgers, 447.

The pardoning power under the Constitution is not regarded as a prerogative claim of divine right, but as an adjunct to the administration of justice, recognized in all civilized governments as necessary by reason of the fallibility of human laws and human tribunals. The power so recognized is granted without distinction in regard to offences or their consequences, with no exception or limitation but that of impeachment; hence a pardon restores competency to a witness who has been convicted and sentenced for perjury, notwithstanding the Acts of March 31, 1860, and May 23, 1877. Id.

PAROL DEFEASANCE. See MORTGAGE. Burr *v.* Kase, 284.

PARTITION. If the evidence of a parol partition of land depend upon the declarations of the parties to third persons in the course of conversation, these declarations must be specific and definite as to the contract and its terms. Howell *v.* Mellon, 484.

PARTNERSHIP. At common law, an agreement

Digitized by Google

PARTNERSHIP—*Continued.*
to advance money to a business concern and to receive a share of the profits of the business, makes the lender a partner in the business, so far as concerns third persons. Wessels *v.* Weiss, 111.

Where a loan of money to an individual or a firm has been made upon an agreement to receive a share of the profit of the business of the borrower as compensation for the use of the money, the exemption from liability as a partner under the Act of April 6, 1870, P. L. 56, is on condition that the agreement shall be in writing, and that the share of profits shall be in lieu of interest; a deviation from the requirements of the statute has the effect of imposing a liability as a partner. Id.

Where A. loans to B. money, and there is an agreement in writing that A. shall receive a percentage of the profits of B.'s business and there is also an oral agreement that A. shall receive interest on the loan, there is not a sufficient compliance with the Act of April 6, 1870, as the entire contract is not in writing and the lender receives a share of profits in addition to interest, and A. becomes liable as a general partner in B.'s business. Id.

When an agreement entered into shows the intention of the parties thereto to become joint owners in the business to be carried on, they are partners, and it is not necessary to consider whether they would become such against their will, by operation of law. Merrall *v.* Dobbins, 451.

Partnership creditors have no right to come against the separate estate of one of the partners, until the separate creditors have been paid the principal of their debts in full, unless there be no partnership property and no solvent surviving partner. (O. C.) Stauffer's Estate, 150.

Partnership creditors, after exhausting the fund in the lifetime of all the partners, cannot come *pari passu* with separate creditors against the separate estate of one who subsequently dies. Rights of partnership creditors as against separate creditors are not affected or enlarged by the fact that a firm debt was reduced to judgment. Id.

Notice having been given by a partner of his intention to withdraw, in accordance with articles of association, but the subsequent conduct of the partners being inconsistent with his having severed the partnership relation, the said relation will continue. Smith *v.* Erwin, 339.

PARTY WALL. A landowner, desiring to build entirely on his own land, had his lines surveyed by the district surveyor and directed his builder to keep within the line in building the wall. After the building was up it was discovered that while the wall proper was within the owner's line, a portion of the foundation below the surface extended one and three-eighth inches into the adjoining property; *held*, the wall was not a party wall, but a trespass. Pile *v.* Pedrick, 220.

PASSENGER RAILWAY. Township authorities can permit an entry upon the public roads, only, so far as the public is concerned, but have no powers to bind private property or subject it to a servitude for the benefit of any person or corporation, other than the township and the public it represents. The carriage of passengers through the township on their journey from one city or borough to another is in no sense a township purpose. Pennsylvania R. R. Co *v.* Montgomery County Passenger Ry. Co., 153; Township of Rahn *v.* The Tamaqua and Lansford Street Ry. Co., 165.

The requirement of the 16th section of the Act of May 14, 1889, that a company shall construct its street railway and complete it within two years, is not a privilege, but a limitation on the privileges or franchise otherwise granted. Township of Plymouth *v.* Chestnut Hill and Norristown Ry. Co., 317.

A consent revoked, in accordance with the terms on which it was originally granted, is the same as none at

PASSENGER RAILWAY—*Continued.*
all and the revocation is no more a forfeiture of the charter or franchises of the company than refusal of consent in the first instance would have been. Id.

Where a railroad company is subject to the ordinances of councils requiring them to pave and, upon refusal, authorizing the stopping of their cars until the ordinance is fully complied with, evidence of the injury suffered by such stopping, as a set-off to a claim against the companies for the cost of paving is irrelevant. Philadelphia *v.* Thirteenth and Fifteenth Streets Ry. Co., 428.

In an action of trespass against a street railway company which is bound to keep the cartway "in good repair," it is the province of the jury to find whether had proper care been exercised by the company in keeping their tracks in good condition the plaintiff would have suffered injuries or not. Gilton *v.* Hestonville Pass. Ry. Co., 143.

PATENT. A license to manufacture patented articles is in the nature of a monopoly and he who enjoys this right must pay the agreed consideration for it, though the patent may not be valid in law, but when it ceases to be a monopoly and others participate in the manufacture of the goods there is a failure of consideration and he is no longer obliged to pay. Edison Co. *v.* Thackara Mfg. Co., 276.

PAVING. To a scire facias on a municipal claim for paving the street in front of defendant's lot, defendant filed an affidavit setting forth that the street in question was occupied by the tracks of the Philadelphia and Delaware River R. R. Co. and that by the special Act of June 9, 1857, P. L. 802, and the ordinance of the city of Philadelphia, passed July 7, 1857, the said company is required to be at the expense of paving the streets occupied by its tracks; *held*, the affidavit made out an apparent non-liability of the defendant and was sufficient to prevent the entry of judgment. City *v.* Bowman, 138.

The duty to repair a street, where it exists, extends to the replacement of an old pavement by a new one of a different and improved kind. Philadelphia *v.* Thirteenth and Fifteenth Streets Ry. Co., 428.

It is only the first or original pavement, whatever it may be composed of, converting a common road into a street, for which the municipality can charge the abutting property owner. Philadelphia *v.* Eddleman, 438.

As the municipality has the exclusive right to determine when and with what material the conversion of a road to a street shall take place, it is essential to a first pavement, such as shall exonerate the abutting owner from further charge for improvement, that it shall be laid or adopted by the municipal authority. Id.

The first pavement, in the legal sense, which exempts the abutting property-owner from liability for any subsequent improvement, may be defined generally as one that is put down originally, or adopted or acquiesced in subsequently, by the municipal authority for the purpose and with the intent of changing an ordinary road into a street. It may be of macadam or of anything else. If the purpose and intent be wanting, a mere surfacing of the road, however carefully or expensively done, will not be a paving, but, if the intent and purpose be present, or to be fairly inferred, then there is a paving, whatever the material may be. Id.

PAYMENTS. The receipt by a creditor of debtor's note for a debt does not extinguish the debt, unless it is specially agreed that the note be taken as payment. Doughertv *v.* Bash, 420.

PEDDLERS. The Act of February 6, 1830, P. L. 36, forbiding the peddling of clocks except by persons who have obtained a license is constitutional. Commonwealth *v.* Harmel, 1; Commonwealth *v.* Coon, 5.

Digitized by Google

PENAL STATUTES. Penal statutes which inflict punishment must be strictly construed. Commonwealth *v.* Junkin, 503.

PHILADELPHIA. A transfer by city councils of an item in an appropriation from one department to another is expressly recognized by Art. VII. of the Act of June 1, 1885. Bailey *v.* Philadelphia, 236.

Art. VI. of the Act of June 1, 1885, which provides that "no money shall be drawn from the city treasury except by due process of law or upon warrants signed by the head of the appropriate department" was not intended to interfere with the discretion of councils over the department to which appropriations should be properly assigned, but to prohibit the city controller from countersigning any warrant drawn by any department, other than that for which the appropriation was specifically made. Id.

The words "appropriate department" include all officials charged with duties pertaining to the city government for whose expenses the city is obliged to provide; the clerks of councils, though not technically heads of departments, are such officers as to all matters which councils may impose upon them. Id.

PLEADING. Where a rule of court provides that "such items of claim and material averments of fact as are not specifically traversed and denied by the answer shall be taken as admitted," an undenied allegation of negligence is not to be "taken as admitted," if the relations of defendant to plaintiff do not legally import the duty alleged to have been neglected. Farmers and Mechanics Bank *v.* Third National Bank, 47.

The main requirement of a statement under the Act of 1887 is to secure to the defendant clear and exact information as to what is claimed of him. A common count in the old form without a bill of particulars would be demurrable for vagueness; but the general form with the insertion of the necessary dates, amounts and particulars of the contract sued on with no irrelevant or impertinent manner is not objectionable for furnishing too much information instead of too little. Smith, Kline, French & Co. *v.* Smith, 124.

The requirement of the Act of May 25, 1887, P. L. 271, that the plaintiff's demand be stated "concisely" and the rule of court, that, where the damages are capable of liquidation, it must contain an explicit averment that the amount claimed is "justly due" mean that the truth of the actual facts must be followed. Edison Co. *v.* Thackara Mfg. Co., 276.

Averments as to breaches of agreement not to cut prices, etc., not averred explicitly enough to enable it to be determined whether they were conditions or inducements of the sale or mere promises as to future action, are not available as matter of defence in an affidavit in an action brought upon an alleged sale. Id.

The delivery of bills of lading, without endorsement or with an improper endorsement, is sufficient, when made, accepted and intended as a pledge of the property named in them, as security for the sum advanced or paid on the draft to which they are attached, to accomplish the purpose for which they are delivered. Richardson *v.* Atlas National Bank, 242.

While the construction of an affidavit of defence should be in favor of the plaintiff and against the party making it, the defendant is under no duty to deny a liability not fairly arising from the statement. Barker *v.* Fairchild, 358.

Where an affidavit of defence, while not full, is as full as the statement and meets all its allegations and inferences fairly to be drawn from it, imposing liability, it is sufficient. Id.

Where an affidavit of defence states, with sufficient clearness, facts which entitle the defendant to a trial by

PLEADING—*Continued.*

jury, it must be assumed that he is prepared to introduce testimony tending to prove at least all material averments. National Bank of Jamestown *v.* Scofield, 361. Scofield's Appeal, 362.

PLEDGE. After seizure, and prior to the dissolution of an attachment, the property represented by bills of lading is in *custodia legis* and cannot lawfully be sold, without an order of court, but, after the attachment is dissolved, the rights and powers of the pledgee are the same as before the seizure, subject only to the duty of retention, imposed by the bond given on the dissolution of the attachment. Richardson *v.* Atlas National Bank, 242.

POWER. The Act of May 6, 1844, makes no provision for gifts, under a general power of appointment conferred by will, to a brother or sister, who survives testator, but dies in the lifetime of the donee of the power. (O. C.) Coffin's Estate, 71.

In the exercise of a power of appointment under her husband's will, testatrix gave her residuary estate to her daughter, N., for life. After N.'s death, without issue to A., B., C., D. and E., brothers and sisters of the husband of testatrix; N. died before testatrix without issue; B. died after N., but in the lifetime of testatrix; *held*, that the gift to A., C., D. and E. was to them as a class and that the executor of B. must be excluded from the distribution of the estate. Id.

Where real estate is converted into personalty by trustees, in pursuance of powers granted to them by will, such conversion is actual and legal and, upon the death of the *cestui que trust*, the property passes according to its actual status at that time. Ingersoll's Estate, Maury's Appeal, 249.

Excessive exercise of testamentary power in the execution of trust. See WILLS. Ingersoll's Estate, Thomas's Appeal, 253.

A trustee cannot be permitted to deprive himself of a power, conferred for the benefit of the trust, or so to fetter its exercise by himself or his successor as to defeat the purpose of the trust. Hickok *v.* Still, 32[illegible]

A power to sell during the life of the husband of testatrix and a peremptory direction to sell immediately after his death do not empower the executor to enter into an agreement giving a third person the privilege of buying at any time within three years and a half, and a court of equity will not decree specific performance of such agreement. Id.

The Orphans' Court has no jurisdiction to make a decree, upon a conveyance by an executor or trustee under a power conferred by will, unless the aid of the court is required to supply some omission in the terms of the instrument creating the power. Schwartz's Estate, 337.

See WILL, Schwartz's Estate, 337; CONVERSION, Ingersoll's Estate, Lindenberger's Appeal, 251.

PRACTICE. A motion for judgment for want of sufficient affidavit of defence is in the nature of a demurrer. Hicks *v.* National Bank of Northern Liberties, 424.

Where a rule to show cause of action is taken before the plaintiff has declared, no judgment can be asked for until a disclosure of the demand sued on is made. Conshohocken Tube Co. *v.* Iron Car Equipment Co., 254.

Upon the question of the sufficiency of an affidavit of defence to prevent judgment, the court is not at liberty to regard any other matters than such as appear in the affidavit. City *v.* Bowman, 138.

A judgment for want of a sufficient affidavit of defence will be reversed, if the assessment of damages be irreconcilable with the amount claimed in the statement. Edison *v.* Thackara Mfg. Co., 276.

If the plaintiff take judgment against the garnishee on

Digitized by Google

PRACTICE—*Continued.*

his answers to interrogatories, he cannot, afterwards, require answers to additional interrogatories, but must issue a fresh attachment. (C. P.) Sweeting *v.* Wanamaker, No. 1, 279.

An attachment execution issued on a judgment more than five years old must be accompanied by a scire facias to revive judgment. (C. P.) Sweeting *v.* Wanamaker, No. 2, 279.

By an agreement to submit the case to the court under the Act of April 22, 1874, worded "and to submit the case to the decision of the court on the facts and questions of law raised by defendant in the affidavit of defence which facts are to be taken as admitted as alleged in said defence," the plaintiff does not admit inferences or conclusions from the facts in the affidavit. Collins *v.* The London Assurance Corporation, 26.

Where the general issue is pleaded and also a special plea that the cause of action has been tried and disposed of in an earlier proceeding, the case is not to be placed on trial until the special plea which is in effect a plea in abatement has been either replied to or stricken off. (C. P.) Amheim *v.* Dye Works, 32.

Where a rule of court provides that where defendant has a set-off he shall file a specification of the same, verified by an affidavit and, within fifteen days after filing, notify the plaintiff thereof and the plaintiff fifteen days after notice shall file his reply thereto, it is not sufficient to set forth the matter of set-off in an affidavit of defence to plaintiff's claim, but the rule of court should be strictly complied with. Higgins Carpet Company *v.* Latimer, 62.

Rule 8, section 3, of the Common Pleas of Allegheny County, embraces every species of counter claim which may legally or equitably be interposed as a defence. Id.

When an issue of fact is raised, although the testimony is not presented in a clear and orderly manner and is far from being clear and convincing, it is a matter for the jury and a non-suit should not be entered. Fitzwater *v.* Kirk, 113.

Where the jury have disregarded the method of arriving at the damages pointed out by the court and rendered a verdict in excess of that which, had they followed their instructions, they would have found, on a motion to set it aside it is better practice, when the court denies the motion and enters judgment on the verdict as it stands, that reasons for the judgment be filed by the court. Tietz *v.* Philadelphia Traction Co., 469.

Where a plaintiff testified that he was damaged by the loss of business to the extent of $700, the refusal to strike out the testimony because it is a claim for loss of profits is not error when the record shows that the jury was clearly instructed that there could be no allowance for loss of profits and the whole verdict was less than this item. Shaw *v.* Philadelphia, 510.

An application for a change of venue under the Act of May 22, 1878, P. L. 98, may be allowed even after a trial in the court from which it is sought to remove the case, where that court has granted a new trial and defined the issue to be tried thereat. (C. P.) Rand *v.* Caflisch, 198.

Where property of a private corporation is sold under an ordinary fi. fa. and the proceeds are paid to a *bona fide* assignee of the plaintiff in the execution, the sheriff cannot be compelled to restore the money upon the oath of the creditor alleging that the judgment was fraudulent. Reynolds *v.* Reynolds Lumber Co., 537.

No verdict should be set aside because, in the opinion of the court, the damages are excessive, unless some obvious wrong produced such damages and unless there be some rule by which the damages may be computed. (C. P.) Smith *v.* Times Co., 561.

PRACTICE—*Continued.*

A capias ad satisfaciendum will not lie for costs in an amicable ejectment by confession. Lang *v.* Finch, 61.

Where in the course of an investigation, conducted by a committee of councils by virtue of the Acts of May 17, 1883, P. L. 33, and June 1, 1885, P L. 53, a witness refuses to answer a question and the matter is certified to the Court of Common Pleas which, without allowing the witness a sufficient time in which to reply to a rule taken upon him to show cause why he should not answer the questions propounded to him by the committee, makes an order that he answer, the Supreme Court will reverse the action of the Common Pleas without regard to the merits of the controversy.

In the case before the court the action of the court below was reversed, although its order, made about three hours after the rule was granted, was that witness answer "unless there be other sufficient reasons for not answering." Petition of Clerks of Councils, 89.

Land in the possession of A. as guardian of X. was attached by C. in foreign attachment proceedings as the property of Y. Pending the attachment A. sold the property under an agreement with the purchaser and C. that the purchase money should be deposited with B. to hold until C. should recover judgment and establish that the property was subject to the attachment and if C. failed to establish this, then B. was to pay the money back to A. In a suit by A. against B. to recover this fund: *held*, (1), A. could not recover until the attachment proceedings terminated, the mere fact that C. allowed thirteen years to elapse without further proceedings in the attachment gave A. no right to sue; (2), ordinarily, A. would have no right to intermeddle with the attachment proceedings, but by the agreement C. recognized A.'s interest in the land and A. was authorized to intervene. The proper course for A. to pursue was to bring a bill in equity or take a rule to intervene in the attachment proceedings and compel C. to go on or be non-suited. Fidelity Insurance Co. *v.* Commonwealth Title Insurance Co., 387.

Practice.—Orphans' Court. Upon petition or bill of review of an adjudication, where the widow has refused to take under her husband's will she must be made a party. (O. C.) Keys's Estate, 231.

In a petition for specific performance, the petitioner should set forth the terms of the agreement fully and must aver that he has done all that is required of him under it. (O. C.) Parker's Estate, 400.

A petition is the proper method by which to obtain an order in the nature of an injunction from the Orphans' Court and not a bill in equity. (O. C.) Hamilton's Estate, 492.

Upon a bill in equity in the Orphans' Court an award of distribution will not be reviewed. The proper method to obtain this is by bill of review. Id.

In a hearing on petition and answer the statements of the answer must be accepted as verity. (O. C.) Schmidt's Estate, 152.

Where a petition prays that an account may be re-examined as to several specified items of credit, alleging that they had been improperly allowed, and a responsive answer raising issues of fact is filed, the answer must be treated as conclusive until overcome by evidence. Long's Estate, 331.

An examiner is a mere agent to take depositions for the parties; he has no right to withhold his report for the purpose of compelling the payment of his fee. (O. C.) McCarthy's Estate, 315.

Rule V., sec. 10, of the Orphans' Court, only applies where his duties have not been completed, he cannot require security for costs after the completion of his duties. Id.

Digitized by Google

PRACTICE—*Continued.*

Where an attack is made upon the whole of a will, which is alleged to have been procured through undue influence, separate issues of *devisavit vel non* as to each bequest will not be awarded. (O. C.) Erwin's Estate, 412.

Practice.—Supreme Court. The Supreme Court will not reverse a lower court for any construction of its own rules, unless such construction is manifestly erroneous and injurious. Higgins Carpet Company *v.* Latimer, 62.

If the Supreme Court is of opinion that the lower court was correct in taking a case from the jury, improper answers to points for the jury will be disregarded. Gilchrist *v.* Brown, 39.

The Supreme Court will not review the discretion of the Common Pleas in refusing to set aside a sheriff's sale when the advertised dates of sale appear to conflict. Hollister *v.* Vanderlin, 41.

A certiorari brings up for review the record only and, regularly, it can bring nothing not upon the record proper, unless there be an allegation that the court below has been guilty of an abuse of discretion. Conshohocken Tube Co. *v.* Iron Car Equipment Co., 254.

PRESUMPTION. Where a person is absent for many years without being heard of, a presumption arises not only of his death but of his death without issue. (O. C.) Duffy's Estate, 199.

Presumption arising from wife's possession of money. See HUSBAND AND WIFE, Saake *v.* Dorner, 204.

PRINCIPAL AND AGENT. To sustain an action of deceit against a principal upon a misrepresentation of his agent, the fraud should be clear and there should be, in addition, some evidence of participation or knowledge on the part of the principal or circumstances which should have put him on inquiry. Freyer *v.* McCord, 75.

A principal is bound by the acts of his agent, within the scope of the authority that he is held out to the world to possess, even if the latter act contrary to instructions McNeile *v.* Cridland, 274.

Estoppel of principal by action of agent. See ESTOPPEL. Light *v.* Countrymen's Mutual Insurance Co., 454.

PRIVILEGED COMMUNICATION. Reports made by the agents or employees of a railroad company to their superior officers, for the express purpose of being submitted to counsel for the preparation of a defence to a pending action for damages, are in effect made to counsel and are therefore entitled to protection as privileged communications. Davenport Company *v.* Pennsylvania R. R. Co., 132.

PROBATE. The court will set aside the probate of a will invalid by the law of the testator's domicile, although it would have been valid in this State. Price's Appeal, 531.

PROMISSORY NOTE. A promissory note given by a married woman as security for the debt of her husband is invalid. Patrick *v.* Smith, 10.

The receipt by a creditor of debtor's note for a debt does not extinguish the debt, unless it be specially agreed that the note be taken as payment. Dougherty *v.* Bash, 420.

PROXIMATE AND REMOTE CAUSE. The responsibility for negligence does not extend to all the consequences that may by possibility result from that negligence, but to those consequences only that under the circumstances might and ought to have been foreseen. (C. P.) Wood *v.* Pennsylvania R. R. Co., 410.

See LIQUOR LAW. Bradford *v.* Boley, 238.

PURCHASE. Where a testator bequeaths land to several, in shares, with the proviso that within a given

PURCHASE—*Continued.*

time one of them may "purchase the shares of the others," at a price fixed in the will, and the devisee to whom the privilege is given elects to take, he takes not by purchase from or through the devisees, but under the provisions of the will. Bayer *v.* Walsh, 57.

QUESTION OF LAW AND FACT. Abandonment is a mixed question of acts and intention and is ordinarily for the jury. Bartley *v.* Philips, 19.

Abandonment of an oil lease does not depend exclusively on the length of time during which the lessee ceases operations but also on the intention, and that is largely dependent on the agreement and understanding of the parties. Id.

No one can take advantage of an abandonment of an oil lease, except the lessor and his successors in right, therefore, when a plaintifff in ejectment shows a lease to himself and a cesser of operations thereunder for a long time, it is error to enter a non-suit on the presumption of an abandonment, as under the evidence it does not appear under what title the defendant claims. Id.

The question of the extent of the power of a bank cashier to bind the bank by his action, apparently within the scope of his duty, is one of fact for the jury. Farmers and Mechanics Bank *v.* Third National Bank, 47.

The question of the rate of speed at which a car may be going at the time of an accident is one of fact and, solely, for the jury, if this speed be found to be too great, considering the conditions of the case, the company is negligent. Thatcher *v.* Central Traction Co., 84.

Where there is conflicting testimony bearing on the question of defendant's negligence and the alleged contributory negligence of the deceased, the case cannot be withdrawn from the jury, without manifest usurpation of authority and invasion of the province of the jury. Iaquinta *v.* Citizens Traction Co., 86.

If there has been neither delivery nor the assumption of control it may be the duty of the court to pronounce a sale void for legal fraud; but when the vendee has assumed control, the question whether the sale is *bona fide* is usually one of fact and it is for the jury to find if the vendee has done all that could reasonably be expected in such a case. Goddard, Hill & Co. *v.* Leopold Weil & Co., 98.

While gross inadequacy of price, standing alone as the only fact established may justify an inference of fraud, when connected with other facts it must be considered in connection with them, and the question must be submitted to the jury. Id.

In an action of trespass against a street railway company, which is bound to keep the cartway "in good repair" it is the province of the jury to find whether had proper care been exercised by the company in keeping their tracks in good condition the plaintiff would have suffered injuries or not. Gilton *v.* Hestonville Pass. Ry. Co., 143.

The condition of the health of an insured when the policy was issued is essentially and entirely a question of fact to be decided upon the evidence and involving the credibility of witnesses, and it would be manifest error to refuse to submit that question to the jury. Dietz *v.* Metropolitan Life Insurance Co., 403.

In an action for damages incurred by reason of defendant's negligence, brought by one who had previously met with a severe accident, it is a question of fact for the jury, whether the injuries complained of were caused alone by defendant's negligence or were attributable to his former accident. Tietz *v.* Philadelphia Traction Co., 469.

Whether property is urban or rural is, usually, a question for the jury, because it is one of fact but, where the facts are agreed upon, it becomes a question of law for

Digitized by Google

QUESTION OF LAW AND FACT—*Continued.* the court as in other cases. City of Reading *v.* O'Reilly, 489.

QUIETING TITLE. Where there is a petition under the Act of June 10, 1893, to quiet the title to certain coal *in situ*, when there is no adverse claim to the land or its possession, but to part of the product after it has been severed and become personalty, and when the answer sets up no right which could have been asserted in ejectment, and nothing which could not have been asserted in a personal action for the severed coal or for its value, if it had been wrongfully sold, the case is not within the statute. Delaware & Hudson Canal Co. *v.* Genet, 444.

RAILROADS. A railroad company, in taking land for its right of way, may define the limits thereof, so as to exclude whatever is unnecessary to the construction and operation of its line. It does not lose the right so to define by failing to exercise it at the time of taking, provided it exercise it within a reasonable time. Jones *v.* Erie & Wyoming Valley R. R. Co., 441.

A railroad company is not compelled to take for the purpose of its road the utmost that it has the power to take. It may release all of the 60 feet, which it is authorized to take, which it finds unnecessary for its road. There is no claim against the company for the land so released. Id.

The presumption that a railroad company takes, when it enters by virtue of the right of eminent domain, the full breadth of 60 feet for its right of way, is applicable only where the entry is adverse and upon property subject to seizure or appropriation under general laws; it does not apply to an entry upon a highway or a public street. Its right, in such case, depends upon the charter or the terms of a municipal grant, and, unless the grant confer the right to occupy the street for the breadth of 60 feet, the company acquires no more than a right of passage of a reasonable width. Id.

The construction of a road by a company and an actual occupation of a street therefor shows what is reasonably necessary for the purpose of the passage, is a definition by the company of its needs and a construction by it of the municipal grant. Id.

The measure of the duty of a railroad company toward a person who is on the platform of the station and who is either a passenger or is about to become one, having purchased a ticket, is that the company must take all the care for his safety that foresight can suggest. (C. P.) Wood *v.* Pennsylvania R. R. Co., 410.

Railroad tracks, except at crossings and then only under suitable caution against collision, are for the exclusive use of the cars and locomotives. Dell *v.* Phillips Glass Co., 467.

It is an inexcusable trespass to eject a passenger from a railroad car, unless by some act of his he has put himself in the wrong. Laird *v.* Pittsburgh Traction Co., 24.

L., a passenger on an electric car, having paid his fare within two or three minutes of nine o'clock in the morning, received a transfer check punched at nine, entitling him to a ride upon a cable car of another company which connected with the electric car. The conductor of the cable car, however, refused to receive the transfer ticket, because it was also punched at 7.30 A. M. L. assured him that he had received it at nine o'clock but the conductor called a policeman and L. was ejected from the car without violence; *held*, (1), L. was entitled to use the transfer check and was not bound to inquire why it was also punched at 7 30; (2), that if the two punchings raised a doubt in the conductor's mind he had no right to resolve that doubt against L. and eject him from the car. Id.

A transfer check by its terms required the holder to

RAILROADS—*Continued.* satisfy himself that the date and hour were correct; *held*, that such a regulation to be reasonable would require the transfer check to be given to the passenger a sufficient time before he leaves the car to enable him to read it, and, if necessary, have it corrected. Id.

RATIFICATION. The councils of a municipality have power to validate and ratify an act assumed to be done on its behalf, although such act was not done in accordance with any ordinance or resolution passed before the act was performed. *In re* Shiloh Street, 219.

"READ LAW." Definition of phrase. See WILL. Benson's Estate, 512.

RECEIVER. A receiver appointed by the federal court may be sued as garnishee in a State court without leave from the federal court having been first obtained. Conshohocken Tube Co. *v.* Iron Car Equipment Co., 254.

Since the Act of Congress of 1888, an attachment may issue against a receiver as garnishee but if it become necessary for his protection to withhold judgment, until the opinion of the proper federal court can be taken upon the propriety of the payment to the attaching creditor, this should be done. Id.

RESCISSION. When an alleged false representation as to its credit is made by a firm to a mercantile agency and, subsequently, a new firm is formed, containing one of the partners of the old firm and a new man, which new firm retains the name of the old one, one who sells goods to the new firm cannot rescind the sale on the ground of the false statement as to the old firm's credit, especially when the false statement was not learned by him until after making the sale. Manhattan Brass Co. *v.* Reger, 342.

RECORD. Where the record of a deed, purporting to be the deed of A. and B., his wife, for land owned by B., fails to show B.'s signature to same and a suit in ejectment is brought for the land by B.'s only son, after the death of A. and B., it is competent for the defendant, after proof of loss of the original deed, to show, as evidence that the deed was actually executed by B.: (1) An original article of agreement to sell, according to the terms of the deed, which was signed by A. and B., although not acknowledged. (2) The obligations in writing which the purchaser gave for same which were in accordance with the terms in the deed and which were in the name of A. and B., two of which had been duly assigned in writing by A. and B. (3) The record of the paper which purported to be the deed of A. and B., to which was attached a certificate of a justice of the peace of the due acknowledgment of the deed by the wife. Carr *v.* H. C. Frick Coke Co., 493.

RELEASE. The consent of a mortgagee to a sale of the timber on the mortgaged land and the receipt by him of the proceeds of such sale operate as a release of the timber from the lien of the mortgage. Fredonia National Bank *v.* Borden, 16; Perrin *v.* Waterhouse, 17.

A railroad company is not compelled to take for the purpose of its road the utmost that it has power to take. It may release all of the 60 feet, which it is authorized to take, which it finds unnecessary for its road. There is no claim against the company for the land so released. Jones *v.* Erie & Wyoming Valley R. R. Co., 441.

See ASSIGNMENT FOR BENEFIT OF CREDITORS. Ralston's Appeal, 521.

REMAINDERMEN. Where an apportionment has been recognized by the life owner of a charge for many years, it cannot be re-opened and arrearages of the difference, between what has been paid and what the legal rule would have required, exacted by the life owner's administrator; but his heirs, who claim in their own right as remaindermen, are not bound by past payments and may claim for the future on the legal basis. Van Reed *v.* Jones, 549.

Digitized by Google

REPAIR. The duty to repair a street, where it exists extends to the replacement of an old pavement by a new one of a different and improved kind. Philadelphia *v.* Thirteenth and Fifteenth Streets Ry. Co., 428.

REPLEVIN. A claim property bond by defendant in an action of replevin, is not defective, so as to render the sheriff liable for accepting the same, because it does not contain the customary obligation that defendant shall abide the judgment of the court in all things relating to the premises, when it does show an undertaking that defendant shall appear and make good his claim. Watterson *v.* Fuellhart, 565.

RESERVATION. Out of leased premises. See OIL LEASE. Balfour *v.* Russell, 225.

REVOCATION. The doctrine that the court, whenever possible will reconcile two dispositions, which are apparently inconsistent, does not apply as between a will and codicil. Between a will and codicil the argument is stronger in favor of revocation and the words of revocation need not be as clear as those of the gift. (O. C.) Richard's Estate, 264.

SEE WILL. Watt's Estate, No. 1, 369.

ROAD LAW. On the trial of an action to recover from a city for the change of grade of a street, plaintiff insisted that the street had never been accepted or opened by the city and the case went to the jury on the question whether there was any street on the ground covered by the ordinance authorizing the change of grade. The jury gave a verdict for $8,000, in effect finding that when the ordinance was passed there was no street on the ground, and, at the same time, that an attempt to change the grade of the street that had no existence had injured the plaintiff's property; *held*, that this finding was absurd and that the jury should have been instructed that, in case it found for the plaintiff upon the question of the non-existence of a public street, damages could not be recovered for an attempt to change that which had no existence. Huckestein *v.* City of Allegheny, 66.

Where a city has made a mistake in attempting to open and grade a street that has no existence it may be relieved from the consequences thereof, upon the payment of the costs and expenses which the property owner has been compelled to incur thereby. *In re* Sandusky Street, 68.

The appointment of the original petitioner for a road as a reviewer is an irregularity fatal to all subsequent proceedings. *In re* Road in Ohio and Ross Townships, 140.

Testimony taken on a general appeal from a report of viewers is no part of the record and the decision of the court in a road case must be based upon the report of viewers, reviewers or re-reviewers. Id.

In an action to recover damages for change of grade of a street, the jury cannot consider the matter of opening future streets through the plaintiff's property, so far as concerns damage that may be occasioned by such future change. J. G. Brill Co. *v.* Philadelphia, 217.

An execution cannot issue upon a report of viewers, appointed under a petition under the Act of April 22, 1856, to ascertain and assess benefits and damages arising from the opening of a street, unless specific amounts are assessed against or on behalf of certain persons, as there is no judgment on which to base execution. *In re* Opening of Pringle Street, 314.

A report of viewers which does not precisely ascertain whether or not there be damages and benefits and the amount of the same and the names of the property owners so damaged or benefitted is an imperfect performance of the office of viewer. Id.

The Act of May 24, 1887, which was adjudged unconstitutional in Ayar's Appeal, 122 Pa. 266, furnished a complete system of procedure in relation to the grading and paving of streets, and repealed all laws inconsistent with or supplied by it; the ordinances of councils created

ROAD LAW—*Continued.*

by it were validated by the Act of May 13, 1889, and the local improvements made under it are within the purview of the Act of May 23, 1889, "authorizing assessments and re-assessments for the cost of local improvements and providing for and regulating the same." City of Chester *v.* Pennell, 457.

A tenant who leases property, after the passage of an ordinance directing the widening of a street, is entitled to recover for damages occasioned by the actual widening during his tenancy. Justice *v.* Philadelphia, 509.

In an action by a tenant for damages, caused by widening a street under an ordinance whereby four feet were taken from the front, plaintiff is entitled to recover only the actual money loss caused by the necessary work in taking down, with care, the front of the building in question. There can be no allowance for loss of profits. Shaw *v.* Philadelphia, 510.

In such case, plaintiff may give testimony showing actual injury from dirt and grime occasioned by the work. The extent of such injury and whether the work could have been done without any loss from this source are questions for the jury. Id.

Where a jury has been strictly limited to the actual money loss, incurred by a tenant whose front has been compelled to be put back on account of the widening of a street, it is not error to decline to charge that the tenant is only entitled to recover the depreciation in the market value of his leasehold, as affected by the widening of the street. Id.

The Acts of May 23, 1874 and June 8, 1881, not only confer a power of control and direction over streets and alleys but also specify the manner of its exercise, in which is included by the express terms of the Act of 1874 the right to assess damages and benefits. *In re* Narrowing of Greenough Street, 545.

The Acts of May 21, 1836 and May 25, 1887, differ merely in matters of procedure, the latter is cumulative, giving additional powers to be exercized in a different way than those given by the former Act. Schroeder *v.* City of Lancaster, 572.

RULE OF COURT. Where a rule of court provides that where defendant has a set-off he shall file a specification of the same, verified by an affidavit and within fifteen days after filing notify the plaintiff thereof and the plaintiff fifteen days after notice shall file his reply thereto, it is not sufficient to set forth the matter of set-off in an affidavit of defence to plaintiff's claim, but the rule of court should be strictly complied with. Higgins Carpet Company *v.* Latimer, 62.

Rule 8, section 3, of the Common Pleas of Allegheny County, embraces every species of counter claim which may legally or equitably be interposed as a defence. Id.

The Supreme Court will not reverse a lower court for any construction of its own rules unless such construction is manifestly erroneous and injurious. Id.

Where a rule of court provides that "such items of claim and material averments of fact as are not specifically traversed and denied by the answer shall be taken as admitted," an undenied allegation of negligence is not to be "taken as admitted," if the relations of defendant to plaintiff do not legally import the duty alleged to have been neglected. Farmers and Mechanics Bank *v.* Third National Bank, 47.

SALE. Where B. delivers to A. a clock, which he says he is selling on the instalment plan, and a contract is executed, whereby A. "rents" from B. the clock at a given rate per week, and B. agrees that, at any time within the term, A. may purchase the clock at a price equal to the rental and be allowed on said price whatever he had paid under the agreement, the transaction is

Digitized by Google

SALE—*Continued.*
a sale and not a renting. Commonwealth *v.* Harmel, 1: Commonwealth *v.* Coon, 5.

Payment of freight and receipt of goods are not necessarily an acceptance of the goods. Davis *v.* Koenig, 51.

If goods are unmerchantable at time of shipment or become so before arrival, in consequence of the negligent manner of packing, it is the right of the vendee to refuse them, even after having taken physical possession of them. Id.

Where personal property sold is not reasonably susceptible of actual delivery, a constructive delivery is sufficient and it is not necessary that the vendee should do more than assume such control of it as will reasonably indicate the fact of the change of ownership. Goddard, Hill & Co. *v.* Leopold Weil & Co., 98.

If there has been neither delivery nor the assumption of control, it may be the duty of the court to pronounce a sale void for legal fraud, but when the vendee has assumed control the question whether the sale is *bona fide* is usually one of fact and it is for the jury to find whether the vendee has done all that could reasonably be expected in such a case. Id.

SCHOOL LAW. The fourth section of the Act of June 13, 1836, relating to common schools, confers no power on school directors to take possession of real estate held by trustees for the general use of the neighborhood as a school house and its appendages, except by conveyance from the said trustees. The possession of such property by the school directors with the assent of those interested while it is jointly occupied for Sunday-school purposes, church meetings and public gatherings, is not such adverse possession as would confer an absolute title or raise a presumption of a grant to the directors. (C. P.) *In re* Old Eagle School Property, 348.

Trustees of property vested in trustees for school purposes will be appointed by the Common Pleas on petition and an appropriate decree made for the establishment and protection of such trust, when the positions of trustees have become vacant. Id.

The defence of their title by a school board against proceedings to establish by conveyance, not of record, a trust for religious and burial as well as educational uses is justifiable and warrants a division of costs. Id.

SEPARATE USE. All that is necessary to establish a separate use by will is an unequivocal manifestation of an intention of the testator to exclude marital influence. Steinmetz's Estate, Duffield's Appeal, 377.

A married woman having an estate in fee, subject to a separate use trust, cannot devise it by will, unless authorized by the instrument creating the trust. Steinmetz's Estate, Cobb's Appeal, 378.

The Acts of April 11, 1848, P. L. 536, and June 3, 1887, P. L. 332, apply to the common law rights of a married woman, not to trusts in equity for separate use. Id.

SET-OFF. Where a rule of court provides that where defendant has a set-off he shall file a specification of the same, verified by an affidavit and, within fifteen days after filing, notify the plaintiff thereof and the plaintiff fifteen days after notice shall file his reply thereto, it is not sufficient to set forth the matter of set-off in an affidavit of defence to plaintiff's claim, but the rule of court should be strictly complied with. Higgins Carpet Co. *v.* Latimer, 62.

Rule 8, section 3, of the Common Pleas of Allegheny County, embraces every species of counter claim which may legally or equitably be interposed as a defence. Id.

A. made a note, under seal, to order of B. On the same day B. assigned it to C., who assigned it to D. In an action by D. against A., the latter offered in evidence, under plea of set-off, an overdue note of B. to order of F. and assigned to A.: *held*, that, by producing the note,

SET-OFF—*Continued.*
A. had established a valid set-off; he was not bound to establish that he had no notice of assignment of B.'s original note to plaintiff; (2), to defeat the right of set-off, thus established, the onus was upon the plaintiff to prove the assignment to him and that defendant had notice of the set-off. Burford *v.* Fergus, 43.

In an action by the administrator of a solvent estate, the defendant may same, against the claim of the plaintiff, a debt due by the decedent when the suit was brought. Hicks *v.* National Bank of Northern Liberties, 424.

In the case of an insolvent estate the debts of the decedent maturing after his death are not admissible as set-off in an action by the administrator of the estate. Id.

Where a railroad company is subject to the ordinances of councils requiring them to pave and upon refusal authorizing the stopping of their cars until the ordinance is fully complied with, evidence of the injury suffered by such stopping, as a set-off to a claim against the companies for the cost of paving, is irrelevant. Philadelphia *v.* Thirteenth and Fifteenth Streets Ry. Co., 428.

SEVERENCE. Of sub-surface estate from the surface. See COAL. Moreland *v.* H. C. Frick Co., 496.

SEWER. Lots having no present connection with a sewer have no present special advantage from it, and the mere fact that a city's plan contemplates a connection is no ground for the imposition of a present lien and obligation to pay. *Re* Sewer on Park Avenue, 525.

No properties can be assessed for the cost of a sewer except those that abut on the line of it. Witman *v.* City of Reading, 528.

SHERIFF. A claim property bond, by defendant in an action of replevin, is not defective, so as to render the sheriff liable for accepting the same, because it does not contain the customary obligation that defendant shall abide the judgment of the court in all things relating to the premises, when it does show an undertaking that defendant shall appear and make good his claim. Watterson *v.* Fuellhart, 565.

When the plaintiff in an action against the sheriff alleges that the sureties accepted by him on a claim property bond were insufficient it is competent for the defendant to show that said sureties were then reputed to be solvent, among men having business with them. Id.

Although in all counties of the State, except Philadelphia and Allegheny counties, the sheriff is answerable to defendant in replevin, not only for the sufficiency of the sureties when the bond is taken but also for their sufficiency when the judgment has determined the property to be in the defendant, the court will not extend the severe liability to the case of acceptance of sureties on a claim property bond. Id.

Liability for taking insufficient surety. See SHERIFF. Id.

SHERIFF'S SALE. The requirement of the Act of June 16, 1836, section 63, P. L. 772, that a sheriff's sale of lands shall be advertised once a week during three successive weeks, is fulfilled when the advertisement is made in a newspaper in one day of each of three succeeding weeks, although there may not have been twenty-one days between the first publication and the day of the sale. Hollister *v.* Vanderlin, 41.

Mere inadequacy of price alone is not sufficient ground to set aside a sheriff's sale. Id.

SILENCE. See EVIDENCE. Huston's Estate, 205.

SPECIFIC PERFORMANCE. When partners have in writing agreed on a valuation of the partnership property and that upon the death of one the other should have the option to purchase from the decedent's estate his interest at the sum agreed upon, that sum will be regarded

Digitized by Google

SPECIFIC PERFORMANCE—*Continued.*
as intended to have been mutually fixed, and the executors of the will of the deceased partner will be required to convey to the surviving partner the property upon receiving the consideration for the same. Hormann's Appeal, 396.

An agreement to sell is not necessarily testamentary because it is not to be performed until the death of the vendor and, even if testamentary, it may be enforced as a contract, if founded upon sufficient consideration, and this is so even though the contract is unilateral and without reciprocal engagement on the part of the vendee. (O.C.) Parker's Estate, 400.

SPENDTHRIFT TRUST. See TRUST. Assigned Estate of Edward S. Handy, 265.

SPOLIATION. Where it is alleged that words were added to a deed for the conveyance of land after acknowledgment and delivery, the question is not of reformation but of spoliation and may be proved by either of the parties to the deed and, if so found as a fact, the deed may be taken as if the act had never been committed. Mix *v.* Royal Insurance Co., 558.

STATUTE. When the provisions of a general Act of Assembly are utterly hostile to those of special laws the latter are repealed by the repealing clause of the former. Commonwealth *v.* Schneipp, 102.

See INTERPRETATION OF STATUTES.

STATUTE OF FRAUDS. A verbal promise to pay the debt of another, without any consideration moving to the promissor, and where the original debtor continues to be liable, is within the statute of frauds and cannot be enforced. Dougherty *v.* Bash, 420.

STATUTE OF LIMITATIONS. Where a debtor, in acknowledging the owing of money, coupled the acknowledgment with the statement that if she could not raise the money, the plaintiff "could have it out of the land" there is no promise to pay but a remission of the creditor to his legal rights for recovery. Simrell *v.* Miller, 519.

No number of insufficient acknowledgments of an indebtedness will constitute a sufficient one. Id.

It is error to combine the testimony of witnesses to bring any of them up to the required standard. Id.

See LIMITATION OF ACTIONS.

STOCK TRANSACTIONS. "Margin" is security, nothing more, and the only difference between stock transactions and those in other commodities is that stocks are more commonly made the vehicle of gambling speculation and courts are, therefore, disposed to look more closely into them to ascertain their true character. Hopkins *v.* O'Kane, 475.

STOP, LOOK AND LISTEN. See NEGLIGENCE. Gangawer *v.* P. & R. R. Co., 356.

STREETS. A tenant who leases property after the passage of an ordinance directing the widening of a street is entitled to recover for damages occasioned by the actual widening during his tenancy. Justice *v.* Philadelphia, 509.

STREET RAILWAYS. Where a union of street railroads is brought about by an Act of Legislature providing for the surrender of certain corporate rights and conferring other rights and making them exclusive, which is duly accepted by the corporation concerned, the Act is the operative charter of the consolidated company, and in order to find the grant and limitations thereof and the burdens and obligations imposed by it it is necessary to look to the terms of the two original charters of the separate companies which remain unchanged and confirmed. Philadelphia *v.* Thirteenth & Fifteenth Streets Passenger Ry. Co. 428.

By their original charters, the Thirteenth and Fifteenth Streets Company and the Navy Yard, Broad Street and

STREET RAILWAYS—*Continued.*
Fairmount Railway Company were required to keep in repair the streets traversed and occupied by them in accordance with the regulations of councils. These provisions are general and applicable to all streets on which the tracks are laid, and are not limited to the space between the rails but extend to the entire roadway from curb to curb. Id.

The duty to repair a street, where it exists, extends to the replacement of an old pavement by a new one of a different and improved kind. Id.

That a street railway may, like a steam railway, locate its route, not for the accommodation of local travel along the highways but to reduce time and distance for passengers travelling from city to city or town to town across the country is a proposition not to be entertained. It involves a perversion of the character and object of street railways. Per WILLIAMS, J. Township of Rahn *v.* Tamaqua and Lansford St. Ry. Co. 165.

Street railway companies must share the right to the use of the public streets and of their tracks with the public. Thatcher *v.* Central Traction Co., 84.

The general passenger railway Act of May 14, 1889, contemplates only railways within a city and does not authorize the construction of electric railways to be run over country roads to connect one city or town with another. Pennsylvania R. R. Co. *v.* Montgomery County Passenger Ry. Co., 153; Township of Rahn *v.* The Tamaqua and Lansford Street Ry. Co., 165.

Land condemned for a country road has imposed upon it no other servitude than that of passage; the laying of tracks upon it is the imposition of a new servitude, it is otherwise in the case of land taken for city streets. Id.

Use of county bridge, by street railway. See BRIDGE. County of Berks *v.* Reading City Pass. Ry. Co. and Reading Traction Co., 173.

A street passenger railway company does not possess the right of eminent domain. Pennsylvania R. R. Co. *v.* Montgomery County Passenger Ry. Co., 153; Township of Rahn *v* The Tamaqua and Lansford Street Ry. Co., 165.

Where a passenger railway company, authorized to build a continuous road through several townships, provided the assent of the local authorities to the construction of the road be obtained, fails to obtain the assent of one, it may be restrained by injunction from beginning the construction of its road even in a township whose authorities have given consent; such an injunction is not a "practical repeal of the charter," it merely restrains the company from exercising its rights under the charter, until it has complied with the condition precedent contained therein. Lehigh Coal and Navigation Co. *v.* Inter-County Street Ry. Co., 160.

SURETY. A married woman cannot become a surety for another and cannot render herself liable as such by adopting the form of giving her note, when such note is in reality security. Patrick *v.* Smith, 10.

SURRENDER. Where a lessee claims to be released from liability to pay rent, by reason of a surrender of the demised premises, during the term, he must prove clearly an acceptance by the lessor. Reeves *v.* McComesky, 394.

An offer by lessee to prove that he was told, previously to his removal, that, they would take the property and that he might lease it, is too vague to prove acceptance. Id.

SURVIVAL OF ACTION. The first section of the Act of April 26, 1855, designating four separate parties, to one of whom, according to the circumstances of each case, the right of action is given, does not affect section 18 of the Act of 1851, but an action brought to recover for personal injuries will still survive and may be

Digitized by Google

SURVIVAL OF ACTION—*Continued.*
prosecuted by the personal representatives, although it appear in the pleadings that the death of the plaintiff, occurring after action brought, was due to the act of the defendant, to recover the damages occasioned by which the action was brought. Birch *v.* Pitts., Cin., Chicago & St. Louis Ry. Co., 69.

TAXATION. A company of the national guard is a purely public charity, and its armory and the lot upon which it is located, being owned by the organization, are public property and exempt from taxation. Philadelphia *v.* Keystone Battery A., 482.

Where a military company, having purchased a lot and begun the erection of an armory, finds the lot unsuitable for its purposes and proceeds to secure a more suitable site, the first lot is not subject to taxation, during the interval between the abandonment of the first building and the sale of the site. Id.

Local and special taxation is sustainable only on the basis of special and individual benefit and the limit of the benefit is the limit of the taxing power. When, therefore, it appears that there is no special benefit to the owners of the property by reason of a main sewer required for lands further off, but that a smaller sewer would have been sufficient to give the property all the benefits it derives from the improvement, it can only be assessed to the extent of the cost of the latter. This is in accordance with the terms of the Act of 1891, which provides that if sufficient property benefited cannot be found, the extra expense is to be paid by the municipality. *Re* Sewer on Park Avenue, 525.

The property of a public charitable institution which is used directly for the purpose and in the operation of the charity, although detached geographically from the main part of the institution, is exempt from taxation, although it may also be used in a manner to yield some return in the way of reducing expenses. Pennsylvania Hospital *v.* Delaware County, 547.

Under the Act of June 8, 1891, P. L. 229, the auditor-general and State treasurer cannot change the appraised value of stock of a corporation made under oath by the president and treasurer of the same, when the only basis for the change is that the net earnings represent at six per cent. interest a larger sum than that returned by the officers of the company. Commonwealth *v.* Pittsburgh & Western Ry. Co., 137.

The Act of 1891 is not in conflict with Amendment XIV., sec. 1, of the Federal Constitution, as a denial of equal protection of the laws to any person within its jurisdiction. Id.

The 6th and 7th sections of the Act of 1891 do not establish a system whereby the shareholder in a corporation is deprived of his property without due process of law, in violation of Art. XIV. of the Constitution of the United States. Commonwealth *v.* Merchants & Manufacturers National Bank, 291.

The Act of 1891 is not in conflict with the condition of U. S. R. S. section 5219, allowing a State to tax stock of national banks, *i. e.*, that the taxation thereof shall not be at a greater rate than that assessed upon other moneyed capital in the hands of individual citizens of such State. Id.

See CONSTITUTIONAL LAW. Id.

TENANCY BY ENTIRETIES. Words which, in a conveyance to unmarried persons, would create a joint tenancy or a tenancy in common create where the grantees are husband and wife, and they are so named in the conveyance, a tenancy by entireties. Young *v.* Fox, 201.

Where a deed would create neither a tenancy in common nor a joint tenancy in unmarried persons it will not

TENANCY BY ENTIRETIES—*Continued.*
create a tenancy by entireties, although the grantees be described as husband and wife. Id.

TESTAMENTARY AGREEMENT. An agreement to sell is not necessarily testamentary because it is not to be performed until the death of the vendor, and even if testamentary, it may be enforced as a contract, if founded upon sufficient consideration, and this is so even though the contract is unilateral and without reciprocal engagement on the part of the vendee. (O. C.) Parker's Estate, 400.

TESTAMENTARY CAPACITY. Neither old age, lessened mental activity nor impaired memory is inconsistent with the making of a will. (O. C.) Lennig's Estate, 118.

TOLLS. The only restriction upon the right to charge toll is that it must be reasonable. If the amount is not fixed with regard to a vehicle by the act giving the power to charge toll, the mere fact that the toll payable by certain vehicles is incapable of computation by the method designated for other vehicles in the Act does not negative the power expressly given to collect toll from those travelling by carriage. Geiger *v.* Perkiomen and Reading Turnpike Co., 233.

TRESPASS. A building upon land of an adjoining owner may be treated by said owner as a permanent trespass. See EQUITY. Pile *v.* Pedrick, 220.

A plaintiff may recover against one of two or more defendants where conspiracy is alleged, if the wrongful act could have been committed by that one. Fillman *v.* Ryon, 391.

TRUST. An absolute assignment of a policy of life insurance by a daughter to her mother may be shown by parol to have been intended to create a trust in the mother to collect and manage the insurance money and apply the income to the support and care of the daughter. Estate of Ellen J. Harker, 207.

When it appears that for a long period of years a daughter was almost entirely dependent upon her mother, to whom she assigned a policy of life insurance, that no account of receipts or expenditures was kept or demanded and no charge for care and maintenance made; on the death of the mother, her estate will not be charged with interest during the whole period, less a small credit based on an estimate of the expenditures, but it will be assumed that the mother was entrusted with the management of the principal and the expenditure of the income, with no thought or intention of accounting for the income, otherwise than by the support of the daughter and the daughter is, therefore, only entitled to the principal of the insurance money, with interest from the date of the mother's death. Id.

A will bequeathing testator's estate, in trust to allow his widow to occupy testator's houses with his children; pay half of the income of the estate to the widow and the other half to the children; on the death of the widow to pay one-fourth of the income to each of testator's daughters for her separate use; upon the death of a daughter to pay three-fourths of the principal of her share to her issue, if any; when each of testator's sons attain the age of 21 to advance him, in the discretion of the trustees and with the widow's consent, a certain amount and, after the death of the widow, to pay each of the sons one half of his share when he attains the age of 25 years, one-fourth when he attains the age of 28 and the remaining fourth to hold on a spendthrift trust for the son for life; creates a spendthrift trust for each son in the one-fourth only and that particular trust is not extended to the whole share of a son by a codicil directing a division of the estate into four shares on the death of the widow and that one equal share shall be held by the trustees for each one of testator's children "upon the trusts and for

Digitized by Google

TRUST—*Continued.*
the same purposes as are set forth in my will and for no other trust or purposes whatsoever." Assigned Estate of Edward S. Handy, 265.

The fraud which will convert a purchaser at a sheriff's sale into a trustee *ex maleficio* for the debtor must have occurred at the time of the sale. Burr *v.* Kase, 284.

The Acts of April 11, 1848, P. L. 536, and June 3, 1887, P. L. 332, apply to the common law rights of a married woman, not to trusts in equity for separate use. Steinmetz's Estate, Cobb's Appeal, 378.

When words of request or desire follow an absolute gift and the benefit contemplated in favor of another, is to be accomplished, not by the direct request or desire of the testator, taking effect at the expiration of a prior limitation, but through the agency of the original legatee invoked by the testator's request, the person or class in whose favor it is invoked cannot assert the existence of a trust which can be enforced by decree. (O. C.) Whelen's Estate, 575.

TRUSTEE. A trustee cannot be permitted to deprive himself of a power, conferred for the benefit of the trust, or so to fetter its exercise by himself or his successor as to defeat the purpose of the trust. Hickok *v.* Still, 329.

Equity will not decree a holder of title to be a trustee for another, unless there be something more than a mere violation of a parol agreement. Barry *v.* Hill, 92.

TRUSTEE EX MALEFICIO. A trust *ex maleficio* can only result from some act of bad faith and a mere refusal to perform a parol contract to hold or convey land is not sufficient to create such trust. Barry *v.* Hill, 92.

The statute of limitations of April 22, 1856, section 6, applicable to actions to enforce implied or resulting trusts, applies to resulting trusts which arise *ex maleficio.* Id.

VENDOR AND VENDEE. Averments as to breaches of agreement not to cut prices, etc., not averred explicitly enough to enable it to be determined whether they were conditions or inducements of a sale or mere promises as to future action, are not available as matter of defence in an action brought upon alleged sale. Smith, Kline & French Co. *v.* Smith, 124.

VENUE. An application for a change of venue under the Act of May 22, 1878, P. L. 98, may be allowed even after a trial in the court, from which it is sought to remove the cause, where that court has granted a new trial and defined the issue to be tried thereat. (C. P.) Rand *v.* Caflisch, 198.

VIEWERS. See ROAD LAW. *In re* Opening of Pringle Street, 314.

WAGES. See LIEN. Mulholland *v.* Wood, Brown & Co., 140.

WAIVER. Where a company has been led to believe that the property which it has insured is that of a man, whereas in fact it is that of his wife and, after a loss, the husband so deals with the agents of the company as to lead them to believe that he is the insured person, the mere fact that, pending negotiations, the wife makes out proofs of loss which reveal her sex and sends them to the central office and, as a result, receives a reply, addressed "Madam," calling her attention to defects in the proof but not admitting liability, do not show a waiver by the insurer of the right to insist on the fraud of the plaintiff, in obtaining the policy, as a defence in an action upon it. Freedman *v.* Fire Association, 353.

Notwithstanding a policy of insurance contains a stipulation that nothing less than a written agreement endorsed on the policy shall suffice to establish a waiver, a waiver

WAIVER—*Continued.*
may be shown by parol testimony of acts *in pais* of the agent of the company. Mix *v.* Royal Insurance Co., 558.

WARRANTY. Allegation of in affidavit of defence. See AFFIDAVIT OF DEFENCE. Baugh & Sons *v.* Mitchell, 228.

WIDOW. Acceleration of gift by refusal to take under will. See ACCELERATION. (O. C.) Keys's Estate, 231.

A testator gave his estate to his widow for life and, upon her death, half of the principal to his heirs-at-law and the other half to her heirs-at-law; *held,* that the widow was not an heir-at-law of the testator in the sense intended by his will. (O. C.) Keys's Estate, 459.

WILL. Neither old age, lessened mental activity nor impaired memory is inconsistent with the making of a will. (O. C.) Lennig's Estate, 118.

In appeals from the Register of Wills, on the ground of want of testamentary capacity or undue influence, the inquiry is always to be directed to the mental condition of the testator at the time of the execution of the will and to the circumstances then surrounding him or affecting his action. Id.

A testator may be prevented from signing his will by the extremity of his last sickness within the meaning of the statute, although both mentally and physically able to do so, if the exertion would be at the risk of his life. Diehl *v.* Rodgers, 447.

A will is to be construed in the light of the circumstances surrounding the testator at the time of its execution; and the construction is to be upon the entire instrument. (O. C.) Duffy's Estate, 199.

An interpretation which leads to an intestacy or which defeats, partially or altogether, a manifest purpose of the testator will not be adopted, if any other is possible and to accomplish such purpose words may be freely transposed, omitted or supplied. Id.

If the subject of a gift is personalty the phrase "die without issue" means without issue living at the death of the person, the failure of whose issue is spoken of. Id.

Where a will contains an express devise in fee of all the testator's "estate both personal, real and mixed" and a subsequent clause as follows: "I give and bequeath to my three children R., M. and B., the residue of my said estate after the death of my said wife, and after the bequest to my said grandson H., to be divided into three shares," etc., the said clause is a gift not of the residue of the testator's estate but of the estate of the devisee unconsumed by her and hence it cannot be considered as being intended to reduce her fee simple estate in the whole. Evans *v.* Smith, 144.

A direction to sell whatever of the estate the widow may not have sold or disposed of during her life is a recognition of her right to sell and dispose of the whole estate and not a restraint upon her estate under the will. Id.

Where devises have been made by express words in a will, the presumption is that they continue, until they are displaced by equivalent phrases, and a codicil will not be construed so as to revoke or modify them, beyond the necessary implication of the language used. Fife *v.* Miller, 37.

T. by his will devised to his daughter M. certain land "to be used and controlled by her and her husband F. during her lifetime for her own profit and advantage and in case she dies without children, her husband, if he survives her, shall have the use of it for his benefit during his lifetime and then" a devise over; in a codicil, T., subsequently, declared "I hereby alter that part of my will found recorded on second page of this will and at the end of the twenty-second line that is now cancelled to the middle of the thirty-second line marked in parenthesis, so that it

Digitized by Google

WILL—*Continued.*

should read that my son-in-law F. instead of only having a life estate in it shall own and possess it as his own without let or hindrance." *Held*, (1), that M. and her children were preferred devisees of the testator, and it was only in the event of her dying without issue and her husband surviving her that he would become entitled to any interest in the land in severalty and possession; (2), that while the effect of the codicil was to enlarge the quantum of F.'s estate, it did not revoke the double contingency; his estate was still dependent upon his surviving his wife and her dying without issue. Id.

I. by will gave one-fourth of his estate in fee in trust during the minority of his two grandsons, C. and F., with cross remainders in case either died during minority and without issue, and remainder over if both so died, but as each arrived at 21 his estate was to go to him in severalty. He further gave his daughter A. power to revoke the aforesaid devises and bequests and to appoint trusts for either or both, either deferring the time at which they should receive the principal or reducing the estate to one for life under a spendthrift trust, with or without testamentary power of appointment, "and with remainders to the persons who would be entitled if the child as to whose estate this power is exercised died owner of the same." Before either of the grandsons had attained their majority, A., in the exercise of the power under the will, revoked the devise to her nephew C., and declared a spendthrift trust for life for him, with a power of testamentary appointment, in case he left no descendants surviving and, if he should have descendants or fail to exercise his power of appointment, appointed the estate to the persons who would be entitled to take if said child died owner thereof. She then added the following proviso, "that to the extent it is lawful for me so to do and only to that extent I direct that any share of said principal passing by virtue of said child's decease to his brother F., shall be held by said trustees upon the same trusts hereinafter directed by me as to the original share of said F.," C. died, after attaining his majority, leaving a will in which he failed to dispose of his real estate. The trustees under the will of I. claimed to hold the real estate belonging to C. in trust for F., who claimed that the said real estate passed to him absolutely free of all trusts; *held*, that the limitation sought to be imposed by A. upon the property passing from C. to F. was in excess of the power given to her by I. in his will; (2), also that F. took the real estate absolutely and unfettered by any trust. Ingersoll's Estate, Thomas' Appeal, 253.

S. by his will devised to his wife A. for life, the use and occupancy, rents, issues and profits of all his real estate with power "to divide and parcel out the same amongst my five sons upon such conditions and terms as she shall deem best and right." S. left his wife, five sons and the children of two daughters; *held*, that the five sons of S. took a vested estate in remainder in their father's real estate, which upon the death of any one of them passed to his heir and that the widow had a power of appointment without reference to any confirmation thereof by the Orphans' Court. Schwartz's Estate, 337.

The blending of real and personal estate in the residuary clause of a will binds the real estate for the payment of the legacies, theretofore given, by implication, since the "residue and remainder" can only be ascertained after the payments of the debts, legacies and expenses. Watt's Estate, No. 1, 369.

The mere use of the words "annul and revoke" in a codicil as to a bequest previously given by a will is not a revocation of the bequest, when it is clearly the intention of the testator only to change the time for the payment of the bequest, so as to give a prior life interest to certain persons named in the codicil. Id.

WILL—*Continued.*

A testator by his will gave a bequest to a public charity. Some fifteen months later and within one calendar month of his death he executed a codicil in which he said: "I hereby annul and revoke the bequest to" said public charity "and instead thereof I give and bequeath" the same amount in trust for certain annuitants and after their deaths to pay the bequest to the same public charity for the purposes mentioned in the will. It was claimed by the residuary legatees that the bequest originally given in the will was revoked by the codicil and that the bequest given in the codicil was void by the statutes; *held*, (1), that the language of the codicil was not a revocation of the bequest to the charity; (2), that the Act of April 26, 1855, did not apply. Id.

Testator, who was a member of the bar, provided by will as follows: "My law books to be taken charge of by H. H. Benson and to be divided among my nephews who may read law; not to be sold—never; rather be burned." At the date of the will one of testator's nephews had begun the study of law and abandoned it. Subsequently to the date of the will, three other nephews studied law, and at the time of the testator's death two had been admitted to the bar and one was still a student: *held*, (1), to "read law" while not strictly a legal technical term is an expression which should find its interpretation in the common understanding of lawyers as meaning to take up the study of the law, with the purpose of being admitted to the bar and practicing the profession. Its meaning is not confined to the preparatory course, but may properly be said to include that reading of cases and text books of which every lawyer does more or less; (2), under the circumstances of this case the will excluded the nephew who had abandoned the study of the law and divided the library equally among the three nephews, of whom two were practicing lawyers and the third a law student at the time of testator's death. Benson's Estate, 512.

Where the words of the will are "I give and bequeath the said gas stock to the extent of $6,000," the subject of the gift is gas stock, not money; in such case the words "six thousand dollars" are not used to define the gift itself but as a means of measuring the extent of it. Johnson's Estate, 514.

A bequest to a number of persons, not named but answering a general description, is a gift to them as a class, and as to who shall be the constituents of this class the intention of the testator must be first sought. Denlinger's Estate, 573.

Where a testator devised a portion of his estate to "all the children of my brothers H. and D. share and share alike," M., a granddaughter of H., whose mother died before testator, was held to be entitled to a share of the estate under that devise. Id.

A codicil is to be interpreted in the light of the circumstances surrounding the testator at the time of its execution and of the reasons which induced it, especially where they appear upon its face, and as its purpose, ordinarily, is merely to modify or add to and not to revoke, it is only permitted to change the will to the extent that it is inconsistent with it. (O. C.) Whelen's Estate, 575.

A clear gift cannot be cut down by subsequent words, unless such words show an intention equally clear. Id.

When words of request or desire follow an absolute gift and the benefit contemplated in favor of another is to be accomplished, not by the direct request or desire of the testator taking effect at the expiration of a prior limitation but through the agency of the original legatee invoked by the testator's request, the person or class in

Digitized by Google

WILL—*Continued.*
whose favor it is invoked cannot assert the existence of a trust which can be enforced by decree. Id.

A testator gave his estate to his widow for life and, upon her death, half of the principal to his heirs-at-law and the other half to her heirs-at-law: *held*, that the widow was not an heir-at-law of the testator in the sense intended by his will. (O. C.) Keys's Estate, 459.

Where a testator provides that "the separate portion of my daughters shall be separately secured to them and their use beyond the dictation of the husband of either of them," a valid separate use is created. Steinmetz's Estate, Duffield's Appeal, 377.

Where a will provides that after certain indebtedness is paid "one third of the net amount shall be paid to my said wife," and at the same time leaves the whole estate in an active trust "as though I myself acted in the premises," an estate in fee simple in the third does not pass to the widow. Id.

Where a testator bequeaths land to several in shares with the proviso that within a given time one of them may "purchase the shares of the others," at a price fixed in the will, and the devisee to whom the privilege is given elects to take, he takes not by purchase, from or through the devisees, but under the provisions of the will. Bayer *v.* Walsh, 57.

WILL—*Continued.*
In the absence of words of substitution or of statutory provisions, the death of a legatee, in the lifetime of the testator, occasions a lapse of the legacy, which will go to the residuary legatee or to the next kin, unless the legatee be one of a class taking as tenants in comm on, in which case the survivors of the class will take the entire fund. (O. C.) Coffin's Estate, 71.

The word "effects" embraces in its widest scope every form and species of personal estate. (O. C.) Lippincott's Estate, 333.

When a testator enumerates particular kinds of chattels and couples with them "effects" or equivalent words, the generality of his expression is to be restricted to such species of property as are *ejusdem generis* with the particular words. Id.

A testamentary gift to a person will lapse, if the legatee die in the testator's lifetime, even though the gift be expressed to be to him and his heirs, but it may be so worded or the context may be such as to show that the word "heirs" was meant to describe not the estate but the takers. (O. C.) Worsley's Estate, 247.

Charge on real estate by will. See CHARGE ON REALTY. Dickerman *v.* Eddinger, 327.

WITNESS. One who has been convicted of perjury and sentenced therefor is rendered a competent witness by a pardon. Diehl *v.* Rodgers, 447.

END OF VOLUME XXXVI.

Ex. J. M.

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

HARVARD LAW LIBRARY

Digitized by Google

Digitized by Google